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

APRIL — MAY, 1917

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# This is a Key-Numbered Volume

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

# AMENDMENTS TO RULES

## UNITED STATES CIRCUIT COURT OF APPEALS

### FOURTH CIRCUIT [1]

It is ordered by the court that section 1 of rule 3 of this court be, and the same is hereby, amended so as to read as follows:

TERMS.

1. There shall be held in the City of Richmond, Virginia, three regular terms of this court; one on the first Tuesday of January, one on the first Tuesday of April, and one on the first Tuesday of October, in each year; and there shall be held in the city of Asheville, North Carolina, one regular term of this court on the first Tuesday of July, in each year.

This amendment shall take effect after the May Term, 1917.

[1] For other rules, see 233 Fed. v, 146 C. C. A. v.

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[1] Appointed March 16, 1917.
[2] Appointed April 12, 1917.
[3] Appointed March 14, 1917.

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# CASES

## ARGUED AND DETERMINED

IN THE

# UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

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### PHILADELPHIA & R. RY. CO. v. MARLAND.

(Circuit Court of Appeals, Third Circuit. January 22, 1917.)

No. 2112.

1. MASTER AND SERVANT ⟸276(7)—INJURIES TO SERVANT—EVIDENCE—CAUSE OF INJURY.

Evidence that a brakeman on a train which passed under three bridges having insufficient clearance was found on the tender lying with his feet toward the engine and his head toward the train, having a gash on his forehead and a broken neck, is sufficient to warrant the jury in inferring, not merely speculating, that the brakeman was killed by one of those bridges striking his head while he was standing on the tender as the train passed under it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959; Dec. Dig. ⟸276(7).]

2. MASTER AND SERVANT ⟸276(7)—INJURIES TO SERVANT—EVIDENCE—CAUSE OF INJURY.

Evidence that the brakeman was seen on one of the cars when so close to the first of those three bridges that he would not have had time to get onto the tender before the train passed under it, and that another of the bridges had sufficient clearance for one standing on the tender, though not for one standing on a box car, was sufficient to warrant the jury in inferring, not speculating, that it was the third of those bridges which struck him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 951, 959; Dec. Dig. ⟸276(7).]

3. MASTER AND SERVANT ⟸278(20)—INJURIES TO SERVANT—EVIDENCE—NEGLIGENCE.

In an action for the death of a railroad brakeman, who was struck by a bridge while he was riding on the train, where plaintiff abandoned the charge of negligence in the construction of the bridge, and relied only on negligent failure to warn the brakeman from the danger arising in the construction, concerning which there was affirmative evidence introduced, defendant's contention that the jury were permitted to presume negligence from the fact of the accident cannot be sustained.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 972; Dec. Dig. ⟸278(20).]

4. MASTER AND SERVANT ⟸226(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK—NEGLIGENCE OF MASTER.

A railroad employé has a right to presume that the company will perform its duty to provide a reasonably safe place and safe appliances for

use of its employés, and does not assume the risk of the company's negligence in performing that duty, though he does assume the ordinary risks incident to his work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659, 660; Dec. Dig. ⊂⊃226(1).]

5. MASTER AND SERVANT ⊂⊃217(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK—RAILROAD BRAKEMAN—HIDDEN DANGERS.

A brakeman assumes risks which are obvious, or of which he knew or might have learned by the ordinary use of his senses, but not the risk of hidden or latent dangers, of which he was ignorant, and concerning which the railroad company owes him the duty to warn.

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

6. MASTER AND SERVANT ⊂⊃288(12)—INJURIES TO SERVANT—QUESTION FOR JURY—ASSUMPTION OF RISK.

In an action for the death of a brakeman, who was struck by a bridge over the track, the outer portions of which had a sufficient clearance, but the central portion did not, where it appeared that the whole structure was so blackened by smoke and was so shaded that it was difficult for one approaching the bridge on a train to see the lower central portion, the question whether the risk was so obvious that the brakeman assumed it is one for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1083; Dec. Dig. ⊂⊃288(12).]

7. MASTER AND SERVANT ⊂⊃288(5)—INJURIES TO SERVANT—QUESTION FOR JURY—ASSUMPTION OF RISK—WARNING OF DANGER.

In such an action, evidence as to the warning given the brakeman as to the particular danger of that bridge *held* not to show as a matter of law that he knew of that danger and therefore assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1077; Dec. Dig. ⊂⊃288(5).]

8. DEATH ⊂⊃11—MEASURE OF DAMAGES—STATUTE.

Since there was no recovery at common law for injuries resulting from death, not only the right to recover for such injuries, but also the measure of recovery when it exists, must be found in some statute.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 10, 15; Dec. Dig. ⊂⊃11.]

9. DEATH ⊂⊃84—DAMAGES—EMPLOYERS' LIABILITY ACT—FUNERAL EXPENSES.

Under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]), which authorizes recovery only of the pecuniary loss resulting from death to the beneficiaries, the widow and children of a deceased brakeman cannot recover the funeral expenses, since those are charges not against the beneficiaries, but against the estate, which has a right of action to recover such loss.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 110; Dec. Dig. ⊂⊃84.]

10. COURTS ⊂⊃352—FEDERAL COURTS—RULES OF DECISION—STATE STATUTES.

Comp. St. Ann. 1916, § 1537, commonly called the Conformity Act, which provides that the practice and modes of proceeding in civil causes in the District Court shall conform as nearly as may be to the practice and modes of proceeding in like causes in courts of record in the state, any rule to the contrary notwithstanding, does not relate to the personal conduct and administration of the judge in the discharge of his separate functions, or to the right of the federal courts to determine what matters they will review, and the mode in which such matters shall be prepared and submitted and therefore does not make Act Pa. May 11, 1911 (P. L. 279) authorizing exceptions without allowance by the trial judge to any

part or all of the charge applicable in federal courts notwithstanding rule 10, § 2 of the District Court for the Eastern District of Pennsylvania, providing that no bill of exceptions will be allowed which contains the charge of the court at large, upon any general exception to the whole of such charge, and rule 10, § 1, of the Circuit Court of Appeals, Third Circuit (224 Fed. vii, 137 C. C. A. vii), providing that the judges of the District Court shall not allow any general exception to the whole of the charge to the jury, but requiring the party excepting to state distinctly and separately the several matters to which he excepts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926–932; Dec. Dig. ⊂=352.]

11. COURTS ⊂=356—FEDERAL COURTS—REVIEW—PLAIN ERRORS.

Error in an instruction in a charge in an action under the Employers' Liability Act, authorizing recovery by a widow for loss of her husband's companionship, is a plain error which the court will notice under rule 11 of the Circuit Court of Appeals, Third Circuit (224 Fed. vii, 137 C. C. A. vii), authorizing the court at its option to notice plain errors not assigned, though such error was not specifically excepted to.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. ⊂=356.]

12. COURTS ⊂=356—FEDERAL COURTS—REVIEW—ERRORS NOT ASSIGNED—FAILURE TO EXCEPT.

Though such error was assigned, it stands as though unassigned within the rule, since it was not properly assigned because of the lack of a specific exception.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. ⊂=356.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action by Catherine Marland, administratrix of the estate of William Edgar Marland, deceased, against the Philadelphia & Reading Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, and new venire awarded.

Wm. C. Mason, of Philadelphia, Pa., for plaintiff in error.

George Demming, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an action brought under the Employers' Liability Act of April 23, 1908, c. 149, 35 Stat. 65, against the railway company for negligently causing the death of the plaintiff's intestate, her husband. The averments in the statement of claim pertinent to the present inquiry are, that the plaintiff's intestate was a freight brakeman in the employ of the defendant railway company, engaged at the time of his injury in interstate commerce; that his death was caused by his head coming in contact with an overhead bridge; and that his death was due to the negligence of the defendant company, (1) in constructing and maintaining over its tracks a bridge with insufficient clearance; and (2) in operating a train under such bridge, without giving the intestate timely and sufficient warning of its dangers. The first ground of negligence was abandoned,

and the case was tried and decided upon the second ground, resulting in a verdict for the plaintiff. The defendant sued out this writ.

Of the several specifications of error, the defendant (plaintiff in error) relies chiefly upon the one in which error is charged to the court's refusal to give binding instructions in its favor. Under this assignment, its complaint is, that the court permitted the jury to speculate, in the absence of affirmative proof, (1) as to the cause of the intestate's death, and (2) as to the fact and character of the defendant's negligence. A consideration of this contention calls for a brief recital of the evidence.

[1] At the time of his death, Marland was the front brakeman of a freight train on a run on the defendant's railroad from Nicetown to Belmont. Over the tracks of this run were seven overhead bridges constructed at different elevations. Four of these bridges were so high that they were in no sense dangerous, and may, therefore, be eliminated from the case. Three were known as the Wissahickon Avenue bridge, Stokely Street bridge, Fox Street bridge, and were approached in the order named. The Wissahickon Avenue bridge had a clearance of fifteen feet ten inches, that is, the distance between the top of the rails and the under surface of the bridge was fifteen feet ten inches. Stokely Street bridge had a like clearance of fifteen feet ten inches between the rails and the lowest part of its under surface; and Fox Street bridge had a clearance of nineteen feet seven inches. It was testified that the clearances of these three bridges were such that a man could not stand upon a box car of ordinary height and escape being struck on the head by the bridges, and that the clearances of two of the bridges were such as not to permit a man to sit erect upon such a box car in passing under them without like contact.

Marland was found, on the arrival of the train at Belmont, after passing under the three bridges, lying upon the top of the tender, with a gash in his forehead and his neck broken, dead or dying. There was no witness to his injury, and the court permitted the jury to infer the cause of death from his position upon the tender of a given height, considered in connection with his own height, in relation to the clearances of the bridges under which he had passed, as well as from the nature of his injuries. The defendant says that in submitting this testimony to the jury and allowing them to infer from it the cause of the intestate's death, the court relieved the plaintiff of her duty to affirmatively show the cause of death, and permitted the jury to speculate thereon, arguing that the intestate might have come to his death by other means, as by something falling or thrown from a bridge, and striking him. True, as to the cause of death there was no direct evidence. But clearly, proof of cause of death is not restricted to direct evidence. 2 Thompson on Negligence, § 2194. It may be proved by legitimate inferences drawn from attendant facts, such as the nature of the wound, the position of the body, the clearances of the bridges, and the absence of any other suggested or reasonable cause. These facts constitute evidence from which the reasonable and almost unavoidable inference is that death was caused by contact with an overhead bridge. From these facts we think the

jury might find the cause of death as a fact. Such findings, upon like inferences drawn from similar situations, have been sustained by the courts. In C. & O. Ry. Co. v. Cowley, 166 Fed. 283, 92 C. C. A. 201, and in Choctaw, etc., R. Co. v. McDade, 112 Fed. 888, 50 C. C. A. 591, affirmed by the Supreme Court in 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96, it appears that a railroad company permitted the spout of a water tank to hang so low over passing trains as not to clear a person standing upon a car. Evidence that a brakeman, after being on a car passing the tank, was found lying on the track injured, was held sufficient (in the absence of direct testimony) to justify a finding that he was struck and injured by the overhanging spout. This was an entirely natural and reasonable inference. So a reading of the testimony in the case at bar makes it difficult to conceive how the jury could have arrived at any other conclusion than that Marland was struck and killed by one of the bridges.

The next contention of the defendant is that the plaintiff failed to show by which one of the three bridges the intestate's injuries were inflicted, and that the court permitted the jury (1) to speculate as to which one caused his death, and (2) to presume the defendant's negligence from the fact of the accident.

[2] It is manifest, that had there been but one overhead bridge so constructed as to cause the injury, the issue as to what caused death would have been submissible to the jury. Cases supra. The fact that there were three bridges so constructed does not alter the submissible character of the issue, although it may widen its range. A careful reading of the testimony discloses that the theory upon which the case was tried and upon which it was submitted does not leave open to speculation which of the three bridges caused the injury. As no one saw the injury inflicted and as the jury might properly have found that it was inflicted by one of the bridges, the plaintiff endeavored to prove and the jury evidently found, by process of elimination, which bridge did the injury.

The evidence tends to show that a man of the height of the decedent, five feet four inches, standing erect on the top of a box car of ordinary height, would be struck by *any one* of the three bridges. We think the evidence shows conclusively that at the time Marland was struck he was not upon a box car at all. When found, he was upon the tender, lying with his feet toward the engine and his head toward the train, being in a place and in a position quite impossible (in view of the direction in which the train was moving) had he received the blow when upon any box car of the train. So, it is a fair, in fact almost an inescapable inference, for the jury to draw, *that he was upon the tender when struck.*

The testimony shows, that standing upon the tender, which was about twelve feet high, his own height being five feet four inches, he would have been struck by either one of *two* bridges, that is, by Wissahickon Avenue bridge and by Stokely Street bridge, both of which had clearances of but fifteen feet ten inches; and it also shows that if standing upon the tender when passing under Fox Street bridge with its clearance of nineteen feet seven inches, he would have

cleared it. Therefore, Fox Street bridge is eliminated and the question is reduced to *which of the two bridges,* Wissahickon Avenue or Stokely Street bridge, of the same clearance, inflicted the injury.

Wissahickon Avenue bridge was the first bridge approached, and in approaching it, Marland was last seen on the fourth car from the engine, at a point about eight car-lengths distant from the bridge. The train was moving toward the bridge, and Marland was walking toward the front of the train. It was testified that the space between the first box car and the tender was too great to jump, and that one walking from the train to the tender had to descend the box car, step across to the sill of the tender, and climb up the tender to its top. It appears to be a very reasonable and in truth a very probable inference, that within the time the train moved Marland eight car-lengths to Wissahickon Avenue Bridge, it was impossible for him to make the journey of four cars, descend the last car and ascend the tender in time to be struck by Wissahickon Avenue bridge. The elimination of Fox Street bridge because of its sufficient clearance, and of Wissahickon Avenue bridge because of the location in which the testimony put Marland when the train passed under it, leaves Stokely Street bridge as the bridge which in all reasonable probability inflicted the injury. We are therefore of opinion that the jury did not speculate but drew a reasonable and sustainable inference that Marland met his death at Stokely Street bridge, and that the plaintiff did all that was required of her in telling the defendant and proving to the jury how and where Marland met his death.

[3] Further complaining of speculation by the jury, the defendant maintains that they were allowed to presume the negligence of the defendant from the fact of the accident, in violation of the well settled rule, that the fact of the accident carries with it no presumption of negligence on the part of the employer, and that the employer's negligence is an affirmative fact to be established by the injured employee. Patton v. R. R. Co., 179 U. S. 663, 21 Sup. Ct. 275, 45 L. Ed. 361; Texas and Pacific R. R. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136. The serious fault in this contention is in placing the negligence upon which the plaintiff relies at the bridge, and in supposing that the particular negligence charged to the defendant is at all deducible from the fact of the accident. She relies upon the accident as proof of the cause of death, but for proof of the cause of the accident, which is the negligence charged, she goes entirely away from the accident and produces other testimony. If she had held to her original charge that the negligence of the defendant in maintaining a bridge with insufficient clearance caused the accident, there might be substance in the suggestion that she relied upon the fact of the accident to prove that negligence, for she offered no other evidence of such negligence; but she abandoned that ground of negligence and relied upon another, which was the defendant's failure to give her intestate explicit and sufficient warning of the peculiar dangers of the bridge *before he reached it.* Negligence arising from insufficient warning is by no possibility deducible from the fact or from the character of the accident. Such negligence, if it exists, is

to be found before the time and away from the place of the accident; the accident is its result, subsequently occurring. Upon this ground of negligence the plaintiff produced affirmative evidence, with which the defendant joined issue by vigorously controverting it. We are therefore of opinion that the court did not permit the jury to presume negligence from the accident.

As there was no issue of the defendant's liability for constructing or maintaining overhead bridges with their limited clearance, the next question is whether the risks incident to passing under such bridges were assumed by the intestate as risks incident to his employment.

[4, 5] It is one of the primary duties of a railroad company to use due care in providing a reasonably safe place and safe appliances for the use of its employees. An employee has a right to assume that the railroad company will perform this duty, and he does not assume the risks arising from his employer's negligence in performing it, Texas & Pacific Ry. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188; Choctaw, etc., R. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; until, at least, he becomes aware of them, or they are so plainly observable that he must be presumed to have known them, Cincinnati, etc., Co. v. Thompson, 236 Fed. 1, 7, — C. C. A. —; C. & O. Ry. Co. v. Proffit, 241 U. S. 462, 36 Sup. Ct. 620, 60 L. Ed. 1102. What the employee assumes upon entering the employ of a railroad company are the ordinary risks incident to his work, as distinguished from the risks incident to the failure of the railroad company to do its duty to him. Therefore, in this case, Marland did not assume the risk that the railroad company would not properly and sufficiently warn him, but he assumed those risks which were patent and obvious and incidentally occurring in the course of his employment as brakeman. Speaking generally with respect to the question of the assumption of risk, as raised by the facts of this case, Marland assumed those risks on his run which were obvious or of which he knew or might have learned by the ordinary use of his senses. But with respect to hidden or latent dangers, of which Marland was ignorant or with knowledge of which he was not charged, the railroad company, in the performance of its primary duty of furnishing its servants a reasonably safe place in which to work, owed Marland the duty to give him warning of such hidden or latent dangers and to make the warning commensurate with their risk, and when the dangers were peculiar, to make the warning explicit, so that he might know when and how to protect himself from them.

[6] With this elementary statement of the law we approach the question whether the issue of the assumption of risk should have been decided by the court as a matter of law or submitted to the jury as an issue of fact. The determination of this question depends upon the character of the testimony upon which the court was required to act. If the facts were such that all reasonable men must draw from them the one conclusion that the intestate assumed the risks, then unquestionably it was the duty of the court to withdraw the case from the jury and peremptorily instruct them to render a verdict for the defendant. Pittsburgh S. & M. R. R. Co. v. Lamphere (C. C. A. 3d)

137 Fed. 20, 25, 69 C. C. A. 542. But if there was a conflict in the testimony such as to warrant reasonable men to draw different conclusions, the question of assumption of risk, like the question of contributory negligence, was primarily one for the jury. Pittsburgh S. & M. R. R. Co. v. Lamphere, 137 Fed. 20, 25, 69 C. C. A. 542; Terminal Co. v. Jarvis, 227 Fed. 8, 141 C. C. A. 562; Choctaw, etc., Co. v. McDade, 112 Fed. 886, 50 C. C. A. 591, affirmed 191 U. S. 64, 66, 68, 24 Sup. Ct. 24, 48 L. Ed. 96; Cincinnati, etc. Co. v. Thompson, 236 Fed. 1, —— C. C. A. ——; Seaboard Air Line Ry. Co. v. Padgett, 236 U. S. 668, 673, 35 Sup. Ct. 481, 59 L. Ed. 777; B. & O. Ry. Co. v. Whitacre, 242 U. S. 169, 37 Sup. Ct. 33, 61 L. Ed. ——. In determining whether the question of assumption of risk is for the court or the jury, the court is controlled not by the weight of evidence to the effect that the risks were assumed, but by the fact that there is substantial evidence to the effect that they were not assumed. Cincinnati, etc., Co. v. Thompson, 236 Fed. 1, 6, —— C. C. A. ——. Our inquiry, therefore, is directed to the question, first, whether there is a conflict of testimony upon the question of the assumption of risk, and second, whether the testimony to the effect that the plaintiff's intestate did not assume the risks, is substantial.

[7] The testimony shows that the under surface of both the Wissahickon Avenue and Fox Street bridges was smooth and regular, that is, there were no hidden or latent dangers under those bridges, and that their dangers were such as could be seen and anticipated from observation of the bridge elevation by one approaching them. In the Stokely Street bridge, however, the situation was entirely different. This bridge, as it spanned the tracks, was practically in three parts, or, as a witness said, it "is really three bridges," linked together, having three clearances. The side elevation of the bridge, that is, the side visible to one approaching it by train, was 19 feet 10 inches, a clearance carrying dangers, inconsiderable, if any. Toward the center of the bridge, at a distance of about 12 feet from its side and running its entire length, the under part abruptly dipped down two feet or more, reducing the clearance to 15 feet 10 inches. This central hanging structure extended to within 12 feet of the other side, where it as abruptly ascended an equal distance and made the clearance for the third part of the bridge the same as that of the first. The entire under part of the bridge was blackened by smoke and gases from engines. In approaching the structure from a distance, the under portion of the bridge appeared to be one dark plane, as the central hanging part was in shadow. When within "about 30 feet or perhaps two car-lengths of the structure," by careful looking, this part was discernible. As this central depending structure, dark in itself, was in the shadow of its lateral elevations, there was a question, vigorously controverted, whether its dangers, manifestly considerable, were obvious, and therefore whether they were risks assumed by the intestate as incidents to his employment. We think this was a submissible issue, as evidently, did the parties, for the plaintiff, considering it to be a risk not assumed, based her case of negligence upon proofs of an insufficient warning of its dangers; and

the defendant based its case upon proofs that the warning was sufficient, and even if it were not, then the dangers were known to the decedent, and *for that reason* their risks were assumed by him. Here was a complete conflict of testimony. The plaintiff's case as to the intestate's lack of knowledge and the defendant's lack of warning was to the effect that the run was new to him and that he told the conductor that "he had been as far as Nicetown before, but he had not been beyond Nicetown on this job," and "that he had never worked on this job before," and that the conductor "gave him instructions in regard to bridges beyond Nicetown," and "told him to be careful to look out for the overhead bridges * * * because some of them would not clear him, they would not *clear a man standing up* on the *cars* * * * (and further the conductor) mentioned the Stokely Street bridge in particular to him." The jury may have found nothing in this warning that informed Marland that the Stokely Street bridge would not clear him *sitting* on a car or *standing on a tender* or acquainted him with the peculiar danger of the abrupt drop in the center and within the shadow of that bridge. The defendant's position upon the subject of intestate's knowledge and of its own warning is that the warning given was ample, but that it was not bound to warn the intestate at all because he already knew the dangers, having previously and repeatedly made the run. This is a perfectly legitimate defense, raising the question of assumption of risk in another aspect, but leaving it, nevertheless, still a question for the jury. The defendant produced testimony to the effect that Marland had made this run four times during the two previous days and had made a part of the run going under some of the same bridges a number of times during previous years. Thus upon the questions of sufficiency of warning and the decedent's knowledge of the dangers acquired before and after warning, there was a conflict of testimony out of which the jury could render a verdict either for the plaintiff or defendant.

The defendant also relied upon the warning given by tell-tales, which, as shown by the testimony, were in good working condition, and the court permitted the jury to decide whether the tell-tale in front of the Stokely Street bridge alone constituted a warning sufficient to apprise the decedent of the peculiar dangers of that bridge lurking in its shadow.

Thus the case went to the jury, and error is charged to the court for not deciding as a matter of law "that the warnings were sufficient and adequate, and therefore, he (Marland) must be presumed to have assumed the risk incident to his employment," and that the plaintiff was without right to recover.

The matters which control a trial court in determining when the question of assumption of risk is to be submitted to or withdrawn from a jury were tersely stated (in principle) by the Circuit Court of Appeals for the Second Circuit in New York, N. H. & H. R. Co. v. Vizvari, 210 Fed. 118, 127, 126 C. C. A. 632, and elaborately discussed by the Circuit Court of Appeals for the Sixth Circuit in Cincinnati, N. O. & T. P. Ry. Co. v. Thompson, 236 Fed. 1, —— C. C. A. ——, and followed by the Circuit Court of Appeals for the First

Circuit in Terminal Co. v. Jarvis, 227 Fed. 8, 141 C. C. A. 562, a case of singular resemblance in issue and fact to the case at bar. In applying these well settled principles to this case, it is sufficient to say, without further citing the law or reviewing the testimony, that we find a conflict of evidence upon the question of assumption of risk in any aspect in which that question is raised, and while we do not assume to weigh the evidence and determine for which party it preponderates, we nevertheless find substantial evidence upon which, if believed, the jury might determine that the risks were not assumed, and that, therefore, the court committed no error in refusing to withdraw the case from the jury.

The remaining assignments of error relate to the measure of damages. They may be divided into two classes, one charging error to the court in admitting testimony of funeral expenses and instructing the jury to award damages therefor; and the other assigning error in that part of the charge in which the jury were directed to include in the damages the loss to the plaintiff of her husband's companionship. To the first point, exception was properly taken when the testimony was offered. With respect to the second, an exception was noted generally to the measure of damages, without pointing out to which of several elements of damage embraced in the charge the exception related.

[8] The defendant urges that there is nothing in the Federal Employers' Liability Act that authorizes an award of damages for funeral expenses. The plaintiff concedes that the act is silent upon the subject, but maintains that under rulings of the Supreme Court interpreting the statute as contemplating such *pecuniary loss and damages* resulting from death as are sustained by the beneficiaries, funeral expenses are included, and for authority cites a number of cases under a state statute, of which these are the leading ones: Burns v. P. R. R. Co., 219 Pa. 225, 68 Atl. 704; Irwin v. P. R. R. Co., 226 Pa. 157, 75 Atl. 19, P. R. R. Co. v. Zebe, 33 Pa. 318; Bradford v. Downs, 126 Pa. 622, 17 Atl. 884. The first two cases do not touch the subject; the last two decide that a father is entitled to damages for pecuniary loss sustained by injury to his child, which includes expenses for medical care and burial, for the reason that as the father is liable for these expenses, he sustains a pecuniary loss when compelled to meet them, and may recover them from the one by whose negligence they are occasioned. These authorities are manifestly not in point. Though cited for another purpose, they are nevertheless helpful, as they show, upon principle, that the pecuniary loss or damage contemplated by the act is at most only such as the beneficiaries can sustain. At the common law, the death of a human being, though wrongfully caused, afforded no basis for a recovery of damages, as the right of action for personal injuries died with the person injured; the right to recover, as well as the measure of recovery when it exists, must be found in a statute. Such a right of action is given by statute in nearly all the states. We are concerned in this case only with the right of action afforded by the Federal Employers' Liability Act, and then only with respect to the right of action afforded by

that act to the surviving widow and children of the deceased employee, such being the persons for whose benefit the present action was instituted.

[9] In cases brought under the Employers' Liability Act, the only right of recovery is that conferred by the statute, and the damages recoverable are only such as are named by its terms. The Supreme Court has repeatedly held that in actions under this act the measure of damages is the pecuniary loss resulting from death and sustained by the designated beneficiaries. This is usually limited to loss of support, though extended by the amendment of 1910 to conscious pain and suffering endured by the decedent. Garrett v. L. & N. R. Co., 235 U. S. 308, 35 Sup. Ct. 32, 59 L. Ed. 242; St. Louis etc., Co. v. Craft, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. Ed. 1160; Kansas City S. R. Co. v. Leslie, 238 U. S. 599, 35 Sup. Ct. 844, 59 L. Ed. 1478. Excepting as enlarged by statute, the pecuniary loss of a widow and children resulting from death can be no more than from the nature of their relation to the deceased they can sustain.

The widow and children cannot sustain loss for funeral expenses of the husband and father because they are in no sense liable for them. Liability for funeral expenses rests upon his estate, for loss to which a right of action is otherwise afforded. As the widow and children cannot sustain such a loss, damages for such a loss cannot be included in damages awarded exclusively for their benefit. Damages recovered in an action under the act are "in trust for the designated individuals." Kansas City S. R. Co. v. Leslie, 238 U. S. 599, 604, 35 Sup. Ct. 844, 59 L. Ed. 1478. Therefore, in a suit brought for their benefit, damages may not be recovered for the benefit of the decedent's estate.

We are of opinion, that in the rulings and charge of the court including funeral expenses as an element of damage, there was error.

The remaining assignments of error as classified also relate to the measure of damages. The judge said in his charge to the jury:

"In awarding damages in cases of this sort, you are to award damages as compensation merely, that is to say, pecuniary compensation for the loss which Mrs. Marland has sustained by reason of the death of her husband. * * * *That includes loss of his companionship for one thing* and also the pecuniary loss from being deprived of the support of her husband."

In a later instruction, as to the method by which the jury were to arrive at the pecuniary loss, the judge said:

"You are to take into consideration in determining that, also the probabilities of her continuing to live, *and award her such an amount as*, in your judgment as men of affairs and experience, you think *would compensate her* for the loss of the support and *for the loss of companionship of her husband.*"

At the conclusion of the charge, counsel for the defendant asked and was allowed a number of exceptions, among them an exception "on the question of damages." Evidently thinking that this exception was directed to a matter of deduction of benefits paid to the widow by a railway beneficial association, of which the deceased had been a member, the judge turned to the jury and gave additional instructions upon that phase of damages.

The record thus discloses a general exception to one branch of the charge, namely, the measure of damages, a branch comprising several elements, with respect to any one of which the court might have erred. The defendant now assigns as error, under this general exception, the quoted parts of the charge in which the jury were directed to award compensation for the plaintiff's loss of the companionship of her husband.

It is generally recognized that in actions brought under state statutes for loss sustained by death, pecuniary loss only is contemplated (cases cited in Tiffany, Death by Wrongful Act, § 154; Hale on Damages, 301; Joyce on Damages, § 871; A. & E. Enc. of Law, 926–928), and it has been held, that the pecuniary loss recoverable under the Federal Employers' Liability Act by one dependent upon the employee wrongfully killed, must be a loss which can be measured by some standard, and does not include an inestimable loss such as that of society and companionship of the deceased. Michigan Central R. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; New York, etc., R. R. Co. v. Niebel, 214 Fed. 952, 131 C. C. A. 248. The learned trial judge recognized this to be the law, for in his opinion on the defendant's motion for a new trial, he frankly conceded, that if what he had said to the jury concerning the plaintiff's right to damages for loss of companionship was not cured by his subsequent instructions, then he had committed an error, which he would have at once corrected, had it been called to his attention. If the exception to the instruction had not been general but had been specific, as required by the rule of the court in which the case was being tried, an error, inadvertently made, would thus have been saved.

But the record as made presents the question whether, under the rules and practice binding on federal courts, the defendant, on a general exception to what may be termed the whole charge, is entitled to a review by an appellate court of an error not specified at the time. This question is raised under the Act of June 1, 1872, commonly known as the Conformity Act, U. S. Comp. Stat. Ann. 1916, § 1537 (R. S. 914), which provides that:

"The practice, pleadings, and forms and *modes of proceeding* in civil causes, other than equity and admiralty causes, in the district courts, *shall conform, as near as may be,* to the practice, pleadings, * * * forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such district courts are held, *any rule * * * to the contrary notwithstanding.*"

For the governance of its own proceedings, the District Court of the United States for the Eastern District of Pennsylvania promulgated a rule, being rule 10, § 2, as follows:

"No bills of exception will be allowed which contain the charge of the court at large, *upon any general exception to the whole of such charge.* The party excepting must state distinctly and specifically the several matters of law in the charge to which he excepts."

To the same effect is a rule of this court (C. C. A. Third, Rule 10, § 1 [224 Fed. vii, 137 C. C. A. vii]) prescribing with greater particu-

larity what shall be done to make a reviewable record and of what a bill of exceptions shall consist. It is as follows:

"The judges of the District Courts shall not allow any general exception to the whole of the charge to the jury in a civil or a criminal trial at common law, nor shall a series of exceptions be allowed which produces the same result. But the party excepting shall state distinctly and separately the several matters in such charge to which he excepts, and only such matters shall be included in the bill of exceptions and allowed by the court. Exceptions to the charge or to the judge's action upon the requests for instruction shall be taken immediately on the conclusion of the charge before the jury retire, shall be specified in writing or dictated to the stenographer, and shall be specific and not general."

In harmony with these rules apparently was the practice or modes of proceeding in the state courts of Pennsylvania, until by the Act of the Commonwealth of May 11, 1911, P. L. 279, it was provided that:

"Exceptions may be taken, without allowance by the trial judge, to any part or *all of the charge*, or to the answers to points, for any reason that may be alleged regarding the same in the hearing of the court, before the jury retires to consider its verdict, or, thereafter, by leave of the court. * * *"

In interpreting this statute, the Supreme Court of Pennsylvania has said, in effect, that a litigant is entitled, of right, to except generally to a charge, without specifying the error at the time, Foley v. P. R. T. Co., 240 Pa. 169, 87 Atl. 289, if the matter excepted to is an error committed in something said or done, as distinguished from an error of omission, which the party complaining is held to have waived, Burns v. P. R. R. Co., 239 Pa. 207, 86 Atl. 786; Merritt v. Poli, 236 Pa. 170, 174, 84 Atl. 683; Reznor Mfg. Co. v. B. & L. E. R. R. Co., 233 Pa. 369, 372, 82 Atl. 473; Fortney v. Breon, 245 Pa. 47, 91 Atl. 525; Mastel v. Walker, 246 Pa. 65, 92 Atl. 63.

The defendant urges that the act of Pennsylvania is binding on the federal courts within that State in their procedure, and, as in this instance, the rules of the District Court and of this court are "contrary" to the state statute, they must give way to the statute.

[10] We here enter a realm of legal disputes, in which federal courts have made many distinctions, not always easy to follow, between instances in which they are bound by state statutes under the Conformity Act, and instances in which they are bound only by their own rules of procedure and the laws of Congress. From the large amount of decisional law upon this statute, we readily discern two principles, which, in our opinion, are controlling upon the question before us. These principles relate to the personal conduct and administration of a judge in the discharge of his separate functions, which are uniformly held not to be "practice, pleadings and forms and modes of proceeding" within the meaning of the act, Nudd v. Burrows, 91 U. S. 426, 442, 23 L. Ed. 286; Grimes Dry Goods Co. v. Malcolm, 164 U. S. 483, 17 Sup. Ct. 158, 41 L. Ed. 524; and the right of federal courts, both trial and appellate, to determine, without regard to state statutes or practice, what matters they will review and the mode in which such matters shall be prepared, submitted and

received for review. Duncan v. Atchison, T. & S. F. R. Co., 72 Fed. 808, 19 C. C. A. 202.

Upon these phases of the federal administration of justice, speaking generally, federal courts are not inclined to be bound by state statutes. The personal conduct of the trial judge and the performance of his judicial functions are matters considered beyond the influence of state legislation and not within the purview of the Conformity Act. In this connection, it has been ruled that the Act does not require federal judges to conform to state regulations in the submission of cases and the control of the deliberations of juries, such proceedings being governed by the common law and federal statutes. Nudd v. Burrows, 91 U. S. 426, 441, 442, 23 L. Ed. 286; U. S. Comp. Stat. 1916, Ann. p. 2966, cases cited. Judges of federal courts are not controlled in charging juries by state statutes prescribing the manner of giving instructions, U. S. v. Oppenheim (D. C.) 228 Fed. 220, 228, as for instance, requiring that all instructions shall be in writing. Lincoln v. Power, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224. State statutes and state constitutions forbidding judges, in instructing juries, to charge upon the facts, or to express opinions upon the facts, are not binding on federal courts, R. R. Co. v. Putnam, 118 U. S. 545, 553, 7 Sup. Ct. 1, 30 L. Ed. 257; Railway Co. v. Vickers, 122 U. S. 360, 7 Sup. Ct. 1216, 30 L. Ed. 1161; Mead v. Darling, 159 Fed. 684, 86 C. C. A. 552; nor is a state statute requiring written instructions to be taken by the jury on retiring, or permitting papers read in evidence to be taken by them, Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286, or forbidding separation of a jury, or dispensing with the requirement that exceptions to the charge be made while the jury is at the bar. Consumers' Cotton Oil Co. v. Ashburn, 81 Fed. 331, 26 C. C. A. 436; Knight v. Illinois Central R. R. Co., 180 Fed. 366, 103 C. C. A. 514; Liverpool Ins. Co. v. Friedman, 133 Fed. 713, 66 C. C. A. 543; Mead v. Darling, 159 Fed. 684, 86 C. C. A. 552; Young v. Corrigan (D. C.) 208 Fed. 431. A state statute prescribing that the judge require the jury to find specially upon particular questions of fact, R. R. Co. v. Horst, 93 U. S. 291, 299, 23 L. Ed. 898; McElwee v. Metropolitan Lumber Co., 69 Fed. 302, 319, 16 C. C. A. 232, or a statute requiring a judge to give his decision in writing upon every issue made by the pleadings, Martindale v. Waas (C. C.) 11 Fed. 551, is not binding on federal courts. As to motions for new trials, bills of exception and proceedings on review, it has been generally held that the courts of the United States are independent of state statutes and practice. Missouri Pacific Ry. Co. v. C. & A. R. R. Co., 132 U. S. 191, 10 Sup. Ct. 65, 33 L. Ed. 309; Francisco v. C. & A. R. R. Co., 149 Fed. 354, 79 C. C. A. 292, 9 Ann. Cas. 628; Chateaugay Ore and Iron Co., 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508; Knight v. Illinois Central R. R. Co., 180 Fed. 368, 372, 103 C. C. A. 514; U. S. Comp. Stat. 1916, Ann. pp. 2969, 2976, 2978, 2979, cases cited.

It would seem from the trend of these decisions, that while federal courts are required by the act to conform their modes of proceeding in civil causes, as near as may be, to modes of proceeding ex-

isting by force of statute in the state courts, they nevertheless are free from state practice and statutes in determining what matters in a trial shall be subjected to review and the manner in which such a review shall be prepared. Certainly as early as Graham v. Bayne, 18 How. 60, 15 L. Ed. 265, the Supreme Court decided that state practice does not govern the mode of bringing cases to that court for review, Mr. Justice Grier saying:

"The Circuit Courts may adopt the forms of pleading and practice of the State courts, but no state legislation can be applied to * * * the mode in which causes shall be brought into it (Supreme Court) for review."

It has been held, upon abundant authority, that the Conformity Act is not applicable to the appellate courts of the United States, the practice in which is governed by the constitutional, statutory and common law provisions applicable to writs of error in actions at law in such courts, and the rules thereof. U. S. Comp. Stat. Ann. 1916, p. 2976, cases cited. Thus in ruling on the Conformity Act, the Supreme Court, in St. Claire v. United States, 154 U. S. 134, 153, 14 S. Ct. 1002, 1010, 38 L. Ed. 936, declined to entertain a review because of the absence of an exception in a case arising in a state, where, by statute, no exception was required, saying:

"These provisions of the Penal Code of California do not control the proceedings in the Circuit Court of the United States sitting in that state. What is necessary to be done in a Circuit Court, even in civil cases, in order that its action upon any particular question or matter may be reviewed or revised in this court, depends upon the acts of Congress and the rules of practice which this court recognizes as essential in the administration of justice. Such is the result of our decisions. Rev. Stat., sec. 914 [Comp. St. Ann. 1916, § 1537]; Nudd v. Burrows, 91 U. S. 426 [23 L. Ed. 286]; Indianapolis & St. Louis R. Co. v. Horst, 93 U. S. 291 [23 L. Ed. 898]; Chateaugay Iron Co., 128 U. S. 544, 553 [9 Sup. Ct. 150, 32 L. Ed. 508]; Southern Pacific Co. v. Denton, 146 U. S. 202, 208 [13 Sup. Ct. 44, 36 L. Ed. 942]; Luxton v. Northern River Bridge Co., 147 U. S. 337, 338 [13 Sup. Ct. 356, 37 L. Ed. 194]; Lincoln v. Power, 151 U. S. 436, 442 [14 Sup. Ct. 387, 38 L. Ed. 224]; Logan v. United States, 144 U. S. 263, 302 [12 Sup. Ct. 617, 36 L. Ed. 429]."

From these decisions it clearly appears that a state statute, prescribing the matter of appeal and the mode by which an appeal may be taken to a State appellate court, cannot be binding on a federal trial court as to how it shall prepare its record for review, or on a federal appellate court as to when and with respect to what matters it shall direct or entertain a review. If this were not so, then the appellate jurisdiction, not only of the Circuit Courts of Appeals, but of the Supreme Court, would be defined and limited by the varying provisions of state statutes.

We are of opinion that the act of Pennsylvania, May 11, 1911, permitting an exception to the whole of the charge without specifying the offending portion, is not binding on the District Court or on this court and does not supersede the rules of the two courts declaring against a general exception and requiring a distinct and specific statement of the matter excepted to. As the defendant did not comply with the rules in this regard, it is without right to a review of the instruction upon the measure of damages assigned as error.

[11, 12] Although the defendant cannot ask of right for a review of a matter to which it has not made valid exception, we have before us a record in which positive error appears. Though inadvertently made, there is error nevertheless, and harmful error too, for there is no possible way of knowing how much of the verdict is for the loss of the husband's companionship, erroneously charged as an ingredient of damage. Are we to ignore this error and disregard the manifest prejudice flowing from it, in order to compel hereafter the observance of rules of procedure? Or are we required in the proper administration of justice, to so frame our decree that justice in this particular case may not miscarry? To meet such a situation and to reserve to itself full power to do justice without hindrance and in any event, this court has announced by rule that, *at its option,* it may notice a plain error not assigned (rule 11, 224 Fed. vii, 137 C. C. A. vii). While the error in this case is assigned, it stands as though not assigned, because of the lack of a valid exception, and, whether properly or improperly assigned, it is nevertheless "plain error," which, to do justice within the spirit of the rule, we feel constrained to notice. Therefore, upon the court's errors in admitting evidence of funeral expenses and in charging funeral expenses and the loss of the husband's companionship as elements of damage,

The judgment below is reversed, and a new venire awarded.

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## KNOELL et al. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. February 2, 1917. Rehearing Denied March 14, 1917.)

No. 2121.

1. CONSPIRACY ⇐43(6)—INDICTMENT—RECEIVING PROPERTY FROM BANKRUPT.
An indictment, charging that defendants, on the day after a petition in bankruptcy was filed, conspired together and with others to receive a material amount of the property of the bankrupt with intent to defeat the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544), and that on the following day they agreed to receive that property from the bankrupt and conceal it with intent to convert it to their own use, and charging as the overt acts that on the second day after the bankruptcy they placed the property on the premises of one of the alleged conspirators and persuaded him to allow it to be concealed temporarily, and later induced him to swear to a petition claiming it as his own, which he did, is sufficient to charge a conspiracy to receive the property of the bankrupt after the bankruptcy, contrary to section 29b, cl. 4 (Comp. St. 1913, § 9613); it not being necessary that the property was in the possession of the bankrupt when the conspiracy was formed if it was in fact the property of the bankrupt.

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

2. INDICTMENT AND INFORMATION ⇐146—DEMURRER—EFFECT AS ADMISSION.
On demurrer to the indictment, the averments contained therein are to be taken as true.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 489; Dec. Dig. ⇐146.]

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3. CONSPIRACY ⊂=28—EVIDENCE—RECEIVING PROPERTY FROM BANKRUPT
Defendants may be convicted of conspiracy to receive the property from a bankrupt after bankruptcy, with intent to defeat the Bankruptcy Act, though the evidence shows that the property was taken out of the bankrupt's possession two days before the petition in bankruptcy was filed, since the final agreement may not have been made until thereafter, and the property continued to be the property of the bankrupt.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 40, 41; Dec. Dig. ⊂=28.]

4. CONSPIRACY ⊂=28—TIME OF COMMISSION—CONTINUING CONSPIRACY.
Those conspiring before a petition in bankruptcy was filed to receive the property of the bankrupt with intent to defeat the Bankruptcy Act, under an agreement which contemplated further action after the petition was filed, may be convicted of a conspiracy to receive the property after bankruptcy.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 40, 41; Dec. Dig. ⊂=28.]

5. INDICTMENT AND INFORMATION ⊂=125(5½)—DUPLICITY—SEVERAL OFFENSES—CONSPIRACY.
An indictment, charging a conspiracy to commit four separate offenses of concealing property by a bankrupt, making false oath, presenting a false claim, and fraudulently receiving property, is not bad for duplicity, since the conspiracy is but a single offense, though it contemplated the commission of several offenses.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 237; Dec. Dig. ⊂=125(5½).]

6. CRIMINAL LAW ⊂=510—EVIDENCE—TESTIMONY OF ACCOMPLICE—NECESSITY OF CORROBORATION.
Though the jury should use the utmost caution in scrutinizing the uncorroborated testimony of an accomplice, they may, if they believe that testimony after such scrutiny, convict accused on it alone.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124–1126; Dec. Dig. ⊂=510.]

7. CRIMINAL LAW ⊂=393(1)—EVIDENCE—DECLARATIONS OF ACCUSED—PREVIOUS TESTIMONY—SUBPŒNA.
Testimony given before the referee in bankruptcy by those subsequently accused of conspiring to receive property of the bankrupt is voluntary and admissible in the subsequent prosecution, though they were subpœnaed to testify before the referee, if when called to testify they made no claim of privilege to avoid incrimination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 871; Dec. Dig. ⊂=393(1).]

8. CRIMINAL LAW ⊂=393(1)—TESTIMONY IN BANKRUPTCY PROCEEDINGS—IMMUNITY—PERSONS ENTITLED.
Bankruptcy Act, § 7a, cl. 9 (Comp. St. 1913, § 9591), providing that no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceedings, applies to the bankrupt only, and affords no protection to other witnesses, testifying in the bankruptcy proceedings, who are subsequently charged with conspiring to receive property of the bankrupt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 871; Dec. Dig. ⊂=393(1).]

9. CRIMINAL LAW ⊂=918(10, 11)—INCOMPETENT EVIDENCE—OBJECTIONS—NECESSITY.
Where the husband of the bankrupt testified, in a prosecution for conspiring to receive property from the bankrupt, to facts tending to incriminate his wife, but no objection was made to such testimony, and no mo-

tion to strike it after the trial court called the attention of counsel to its incompetency, the objection cannot be raised on the motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. ⊜=918(10, 11).]

10. WITNESSES ⊜=52(7)—RULES OF DECISION—STATE LAWS—COMPETENCY OF WITNESSES.

The competency of a witness to testify against codefendants of her husband after he had pleaded guilty depends, in the absence of state or federal statute, on the common law of the state at the time of the first judiciary act.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 132–134; Dec. Dig. ⊜=52(7).]

11. WITNESSES ⊜=52(7) — COMPETENCY — WIFE OF CODEFENDANT — PLEA OF GUILTY.

The wife of one of several defendants charged with conspiracy, who has pleaded guilty, can testify against the other defendants, over their objection, where neither she nor her husband claims any privilege, though if he had not pleaded guilty, her testimony would be incompetent, since the reason for that rule, which is to prevent the violation of confidences between husband and wife and the incrimination of one by the other, no longer applies after the plea of guilty.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 132–134; Dec. Dig. ⊜=52(7).]

12. CRIMINAL LAW ⊜=1159(3)—APPEAL—REVIEW—CONFLICTING EVIDENCE.

Where the evidence concerning the crime charged was in decided conflict, but a material part supported the indictment, the verdict is final on the facts.

[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 Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

John Knoell and another were convicted of conspiracy to violate the Bankruptcy Act, their motion for new trial was overruled (230 Fed. 509), and they bring error. Affirmed.

Wm. A. Gray and Reuben O. Moon, both of Philadelphia, Pa., for plaintiffs in error.

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.

McPHERSON, Circuit Judge. John Knoell, George Knoell, and Reuben Turetz were indicted for conspiring to violate several provisions of the Bankruptcy Act. The indictment comprised five counts, but the first three were set aside on demurrer. Turetz pleaded guilty to the fourth and fifth, the others were convicted, and all of them were sentenced to imprisonment. To this judgment the Knoells alone have sued out the pending writ of error, raising several questions that call for consideration.

[1] 1. The sufficiency of the fourth count. The Knoells were wholesale dealers in furniture, and Rose Turetz was a retail dealer, her husband, Reuben, managing the business. An involuntary petition was

filed against Rose on November 23, 1914, and the count charges that, on or about November 24 the three defendants conspired with Rose and with Jacob Winderman, Hyman Rash, Harry Dubin, and Joseph Sandler knowingly and fraudulently to receive from Rose, after the filing of the petition, a material amount of property—brass and iron beds worth about $500—with intent to defeat the act. The count charged, further, that on the 25th the three defendants, knowing that the beds belonged to Rose's estate, agreed to receive them from her, and after such receiving concealed them on the premises of Jacob Winderman, with intent to convert them to their own use. Thus far, the averments of the count are formally correct, and they are not impaired by the description of the overt acts. These are averred to be four in number: (a) About November 25 the defendants placed the beds on Winderman's premises; (b) about the same date they induced Rash to persuade Winderman to allow the beds to be concealed temporarily. (c) on December 4 Turetz induced Winderman to swear to a petition, alleging the beds to be his, and asking the bankruptcy court (whose receiver had meanwhile taken them into possession) to order their return to him; (d) on the same day Winderman signed the petition, and this was afterwards presented to the court.

[2] On demurrer all the averments in the count are to be taken as true, and it is not easy to see wherein they are defective. The beds may have been removed from the possession of Rose before November 23 or afterward, but in either event they continued to be her own property, or the property of her estate. It was not necessary that they should remain in her actual possession; they belonged to her or to the estate; and the conspiracy is charged to have been formed on November 24, the overt acts just set forth helping to show that in form the count is within section 29b4. The demurrer was properly overruled.

[3, 4] 2. The conviction on the fourth count. The assignment of error is supported by an exception, and the contention is that the evidence did not sustain the count, and that such an instruction should have been given. The point of the argument is this: The evidence showed that the beds had been removed on November 21 from Rose's store on Passayunk avenue to the store of Hyman Rash. From there —but just when does not appear—they were removed to Winderman's place of business next door. The beds were taken to Rash's two days before the petition was filed, and the plaintiffs in error contend that the date of the offense is thus fixed as the 21st, and therefore that the beds could not have been received after the filing of the petition. The facts may be true, but the conclusion does not necessarily follow. The argument apparently does not consider that the offense charged is not the actual receiving, but the conspiring to receive. We do not see why the conspirators might not have finally agreed after the beds were removed from the Passayunk store on the 21st. No doubt the goods were in fact removed before the 23d, but the guilty agreement may not have been definitely made until afterward. Certainly, the conspirators would find it easier to receive and convert the goods if these were first put out of the court's reach, whose receiver would immediately seize whatever might be found on the bankrupt's premises. Aside

from this, however, the goods continued to belong to Rose or to her estate after November 21, and the mere taking them to Rash's on that date did not finally determine what was to be done with them. On the 21st Rose was not a bankrupt; she might never be a bankrupt—in fact, she was not adjudicated until January 25—and the goods might be returned to her. But in any event their status was still uncertain, and we think the jury might, with equal propriety, assign the final act of conspiring either to the 21st or to a date after the 23d. Moreover, even if the conspiracy was first formed not later than the 21st, we think there is something to be said for the view that it was a continuing conspiracy, contemplating further action during the next few days or weeks; and, if this be true, the distinction now contended for cannot be successfully drawn. U. S. v. Kissel, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168. We repeat that the count is not for receiving, but for conspiring to receive, and of this after the date of bankruptcy we think there was evidence for the jury.

[5] 3. The sufficiency of the fifth count. This is attacked for duplicity on the ground that four separate offenses are charged therein. It is true that the count does charge the three defendants, in agreement with the other five persons named above, with conspiring to commit the following offenses: (a) Concealment of property by Rose Turetz; (b) making a false oath by Jacob Winderman; (c) presenting a false claim by Jacob Winderman; (d) fraudulently receiving property by the three defendants after the filing of the petition; but, in view of the decisions in Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, and in Brewing Co. v. U. S. (C. C. A. 8) 206 Fed. 386, 124 C. C. A. 268, we think it unnecessary to discuss the objection. Although a conspiracy may contemplate the commission of four offenses, it still remains a single crime. In our opinion the count is correctly drawn, and was properly upheld.

4. The refusal to direct a general verdict of acquittal. We are not sure whether this objection is seriously pressed, but (if it be) we content ourselves with saying that in view of the evidence such a direction could not properly have been given.

[6] 5. The court's instructions concerning the testimony of an accomplice. The brief of the plaintiffs in error admits that the charge to the jury—

> "* * * may be, perhaps, fairly summarized in the statement that the trial judge did charge the jury to the utmost extent about the necessity of using caution in scrutinizing the testimony of these witnesses."

But complains that:

> "* * * While the trial judge did warn them of the corrupt nature of this testimony and its inherent unreliability, and also further instructed the jury as to the advisability of looking into the testimony of other witnesses to find if this impeached testimony was corroborated thereby, [he] did instruct the jury that, notwithstanding all this warning, if in their judgment they believed, notwithstanding the corrupt source from which the testimony came, that it was nevertheless true, they could render a verdict of guilty upon that testimony uncorroborated."

We think the instructions thus summarized are justified by Richardson v. U. S. (C. C. A. 3) 181 Fed. 9, 104 C. C. A. 69; Diggs v. U. S. (C. C. A. 9) 220 Fed. 545, 136 C. C. A. 147, affirmed 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. ——; Holmgren v. U. S., 217 U. S. 523, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778. In the latter case the precise point did not arise. The Supreme Court was asked to hold that the trial judge had erred in refusing the following instruction:

"I charge you that if you believe the testimony of the witness Frank Werta, then that said witness was an accomplice in crime with the defendant; and I instruct you that before you can convict said defendant, the testimony of the witness Frank Werta should be corroborated by the testimony of at least one witness, or strong corroborative circumstances."

But the refusal below was upheld, Mr. Justice Day saying:

"It may be doubtful whether Werta can be regarded as an accomplice. * * * Be that as it may, the request did not properly state the law, as it assumed that Werta was an accomplice, a conclusion which was controverted, and against which the jury might have found in the testimony"

—and adding:

"It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them. But no such charge was asked to be presented to the jury by any proper request in the case, and the refusal to grant the one asked for was not error."

This seems to us to mean necessarily that a jury may rely upon the testimony of an accomplice, but that the judge should caution them against believing it unless it has been corroborated. The decided weight of authority is in favor of the rule as laid down in the instructions now assigned for error. See, also, 1 Ruling Case Law, p. 166, § 13 et seq.

[7, 8] 6. The admission of testimony given by John Knoell and George Knoell before the referee in the proceeding against Rose Turetz. The objection is that this testimony was given under compulsion, and therefore could not be used in the criminal trial. But the objection is not founded on fact. No doubt the Knoells appeared before the referee in obedience to a subpœna, but there was no other compulsion. They were attended by counsel, and were examined without claiming the right to be silent because their answers might criminate them. Burrell v. Montana, 194 U. S. 572, 24 Sup. Ct. 787, 48 L. Ed. 1122. Clearly the subpœna did not compel them to testify; it only compelled them to attend; and whatever testimony they gave afterwards without claiming their privilege was voluntary, and could be used against them in a subsequent proceeding. Section 7a9 of the act applies to the bankrupt only, and does not protect the ordinary witness, whose rights must rest upon the general rules of law. Under these we see no room for doubt that the testimony now objected to was voluntary and was properly admitted. Hardy v. United States, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. Ed. 1137; Vermont v. Duncan, 4 L. R. A. (N. S.) 1144, note; 12 Cyc. 424, and cases in notes.

[9] 7. The admission of the testimony of Reuben Turetz. It is now urged that he should not have been heard, because, although his wife was not on trial and, indeed, was not indicted, his testimony tended to prove that she had been guilty of crime. No objection was made at the trial, and the following quotation from Judge Dickinson's opinion, refusing a new trial ([D. C.] 230 Fed. 513), will show that the failure to object was not an oversight:

"It may be explained in passing that, not only was no objection interposed to his testimony, but he was the first, or an early, witness called. The full facts of the case had not then been disclosed. He was heard by the court under the impression that he was himself the bankrupt. Later it developed, or at least came to the attention of the trial judge, that the wife was the bankrupt. At once the thought of his incompetency arose and was presented to counsel. The notes of testimony do not show just what took place, but it was made clear that the absence of objection was not an inadvertence, and no motion to strike out was made. As the defendants were represented by counsel of experience and ability, fully equal to the discharge of the duty of safeguarding the interests of their clients, the trial judge did not see his way clear to further interfere."

Under the circumstances we need only refer to Burrell v. Montana, 194 U. S. 577, 24 Sup. Ct. 787, 48 L. Ed. 1122, in support of the proposition that the objection was made too late.

8. The chief stress of the argument on this writ has been laid upon the remaining subject, namely, the qualified admission of Rose Turetz as a witness. As stated above, Reuben had pleaded guilty and was no longer on trial. His wife was sworn, and answered a few preliminary questions, after which she was asked whether she had had any conversation with George Knoell before her failure. Thereupon counsel for the defendants on trial made a general objection to her competency, and the trial judge held that:

"She may testify as to anything affecting either of the defendants on trial. If she is asked other questions, we had better have a specific objection. As far as that question is concerned, the objection is overruled"

—defending the decision afterward on the motion for a new trial (D. C.) 230 Fed. 509.

On the face of it, this is a narrow ruling, but we shall follow the parties and accept it as a broad decision that she was competent generally against the defendants on trial. As the few pages of her testimony show, she was only allowed to speak of matters that affected the Knoells, and she did not testify directly against her husband at all. The question, therefore, is this: Reuben having pleaded guilty and having no further interest in the trial, and no objection having been made either by him or by herself, was it proper to allow her to testify about matters that directly affected the Knoells only? In our opinion the ruling is sustained, both by reason and by the weight of authority.

[10,11] There is no federal statute on the subject, and her competency stands or falls by the law of Pennsylvania at the date of the first Judiciary Act (U. S. v. Reid, 53 U. S. [12 How.] 361, 13 L. Ed. 1023); that is—the state having then no relevant statute—by the rules of the common law. Logan v. U. S., 144 U. S. 301, 12 Sup. Ct. 617, 36 L. Ed. 429; Maxey v. U. S. (C. C. A. 8) 207 Fed. 329, 125 C. C. A. 77.

The general question has received attention in many cases, and the discussion has been sometimes confused in part we think by the failure to keep sufficiently in mind the difference between: (1) The situation presented when one spouse is called in favor of the other; and (2) the situation when one is called against the other. In (1) the witness is incompetent for several reasons, chief among them being the presumed identity of interest; in (2) the spouse against whom the testimony is offered has the right or privilege to prevent the other from speaking. These situations are distinct, and, as far as possible, should be kept distinct. Confining our attention to the trial of a crime, and to the offer of one spouse's testimony against the other, where the latter, although a formal party to the record, has been convicted or has pleaded guilty, let us consider the matter closely. The wife, let us say, is called against those indicted with her husband, although he is not on trial, but has been convicted separately or has pleaded guilty. Now, if (in spite of his conviction or his plea) the husband is still at liberty to assert the privilege of objecting, we shall assume for the moment that she cannot be allowed to testify. If, however, he does not object, or if he affirmatively consent, he thereby waives the privilege as far as he can, and another question then arises, namely: In such a situation may she herself assert a privilege of refusing to testify? If the privilege is still hers as well as his, we shall assume again that she may exercise it, and in that event her consent to testify is a waiver, as far as her power goes. Up to this point, the facts in the trial under review show that neither Reuben nor Rose made any claim to privilege, and therefore, as far as they themselves could affect the matter, her testimony was admissible. Could the other defendants object? They had no personal privilege to assert, and unless the marital privilege rests on a ground that permits any defendant on trial to assert it, or requires the trial judge to enforce it of his own motion, the ruling under examination was correct.

The only ground that can support such a position is public policy, and on that, and that alone, the plaintiffs in error rely. The principal cases cited in the brief are Stein v. Bowman, 38 U. S. (13 Pet.) 221, 10 L. Ed. 129, Bassett v. U. S., 137 U. S. 503, 11 Sup. Ct. 165, 34 L. Ed. 762, Pringle v. Pringle, 59 Pa. 288, and Cornelius v. Hambay, 150 Pa. 363, 24 Atl. 515; and in these some language may be found that will bear the broad construction placed upon it, but in none of them, and in no other case to which our attention has been called, has a court directly decided that a spouse cannot testify under the facts now presented. Pringle v. Pringle does not apply; this was a civil suit in which two daughters of a decedent were incompetent witnesses against their father's estate because of their interest, and the point decided is that their respective husbands also were incompetent—not against the daughters, but in their favor. Neither does Bassett v. U. S. apply. In that case, a husband in the (then) territory of Utah was on trial for a polygamous marriage, and his legal wife was allowed to testify, over his objection, that he had confessed the marriage to her. She was testifying directly against him, and the Supreme Court held that Congress had not made her testimony admissible by the Utah Code of Pro-

cedure. Congress had expressly declared that a wife could not be a witness against her husband without his consent, except in a proceeding for a crime committed against her; and it was held that a trial for polygamy was not such a proceeding.

The other two cases are like the present in some particulars, but not in all. In Cornelius v. Hambay a husband was suing his wife's paramour for damages. The husband was allowed to testify to the criminal intercourse over the defendant's objection, and the ruling was declared erroneous on the ground that the husband was testifying to the wife's adultery, and was thus directly charging her with the crime. The paramour was allowed to assert her privilege, but the decision has nothing to say about what would have been the proper ruling, if she had already been tried and had pleaded guilty. Stein v. Bowman was a civil action in which the deposition of a deceased witness had been taken, and his widow was then allowed to testify, over the defendant's objection, that her husband had been bribed to give the deposition, and also that he had made declarations in contradiction thereof. The defendant was allowed to assert the husband's privilege, although the question arose in a collateral proceeding; but, again, nothing is said about the effect of a conviction or a plea of guilty, and, moreover, the discussion is apparently somewhat influenced by the rules governing confidential communications. But, on whatever ground, the admission of her testimony was disapproved; and, as the plaintiffs in error rely with the utmost confidence on Mr. Justice McLean's opinion, we quote the following paragraphs at length:

"The law does not seem to be entirely settled, how far, in a collateral case, a wife may be examined on matters in which her husband may be eventually interested. Nor whether, in such a case, she may not be asked questions as to facts that may, in some measure, tend to criminate her husband, but which afford no foundation for a prosecution. The decisions which have been made on these points seem to have been influenced by the circumstances of each case, and they are somewhat contradictory. It is, however, admitted in all the cases that the wife is not competent, except in cases of violence upon her person, directly to criminate her husband, or to disclose that which she has learned from him in their confidential intercourse. Some color is found in some of the elementary works for the suggestion that this rule, being founded on the confidential relations of the parties, will protect either from the necessity of a disclosure, but will not prohibit either from voluntarily making any disclosure of matters received in confidence; and the wife and the husband have been viewed, in this respect, as having a right to protection from a disclosure, on the same principle as an attorney is protected from a disclosure of the facts communicated to him by his client.

"The rule which protects an attorney in such a case is founded on public policy, and may be essential in the administration of justice; but this privilege is the privilege of the client, and not of the attorney. The rule which protects the domestic relations from exposure rests upon considerations connected with the peace of families. And it is conceived that this principle does not merely afford protection to the husband and wife, which they are at liberty to invoke or not, at their discretion, when the question is propounded; but it renders them incompetent to disclose facts in evidence in violation of the rule. And it is well that the principle does not rest on the discretion of the parties. If it did, in most instances, it would afford no substantial protection to persons uninstructed in their rights, and thrown off their guard and embarrassed by searching interrogatories.

"In the present case, the witness was called to discredit her husband; to prove, in fact, that he had committed perjury; and the establishment of the

fact depended on his own confessions. Confessions which, if ever made, were made under all the confidence that subsists between husband and wife. It is true, the husband was dead, but this does not weaken the principle. Indeed, it would seem rather to increase than lessen the force of the rule. Can the wife, under such circumstances, either voluntarily be permitted, or by force of authority be compelled, to state facts in evidence which render infamous the character of her husband? We think, most clearly, that she cannot be. Public policy and established principles forbid it. This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations that constitute the basis of civil society, and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down and impair the great principles which protect the sanctities of husband and wife would be to destroy the best solace of human existence. We think that the court erred in overruling the objections to this witness."

Now, we agree that the last two cases furnish partial support for the contention that the Knoells could assert Reuben's privilege, and could thereby exclude the testimony of Rose. But, assuming that they could assert whatever privilege Reuben had left, the question remains, What *was* left, after his plea? The principal reason given for the rule of exclusion is that public policy does not permit a wife directly to charge a crime against her husband, whether he be living or dead, because such an accusation would seriously injure the peace and harmony of the family relation if he be living, or his reputation if he be dead, and would thus weaken the foundations of society. Under the circumstances now before us, we think the contention that Rose was incompetent cannot succeed. As it seems to us, public policy ceases to apply where the husband has become his own accuser and has formally confessed the crime. The policy rests on the implication that the husband has, or may have, a guilty secret, and (either in fact or presumptively) is anxious to conceal it. His wife, therefore, will become his antagonist, or will bring reproach on his memory, if she tells what she knows, and for this reason her mouth must be closed. But, if he himself has told the story and has made a formal confession in court, the reason disappears, and in such a situation we can see no ground for holding that she may not repeat what her husband has already proclaimed to the world. By so doing she does not antagonize him, or injure his memory; the family and society are no longer in danger; and we think she may then be allowed with safety to serve the cause of justice. Before he himself spoke out, the theory of the rule protected the family relation as more sacred than justice, but after his own act has disclosed his guilt, we do not see what harm his wife can do by disclosing it again.

The general subject is thoroughly discussed in Commonwealth v. Reid, 8 Phila. 385, by Judge Paxson (then in the common pleas), who afterwards wrote the opinion of the Pennsylvania Supreme Court in Cornelius v. Hambay. And a careful consideration will also be found in 4 Wigmore, Evid. § 2227 et seq. Treating of co-indictees and co-defendants, section 2236 sums up the cases as supporting the general rule—

"* * * that the privilege covers the case of the wife of a codefendant now on trial, but not the case of the wife of a codefendant whose interest has been

removed from the record by conviction, or by acquittal, or by nolle prosequi. * * *"

See, also, the note to West Va. v. Woodrow, 2 L. R. A. (N. S.) 862.

[12] The evidence concerning the crime charged was in decided conflict, but a material part of it supported the indictment, and in such a situation the verdict of the jury is, of course, final on the facts. Apparently the plaintiffs in error have heretofore been well esteemed as merchants and as citizens, but we are bound to regard them now as guilty, and, thus regarded, they can hardly complain with much force that the reputation of some of their associates in the conspiracy may have been justly open to suspicion. If respectable men stoop to the commission of a crime, they must expect to be convicted on the testimony of other criminals.

The judgment is affirmed.

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## MERGENTHALER LINOTYPE CO. v. HULL.

## In re PORTO RICO PROGRESS PUB. CO.

(Circuit Court of Appeals, First Circuit. December 6, 1916.)

No. 1183.

1. SALES ⊂=451—CONDITIONAL SALE—LAW GOVERNING.
The validity of a conditional sale contract is governed by the law of the place where it was entered into, and where it was executed by a delivery of the goods to a carrier for transportation to the buyer, not by the law of the place where it was contemplated by the parties the goods should be kept, and where in fact they were at the time the rights of subsequent purchasers or creditors arose.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1323; Dec. Dig. ⊂=451.]

2. SALES ⊂=451—CONDITIONAL SALE—LAW GOVERNING—COMITY.
Conditional sale contracts, which are valid under the law governing them at their execution, should be enforced as a matter of comity in other jurisdictions were the goods may be taken, unless such enforcement is contrary to the policy of the laws of that jurisdiction.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1323; Dec. Dig. ⊂=451.]

3. SALES ⊂=474(2)—CONDITIONAL SALE—VALIDITY—CREDITORS AND PURCHASERS.
Under Civ. Code Porto Rico, § 1222, providing that contracting parties may make the agreements and establish the clauses and conditions which they may deem advisable, provided they are not in contravention of law, morals, or public order, Rev. St. & Codes, § 4184, providing that creditors, after having attached the property of which the debtor may be in possession, may exercise all the rights and actions of the debtor, except those inherent in his person, and Acts 1916, p. 123, requiring the recording of conditional sale contracts, but virtually recognizing that such contracts were theretofore recognized by the law, an unrecorded conditional sale contract was valid prior to the later act, as against creditors, though under Civ. Code, § 1376, providing that, if the same thing is sold to different vendees, the ownership shall be transferred to the person who may have

first taken possession thereof in good faith, it was not valid as against subsequent bona fide purchasers.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1397; Dec. Dig. ⊂⊃474(2).]

4. BANKRUPTCY ⊂⊃140(1)—CONDITIONAL SALE—UNRECORDED CONTRACT—VALIDITY—STATUTE.

Under Personal Property Law N. Y. (Consol. Laws, c. 41) § 62, providing that all conditions in a conditional sale contract, accompanied by delivery of the goods reserving title in the vendor, shall be void as against subsequent purchasers, pledgees, or mortgagees in good faith, unless recorded, an unrecorded conditional sale contract is valid against the creditors of the buyer, so that the trustee in bankruptcy acquires no rights thereto under Bankr. Act July 1, 1898, c. 541, § 47a2, 30 Stat. 557, as amended by Act June 25, 1910, c. 412, 36 Stat. 840 (Comp. St. 1913, § 9631), providing that trustees in bankruptcy shall be vested with all rights, remedies, and powers of a creditor holding a lien.

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

5. COURTS ⊂⊃405(17)—CIRCUIT COURT OF APPEALS—ASSIGNMENT OF ERROR—PLAIN ERROR.

The error of the District Court in holding that under Personal Property Law N. Y. § 62, making a conditional sale contract void against subsequent purchasers, pledgees, or mortgagees, made such contract invalid against creditors, is so plain and so closely related to an assignment that the court erred in ruling that the contract was governed by the law of New York, and not by that of Port Rico, where such a contract was valid against creditors, that it will be considered, in order to do justice, though it was not specifically noted in the assignments of error.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⊂⊃405(17).]

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

In the matter of the Porto Rico Progress Publishing Company. Petition by the Mergenthaler Linotype Company against Harwood Hull, trustee, for the delivery of certain machines claimed by it. Decree denying the petition, and petitioner appeals. Reversed and remanded, with directions to enter a decree for petitioner.

Bradford Butler, of New York City, for appellant.

Francis E. Neagle, of New York City, for appellee.

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

BINGHAM, Circuit Judge. The Porto Rico Progress Publishing Company, a Porto Rico corporation, was adjudged a bankrupt on December 7, 1914, by the United States District Court of Porto Rico, and among the assets coming into the possession of the trustee were two linotype machines, which had been furnished to the bankrupt by the Mergenthaler Linotype Company, a New York corporation. June 3, 1915, the Mergenthaler Company filed a petition with the referee in bankruptcy, alleging that the machines were its property, that they were leased to the bankrupt; and asking that they be delivered to the petitioner. The trustee filed an answer, denying the material allegations of the petition, and alleging, among other things, that the

two contracts by which the bankrupt acquired possession of the machines were not leases, but were conditional sales; that the retention of title by the Mergenthaler Company provided for in the contracts was void; and that the machines were the property of the bankrupt. The referee found and ruled that the contracts were conditional sales, not leases; that they were signed in New York, and were executed there by the delivery of the machines to a common carrier for transportation to Porto Rico; that the law of New York governed the validity and effect of the contracts; and that, as they were conditional sale contracts, it was necessary, under the law of New York, in order to render them valid against creditors, that they should be recorded, and, not having been recorded there, the retention of title by the Mergenthaler Company was void as against creditors of the Publishing Company and as against the trustee, who possessed the rights of a creditor, and dismissed the petition. On a petition for review the District Court entered a decree affirming the action of the referee. The present proceeding is an appeal by the Mergenthaler Company from the decree of the District Court.

Among the errors assigned are the following:

(1) The court erred in finding the instruments in question are conditional sale agreements, and not leases.

(2) The court erred in holding that conditional sales of movable property are not authorized by the laws of Porto Rico.

(3) The court erred in holding that the contracts in question are governed by the law of New York, and not by the law of Porto Rico.

In discussing the questions raised by the assignments of error, we will assume, for purposes of decision in this case, that the court below was right in construing the contracts to be conditional sales, and not leases, with an option of purchase at the termination of the rental period. The principal question then presented is raised by the third assignment above, to the effect that the court erred in holding that the contracts in question are governed by the law of New York, and not by the law of Porto Rico.

[1] The appellant's position is that, notwithstanding the contracts were signed in New York, and were executed there by delivery of the machines to the agent of the Publishing Company, nevertheless, as the contracts contemplate that the machines should be taken to Porto Rico, and remain in the possession of the Publishing Company so long as it made the payments stipulated for, so far as the acquisition of rights in the property during this period by creditors of the Publishing Company is concerned, the contracts are governed by the law of Porto Rico, and not of New York. In support of this position the appellant relies largely upon the decision, and the reasons given therefor, in the case of Marvin Safe Company v. Norton, 48 N. J. Law, 418, 7 Atl. 418, 57 Am. Rep. 566. In that case the action was trover for a safe which the plaintiff had sold by conditional sale to one Schwartz. The contract was signed in Pennsylvania, and delivery was made in that state to a common carrier for shipment to Schwartz, in New Jersey. Schwartz was to pay $84 for the safe, $7 down and the balance in payments of $7 per month. He made three payments,

and thereafter sold the safe to the defendant Norton, who purchased it without notice of Schwartz's agreement with the plaintiff. In the lower court the defendant recovered judgment, and the reason assigned was that, having bought and paid for the safe bona fide, the title to the property, by the law of Pennsylvania, was transferred to him. In the Supreme Court the judgment entered in the lower court was reversed, and judgment was entered for the plaintiff. De Pue, J., delivered the opinion of the court. He states the law of Pennsylvania to be:

"That, upon a sale of personal property, with delivery of possession to the purchaser, an agreement that title should not pass until the contract price should be paid is valid as between the original parties, but that creditors of the purchaser, or a purchaser from him bona fide by a levy under execution or a bona fide purchase, will acquire a better title than the original purchaser had, a title superior to that reserved by his vendor," and that, "so far as the law of Pennsylvania is applicable to the transaction, it must determine the rights of these parties."

And, in stating the law of New Jersey, he says:

"Conditional sales * * * have been held valid, not only against the immediate purchaser, but also against his creditors and bona fide purchasers from him, unless the vendor has conferred upon his vendee indicia of title beyond mere possession, or has forfeited his right in the property by conduct which the law regards as fraudulent."

He then states the facts under which the sale took place, and says that:

"Delivery of the safe to the carrier in pursuance of the contract was delivery to Schwartz, and was the execution of the contract of sale. His title, such as it was, under the terms of the contract, was thereupon complete."

As to the law governing the validity and effect of the contract, he says the rule is:

That when "the place where the contract is made is also the place of performance and of the situs of the property, the law of that place enters into and becomes a part of the contract, and determines the rights of the parties to it"; that "the contract between Schwartz and the company having been made and also executed in Pennsylvania by the delivery of the safe to him, as between him and the company Schwartz' title will be determined by the law of Pennsylvania"; that, although by the law of Pennsylvania the title reserved in the safe company was valid as between Schwartz and the company, after the property was brought into New Jersey it became subject to the laws of New Jersey; that, as the contract of sale between Schwartz, the conditional vendee, and Norton was made and executed in New Jersey, where the situs of the property was, it was a New Jersey transaction; that, therefore, the construction and legal effect of that contract, and the rights of the purchaser under it, are determined by the law of New Jersey. "By the law of * * * [that] state, Norton, by his purchase, acquired only the title of his vendor—only such title as the vendor had when the property was brought into * * * [that] state and became subject to * * * [its] laws."

He then proceeds and holds:

That "the doctrine of the Pennsylvania courts, that a reservation of title in the vendor upon a conditional sale is void as against creditors and bona fide purchasers, is not a rule affixing a certain construction and legal effect to a contract made in that state. The legal effect of such a contract is conceded to be to leave the property in the vendor. The law acts upon the fact of possession by the purchaser under such an arrangement, and makes it an

indelible badge of fraud, and a forfeiture of the vendor's reserved title as in favor of creditors and bona fide purchasers. The doctrine is founded upon consideration of public policy adopted in that state, and applies to the fact of possession and acts of ownership under such a contract, without regard to the place where the contract was made, or its legal effect considered as a contract"; that "the public policy which has given rise to the doctrine of the Pennsylvania courts is local, and the law which gives effect to it is also local, and has no extraterritorial effect."

Having arrived at this conclusion, he states his application of the law, as follows:

"In the case in hand, the safe was removed to this state by Schwartz as soon as he became the purchaser. His possession, under the contract, has been exclusively in this state. That possession violated no public policy—not the public policy of Pennsylvania, for the possession was not in that state; nor the public policy of this state, for in this state possession under a conditional sale is regarded as lawful, and does not invalidate the vendor's title unless impeached for actual fraud. * * * The title was in the safe company when the property in dispute was removed from the state of Pennsylvania. Whatever might impair that title—the continued possession and exercise of acts of ownership over it by Schwartz, and the purchase by Norton—occurred in this state. The legal effect and consequences of those acts must be adjudged by the law of this state. By the law of this state it was not illegal nor contrary to public policy for the company to leave Schwartz in possession as ostensible owner, and no forfeiture of the company's title could result therefrom. By the law of this state, Norton, by his purchase, acquired only such title as Schwartz had under his contract with the company. Nothing has occurred which by our law will give him a better title. The judgment should be reversed."

It will be recalled that the court, in the early part of its opinion, states:

That "the delivery of the safe to the carrier [in Pennsylvania] in pursuance of the contract was delivery to Schwartz, and was the execution of the contract of sale," and that "his title, such as it was, under the terms of the contract, was thereupon complete."

This shows that Schwartz acquired possession of the safe upon its delivery in Pennsylvania, and that his possession under the contract was during a portion of the time, at least, in Pennsylvania, and could not have been exclusively in New Jersey. The obvious purpose of the court in stating that the possession of the conditional vendee was exclusively in New Jersey was to avoid, if possible, the application of the law of Pennsylvania, which the court recognized as applicable, and would render the reserved title of the vendor void as against bona fide purchasers if the conditional vendee obtained possession of the property in that state. This misstatement of fact resulted in a misapplication of the law. The conditional vendee obtained possession of the property in Pennsylvania, the sale was made there, and the title to the property as between the parties to the contract and as respects third parties became fixed by the law of Pennsylvania. By that law the reservation of title in the vendor was valid as between the parties, but was defeasible and invalid as respects attaching creditors and bona fide purchasers. When the property was removed to New Jersey, the reserved title of the vendor as respects attaching creditors of and bona fide purchasers from the vendee did not become

absolute, but remained defeasible and invalid the same as it was in Pennsylvania.

In view of this we do not think this decision or any others following the same line of reasoning and based upon a like state of facts (Weinstein v. Freyer, 93 Ala. 257, 9 South. 285, 12 L. R. A. 700; Public Parks Amusement Company v. Embree-McLean Carriage Co., 64 Ark. 29, 40 S. W. 582) should be followed. If the delivery of possession had been in New Jersey, there could be no question but that the contract would be governed by the law of that state. But, as possession was obtained by the conditional vendee in Pennsylvania, and, under the law of that state, the title of the vendor was defeasible and invalid as respects third persons, though valid as between the parties to the contract, the title, thus affixed to the property continued with it after removal to New Jersey, and should have enabled a bona fide purchaser to acquire a good title there as well as in Pennsylvania, for the law of the latter state did not contravene the policy of the law of New Jersey.

The case of Hervey et al. v. Rhode Island Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003, is not in point. In that case the vendor of a locomotive engine brought replevin in Illinois against Hervey, who purchased the engine from a sheriff, who had attached it in a suit brought by a creditor against the conditional vendee. The engine was originally sold under a conditional bill of sale, signed by the vendor in Rhode Island and by the vendee in New York, and the engine was delivered to the vendee in Rhode Island and taken to Illinois, where it was attached and sold as above stated. The instrument embodying the agreement was not recorded either in Rhode Island or Illinois prior to the attachment. It was held that the Chattel-Mortgage Act of Illinois (Rev. St. 1874, pp. 711, 712) required:

"That the instrument of conveyance, if it have the effect to preserve a mortgage or lien on the property, must be recorded, whether the party to it be a resident or nonresident of the state. If this be not done, the instrument, so far as third persons are concerned, has no validity."

All this case stands for is that, if the title reserved to the vendor in Rhode Island, where the contract was made and executed, was valid as respects third parties, the courts of Illinois were not bound to recognize the vendee's title as valid, as the contract contravened the policy of the law of that state, in that its recording act required that such a contract, wherever made and executed, to be valid as against creditors, should be recorded in Illinois, if the property was to remain in the possession of the conditional vendee after it was brought into that state. This is an important point to keep in mind in considering cases involving questions of this nature.

In some states, as in Illinois, it is held that its recording acts apply to contracts of conditional sale, wherever made and executed, if the property is to be brought into the state and remain in the vendee's possession. In others these acts are held to apply only to conditional sales executed by the delivery of possession in the state where the recording act was enacted (Machine Works v. Lang, 67 N. H. 348, 31 Atl. 20, 68 Am. St. Rep. 675; Davis v. Osgood, 69 N. H. 427, 44 Atl.

432; Dorntee Casket Co. v. Gunnison, 69 N. H. 297, 45 Atl. 318); while in others it is held that the recording act applies, not only to contracts executed by delivery of possession within the state where the recording act prevails (Knowles Loom Works v. Vacher, 57 N. J. Law, 490, 31 Atl. 306, 33 L. R. A. 305), but to contracts made and executed by delivery of possession in another jurisdiction, if the contract contemplates the removal to and possession of the property by the vendee in such state (Lees v. Harding, Whitman & Co., 68 N. J. Eq. 622, 60 Atl. 352, 355).

In Davis v. Osgood, 69 N. H. 427, 44 Atl. 432, the action was trover by the conditional vendor against a mortgagee of the conditional vendee who had sold the property under the mortgage given him by the conditional vendee. The property was situated and the contract of conditional sale was made and executed in Ellsworth, Me., by delivery of the property to the vendee, who removed it to New Hampshire, and there mortgaged it to the defendant. The conditional sale was recorded in New Hampshire, but not in Maine. The law of Maine required the agreement to be recorded, and provided that it should be invalid as against any other person than the parties thereto unless recorded in the town where the vendee resided, or, if he resided without the state, unless it was recorded in the place where the property was when the contract was made. In that case it was held that judgment should be entered for the defendant, for the reason that the contract was governed by the law of Maine, where the sale was executed by delivery of possession, and that, under that law, the reserved title of the vendor was invalid as against any other person than the parties to the contract, in that it was not recorded as required. In the opinion of the court it was said:

"The contract between the plaintiff and Ricker [the vendee] was a conditional sale of chattels in Maine, and its validity is to be tested by the laws of that state. Cleveland Machine Works v. Lang, 67 N. H. 348, 363 [31 Atl. 20, 68 Am. St. Rep. 675], and cases there cited. Since the conditional vendee resided in New Hampshire, the sale to be valid against 'any other person than the parties thereto' required that the notes and agreement be recorded in Ellsworth, where the property was when the notes and agreement were executed. The neglect to have them so recorded was fatal to the plaintiff's claim. The provisions of our statute respecting the records of such sales (P. S. c. 140, s. 23) apply only to sales that are made within the state. They have no extraterritorial force."

[2, 3] As the contracts between the Mergenthaler Company and the Publishing Company were made in New York, and executed there by delivery of possession to the Publishing Company, the contracts are governed by the law of that state and, if valid there, they should, as a matter of comity, be upheld and enforced in Porto Rico, unless such enforcement would be in contravention of the policy of its laws. From the time the property was brought into Porto Rico by the vendee to the time it was turned over to the trustee in bankruptcy it remained in the possession of the vendee. During this period the laws of Porto Rico did not require that conditional sales of personal property should be recorded. In 1916 the Legislature of Porto Rico passed a conditional sale recording act based largely upon the New York

statutes. Laws Porto Rico 1916, p. 123. This act virtually recognizes that contracts of conditional sale were theretofore sanctioned under the laws of Porto Rico, and provides that thereafter the reserved title will be valid as against everybody, if recorded, but invalid as against certain persons dealing with the conditional vendee in good faith, if not recorded. That such contracts are sanctioned by the law of the island is also evident from the language of section 1222 of the Civil Code of Porto Rico, where it is provided:

"Contracting parties may make the agreement and establish the clauses and conditions which they may deem advisable, provided they are not in contravention of law, morals, or public order."

It would seem, however, that, while under the law of the island prior to the recording act the reserved title of the vendor in a conditional sale would be good as between the parties, it would not be so as against purchasers in good faith from the conditional vendee. This is shown by section 1376 of the Civil Code, which provides:

"If the same thing should have been sold to different vendees, the ownership shall be transferred to the person who may have first taken possession thereof in good faith, if it should be personal property."

No provision of the Code or decision has been brought to our attention showing that a title so held, the possession being in the vendee, would be invalid as respects creditors of the vendee. On the contrary, it appears that creditors could attach and hold only such interest in property in the possession of the conditional vendee as the conditional vendee had, for section 4184 of the Rev. St. & Codes provides that:

"Creditors, after having attached the property of which the debtor may be in possession, in order to collect all that is due them, may exercise all the rights and actions of the latter for the same purpose, excepting those inherent in his person. * * *"

[4] The law of New York is not in conflict with the law of Porto Rico, for under it the reserved title of the conditional vendor is absolute as against creditors, though defeasible as against purchasers in good faith from the conditional vendee. Consolidated Laws N. Y. 1909, c. 41; Personal Property Law N. Y. § 62 et seq.; Bryant v. Swofford Bros. Dry Goods Co., 214 U. S. 279, 290, 29 Sup. Ct. 614, 53 L. Ed. 997; Prentiss Tool & Supply Co. v. Schirmer, 136 N. Y. 305, 310, 32 N. E. 849, 32 Am. St. Rep. 737; Hewit v. Berlin Machine Works, 194 U. S. 296, 301, 24 Sup. Ct. 690, 48 L. Ed. 986. Section 62 reads:

"Except as otherwise provided in this article, all conditions and reservations in a contract for the conditional sale of goods and chattels, accompanied by delivery of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the conditional vendor or in a person other than the conditional vendee, until they are paid for, or until the occurrence of a future event or contingency, shall be void as against subsequent purchasers, pledgees or mortgagees, in good faith, and as to them the sale shall be deemed absolute, unless such contract of sale, containing such conditions and reservations, or a true copy thereof, be filed as directed in this article, and unless the other provisions of the lien law applicable to such contracts are duly complied with."

[5] In the opinion of the District Court section 62 of the New York Statutes is cited to sustain the proposition that, under the law of that state, the title of the vendor is not good as against creditors of the vendee; but it is evident that the court could not have had the text of the law before it, for, if it had, it could not have reached such a conclusion. This error, although not specifically noted in the assignments of error, is such an obvious one, and so related to the third assignment of error above specified, that we feel called upon to consider it in order to do justice and make a complete and final disposition of the case.

Section 47a2 of the Bankruptcy Act of July 1, 1898 (30 Stat. 557, c. 541), as amended in 1910 (Act June 25, 1910, c. 412, 36 Stat. 840 [Comp. St. 1913, § 9631]), defines the rights of trustees as follows:

"And 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."

This act has been held to confer upon the trustee the rights which the bankrupt or any of his creditors possessed or might lawfully possess at the time of the filing of the petition. Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Potter Mfg. Co. v. Arthur, 220 Fed. 843, 136 C. C. A. 589, Ann. Cas. 1916A, 1268; Clark v. Snelliny, 205 Fed. 240, 123 C. C. A. 430; In re Floyd-Scott Co. (D. C.) 224 Fed. 987; In re Pittsburg-Big Muddy Coal Co., 215 Fed. 703, 132 C. C. A. 81; Root Mfg. Co. v. Johnson, 219 Fed. 397, 407, 135 C. C. A. 139. But as the Press Company, the conditional vendee, had no title to the property, by reason of its failure to comply with the conditions of its contract, and the reserved title of the Mergenthaler Company is valid as to creditors of the vendee, the trustee, who stands no better than the vendee or its creditors, has no right to retain the property

The decree of the District Court is reversed, the case is remanded to that court, with directions to enter a decree in favor of the petitioner, and the petitioner is awarded costs in this court.

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## EWART et al. v. SQUIRE.

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

No. 1381.

1. BOUNDARIES ⇐3(1)—DESCRIPTION—RELATIVE IMPORTANCE OF CONFLICTING ELEMENTS.

In ascertaining the boundaries of a tract of land, the guides in the order of importance are: (1) Natural objects; (2) artificial objects; (3) adjacent boundaries; (4) courses; (5) distances; and (6) quantity—but the rule is flexible, and does not control against the intention of the parties as shown by the description taken as a whole, and the order of im-

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

portance is more flexible when the description of subdivisions of a tract is ascertained by protraction and not by actual survey.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3, 5; Dec. Dig. ⊂⊃3(1).]

2. ADVERSE POSSESSION ⊂⊃16(1)—NATURE AND REQUISITES—ACTUAL POSSESSION.

Under the law of West Virginia the building of a small house on a tract of land by a claimant, in which he kept some tools, but which he never occupied, the cutting of a few saplings, and the occasional burning of brush do not constitute adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 82, 83, 87, 88; Dec. Dig. ⊂⊃16(1).]

3. PUBLIC LANDS ⊂⊃186—GRANTS OF STATE LANDS BY VIRGINIA—EFFECT OF FORFEITURE FOR NONPAYMENT OF TAXES.

Under the law of Virginia in force in 1840, the forfeiture of land for nonassessment and nonpayment of taxes under a senior grant transferred the title to the junior grantee of the state against whom the land was assessed, and by whom the taxes had been paid for 5 years only when the claimant under the junior grant was in possession.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 599; Dec. Dig. ⊂⊃186.]

4. PUBLIC LANDS ⊂⊃186—LANDS FORFEITED TO STATE—TRANSFER OF TITLE.

Under the tax statute of West Virginia as construed by its highest court, each separate tract of land must be returned and assessed as an entirety, and, if any undivided interest is left off and not charged with taxes for 5 years, the omission operates as a forfeiture of the entire land, and under Const. W. Va. 1872, art. 13, § 3, and Code W. Va. 1913, c. 31, § 40 (section 1099), the title passes to a claimant under a junior grant as by adverse possession who has paid the taxes thereon for 5 years.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 599; Dec. Dig. ⊂⊃186.]

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Ejectment by Andrew Squire against Harvey Ewart and C. L. Parker, administrators of the estate of James A. Parker, deceased, and James T. McCreery. Judgment for plaintiff, and defendants bring error. Affirmed.

William H. Sawyers, of Hinton, W. Va., and H. M. Patterson, of Beckley, W. Va. (T. N. Read, of Hinton, W. Va., on the brief), for plaintiffs in error.

J. Lewis Bumgardner, of Beckley, W. Va., and W. R. Thompson, of Huntington, W. Va. (J. J. Divine, of Welch, W. Va., and Z. T. Vinson, of Huntington, W. Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The only question now made in this action of ejectment is whether the district judge erred in directing a verdict in favor of the plaintiff for the land in dispute.

The declaration covered 31,633 acres, but the defendants disclaimed title to all the land described therein except a tract of 750 acres. They claim this tract under a grant of the state of Virginia to Thomas Rutter and Reuben Etting for 174,673 acres, dated January 9, 1796. The

plaintiff claims under a junior grant of 90,000 acres to James Welch, dated February 11, 1797. The proof was that both grants covered the land in dispute, and that the plaintiff has a complete chain of title from Welch. The plaintiff asserts that the evidence shows conclusively: (1) That neither of the defendants, nor those under whom they claim, ever acquired title or held possession of any part of the land under a senior grant; (2) that if the defendants, or those under whom they claim, acquired title under the senior grant, either by conveyance or adverse possession or both, it was forfeited for nonassessment and nonpayment of taxes, and under the laws of the state of West Virginia the title so forfeited inured to the plaintiff as a holder of the title under the junior grant from the state, who had paid taxes for five years.

The first question, then, is whether the defendants ever acquired title under the senior grant. On December 15, 1840, the whole of the tract of 174,673 acres covered by the senior grant was sold as land forfeited for taxes by Alfred Beckley, commissioner of delinquent and forfeited lands. Before the sale the land was divided into 28 lots. Lot No. 2 was purchased by Wilson Abbott, and the conveyance was made to him November 10, 1842. The defendants claimed from Wilson Abbott under this deed, and the issue of fact is whether the land in dispute was embraced in it.

[1] In ascertaining location the guides in the order of importance are: (1) Natural objects; (2) artificial objects; (3) adjacent boundaries; (4) courses; (5) distances; (6) quantity. But the rule is flexible, and it does not control against the intention of the parties as shown by the description taken as a whole. Ruffner v. Hill, 31 W. Va. 428, 7 S. E. 13; Lewis v. Yates, 62 W. Va. 575, 59 S. E. 1073; White v. Luning, 93 U. S. 514, 23 L. Ed. 938; Watkins v. King, 118 Fed. 524, 55 C. C. A. 290; Mylius v. Raine-Andrew Lumber Co., 69 W. Va. 346, 71 S. E. 404; Tolley v. Pease, 72 W. Va. 321, 78 S. E. 111; McClure v. Glady Ford Lumber Co., 183 Fed. 76, 105 C. C. A. 368. The order of the importance of the guides is manifestly the more flexible when the description of subdivisions of a tract is ascertained by protraction and not by actual survey.

For the purposes of the sale the exterior lines of the original tract, embracing 174,673 acres, were actually surveyed, the courses and distances being given, and the mile and half-mile stations indicated by trees numbered on the plat. The separate tracts were not surveyed but laid out by protraction. Within the boundaries of the old grant were several tracts excluded from the sale because the titles to them in other persons were considered to be superior to the grant of 1796. These were indicated on the plat, but it does not appear that they were actually surveyed. One of these tracts was the Preston survey of 2,500 acres, the natural marks, boundaries, courses, and distances of which were known and recognized; and they are now acknowledged to be binding on the parties to this controversy. The first call on the deed from Beckley, commissioner, to Wilson Abbott, under whom defendants claim, is:

"Beginning at the twenty mile tree south line of the original survey; then N. 10 W. 190 poles to the two white oaks and a red oak, corner of Preston's 2,500 survey."

Comparison of the map by which the sale was made with the resurveys made for the purposes of this case shows beyond doubt that Beckley was mistaken either as to the location of the 20 mile tree called for in its relation to the Preston survey, or as to the location of the Preston survey, and that the map by which he sold is incorrect in that respect. He either thought the 20 mile tree farther east than it was, or the Preston survey farther west than it was. It is admitted, however, that the eastern lines of tract No. 2 must conform to the lines of the Preston survey for which it calls by known marks, courses, and distances. The line N. 10 W. 190 poles from the 20 mile tree or station as ascertained does not go near the known corner of the Preston survey, but if the known and recognized corner of the Preston survey, for which the deed calls, be taken as a starting point and the call reversed to ascertain the point Beckley meant by what he called the twenty mile tree, and the other courses and distances called for by his description of tract No. 2 followed, the result is a tract of land for No. 2 which corresponds in shape, course, distance, and area with that tract as laid down on the old map. It corresponds also with the understanding of Abbott as to his purchase as indicated by the descriptions in his resales of the tract in several portions. What is, perhaps, more significant it corresponds closely with the distance called for in the southern boundary of adjacent tract No. 1, the description of which called for the 20 mile tree as the southwest corner. Had Beckley's mistake been in supposing that the Preston survey was farther west than it was, this would not have been the case.

On the other hand, it is contended by defendants that all this should be held to be overcome and the location controlled by the description in the forfeiture proceedings, which places the 20 mile tree 200 poles west of Guyandotte Mountain, and the designation of it on the old map as west of the mountain, whereas the location of the tract as contended for by the plaintiff would place the 20 mile tree east of the mountain. From this location of the 20 mile tree the defendants contend that by reversing the call of the last line 480 poles the southwest corner is ascertained. To correspond with this it is reasoned that the northern line of the tract described in the deed as 145 poles should be correspondingly lengthened to 573 poles; or, if not, then the course and distance of the western line should be disregarded, and the western line run from the last call of the deed on the northern line to the terminus of the southern line as contended for by the defendants. It is only by this reasoning that the land in dispute can be made to fall into tract No. 2. In further support of this conclusion the defendants rely on the fact of the assertion of title to the disputed land by George Snuffer claiming under Abbott, his undertaking to convey the land to Azel Ford in 1892, some acts of Snuffer indicating possession, and successive conveyances from those deriving title under Snuffer, including the conveyance to the defendants. Reliance is also placed on the fact that the Beckley map indicates that the boundary between tracts 2 and 3 was at or near the 18½ mile tree, and on the evidence that it was considered by the community to mark the boundary between tracts 2 and 3.

It will be observed that the defendants' theory that the present location of the 20 mile tree is controlling requires that the course and distance from the 20 mile tree to the known corner of the Preston survey, the length of the northern line, the location of the Preston survey on the map, the shape of tract No. 2 on the map, and the length of the southern line of tract No. 1 should be disregarded, and that the area of tract No. 2 should be increased over 1,000 acres, and that too, although the 20 mile tree could not be found and the evidence of Beckley's mistake as to its location seems to be convincing. The deed does not call for the 18½ mile tree and therefore the course and distance cannot be varied to carry the western line to that point.

While it is impossible to reconcile all discrepancies, the plaintiff's location is made out so clearly that we do not think there is ground for any reasonable difference of opinion. It reconciles all proved marks, corners, courses, and distances set out in the deed, except the location of the 20 mile tree. The call for the 20 mile tree is not sufficient to overturn so many strong evidences of the intended location as contended for by the plaintiff. That location is consistent too with the shape of the map and with all areas called for, except that of tract No. 3, which is not described by metes and bounds. All these points of agreement leave little room to doubt that the intention of the grantor was not to include the land in dispute, and his intention, gathered from the entire transaction, governs. It follows that the conveyance by the commissioner of tract No. 2 did not include the land in dispute, and therefore conferred neither title nor color of title on the defendants' grantor, Abbott, and that no adverse possession of defendants or their grantors of any portion of tract No. 2 could avail as adverse possession under this deed as title or color of title to the land in dispute. It follows also that there was no presumption of possession in the defendants, since they had no title.

[2] But the defendants contend that, even if it be true that the land in dispute does not lie within the boundaries of the tract conveyed by Beckley, commissioner, as tract No. 2, nevertheless they have proved sufficient adverse possession under color of title derived in a different way. The other color of title relied on begins with a conveyance from George Snuffer to Azel Ford September 18, 1892, and continues by successive conveyances to defendants. This color of title must be held to begin with this conveyance because the preceding deeds are all limited to the land conveyed by Beckley, commissioner, to Abbott, and, as we have seen, that deed did not embrace the land in dispute. The possession of Snuffer, therefore, before the execution of his deed to Azel Ford, could not extend to any land except that in his actual possession because he had no color of title. After this deed of 1892 from Snuffer to Ford there was no continuous adverse possession on the part of the defendants for 10 years. It is true that one of the defendants claimed the land and leased it to Farmer in 1902, but there was no continuous possession by Farmer. He built a small house in which he kept some tools, but which he never occupied, cut a few saplings, and burnt brush from time to time, but this was not the adverse possession required by the statute of West Virginia.

"A mere claim to possession, accompanied by the occasional cutting of timber, the prevention of trespasses, the payment of taxes, and the assertion of title, is not sufficient, but it must be such occupation, use, or holding of the property, or change in its character, as will make such claimant during such statutory period continuously subject to be treated as a trespasser." Wilson v. Braden, 56 W. Va. 372, 49 S. E. 409, 107 Am. St. Rep. 927; State v. Moore, 71 W. Va. 285, 76 S. E. 461.

The plaintiff's possession of a portion of the land embraced in the interlock with the older grant was proved to have been continuous since 1899 under the junior grant. Hence the plaintiff's possession of a part of the interlock would extend to the land in dispute, and vest in him a good title, since there was no actual possession of the defendant after 1892 of any portion of the land in dispute sufficient to confer a good title, and no possession at any time of a part of the interlock under the senior grant. Camden v. West B. L. Co., 59 W. Va. 148, 53 S. E. 409; Chilton v. White, 72 W. Va. 545, 78 S. E. 1048.

[3] But if it be assumed that the land in dispute was embraced in the conveyance of tract No. 2, and that the defendants and those under whom they claim did acquire title from Beckley, commissioner, the plaintiff is nevertheless entitled to recover under the tax laws of West Virginia as construed by the Supreme Court of that state. The plaintiff's first claim under these tax laws is that upon the forfeiture in 1840 of the whole of the Rutter and Etting grant the title was transferred to and vested in his predecessors in title by virtue of the junior grant and payment of taxes for 5 years. This claim is without foundation. Under the laws of the state of Virginia then in force, the forfeiture for nonassessment and nonpayment of taxes under a senior grant transferred the title to the junior grantee of the state against whom the land was assessed and by whom the taxes had been paid for 5 years only when the claimant under the junior grant was in possession. Inasmuch as there was no proof of possession at that time under the junior grant, this forfeiture inured to the benefit of the state, and not to the benefit of the plaintiff or his predecessors in title. Atkins v. Lewis, 14 Grat. (Va.) 30.

[4] The serious claim which the plaintiff makes to the benefit of a forfeiture arises under the law of the state of West Virginia as it stood in 1883, when the second alleged forfeiture occurred. The provision of the Constitution of that state is as follows:

"All title to lands in this state heretofore forfeited, or treated as forfeited, waste and unappropriated, or escheated to the state of Virginia, or this state, or purchased by either of said states at sales made for the non-payment of taxes and become irredeemable, or hereafter forfeited, or treated as forfeited, or escheated to this state, or purchased by it and become irredeemable, not redeemed, released, or otherwise disposed of, vested and remaining in this state, shall be, and is hereby transferred to, and vested in any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees), for so much thereof as such person has, or shall have had actual continuous possession of, under color or claim of title for ten years, and who, or those under whom he claims, shall have paid the state taxes thereon for any five years during such possession; or if there be no such person, then to any person (other than those for whose default the same may have been forfeited, or returned delinquent, their heirs or devisees), for so much of said land as such person shall have title or claim to, regularly

derived, mediately or immediately from, or under a grant from the commonwealth of Virginia, or this state, not forfeited, which but for the title forfeited, would be valid, and who, or those under whom he claims has, or shall have paid all state taxes charged or chargeable thereon for five successive years, after the year one thousand eight hundred and sixty-five, or from the date of the grant, if it shall have issued since that year; or if there be no such person, as aforesaid, then to any person (other than those for whose default the same may have been forfeited, or returned delinquent, their heirs or devisees), for so much of said land as such person shall have had claim to and actual continuous possession of, under color of title for any five successive years after the year one thousand eight hundred and sixty-five and have paid all state taxes charged or chargeable thereon for said period." Const. 1872, art. 13, § 3.

Section 1099 of the Code of West Virginia is in the same language.

If the defendants were in possession rightfully holding under the senior grant as they claim, and failed to have the land assessed and to pay the taxes, then forfeiture would inure to the benefit of the plaintiff or his predecessors in title claiming under a junior grant and paying taxes for the 5 preceding years.

It appears from the record that the two undivided one-third interests claimed by the predecessors in title of the defendants were entered upon the land books and charged with taxes. But it also appears that one undivided one-third interest was not placed on the land books, and not assessed, and the taxes thereon were not paid. It is not a compliance with the tax law of West Virginia to place separately on the land books undivided interests. In construing the Constitution and statute, the Supreme Court of the state has held that each separate tract must be returned as an entirety, and that if an undivided interest is left off and not charged with taxes for five successive years, the omission operates as a forfeiture of the entire land. This forfeiture by reason of the failure to place one-third interest on the land books occurred in 1883. Before that time the Supreme Court of West Virginia had decided that such a failure would operate as a forfeiture of the entire tract. Smith, Trustee, v. Tharp, 17 W. Va. 221. And this decision has been reaffirmed by Toothman v. Courtney, 62 W. Va. 167, 58 S. E. 915, 921; Caretta Ry. Co. v. Fisher, 74 W. Va. 115, 81 S. E. 710.

"These cases hold that the lands owned by cotenants cannot lawfully be assessed to each of them by an acreage equal to his share, or by a fractional part representing his undivided interest; and that, if thus assessed, and any undivided interest is omitted from the land books and not charged with taxes for 5 successive years, title to the entire tract becomes forfeited, and vests in the state, notwithstanding entry and payment of the taxes assessed may have been made as to other undivided interests therein." Lawson v. Pocahontas, etc., Co., 73 W. Va. 296, 81 S. E. 583.

This construction of the state statute is, of course, binding on this court.

The record affords no escape from the conclusion that the plaintiff was entitled to recover the land in dispute, and the district judge was right in directing a verdict.

Affirmed.

## SOUTHERN RY. CO. v. MAYS.*

(Circuit Court of Appeals, Fourth Circuit. December 9, 1916.)

No. 1449.

1. MASTER AND SERVANT ⊜288(5)—INJURIES TO SERVANT—ASSUMPTION OF RISK—KNOWLEDGE OF DANGER.

Plaintiff was foreman of a railroad wrecking crew, and was required by the company to remain with the wrecking outfit whenever it was out on the road, eating and sleeping in the camp car. At the close of a day's work in clearing a wreck, the outfit was to be taken to a town for the night. The movement of the outfit on the road was under the control of a regular train crew, not subject to the wrecking foreman's orders. This crew intended to take some of the wrecked cars which plaintiff had replaced on the rails back to the same town where the wrecking outfit was to spend the night, and the conductor made up the train with the bad-order cars between the engine and the wrecking outfit, though the track was on a grade and the air brakes on the cars could not be connected, so that those on the wrecking outfit were cut off from the engineer's control. Plaintiff warned the conductor of the danger of making up the train that way, but nevertheless the conductor started down the grade without any brakeman at the hand brakes. A coupling between the wrecked cars broke, so that the train pulled apart, and thereafter the two parts collided, injuring plaintiff, who was eating his supper in the camp car. *Held*, that it could not be said as a matter of law that plaintiff assumed the risk, though he knew of the danger, since he was required to remain with the outfit, and the act of the conductor in proceeding after plaintiff's warning was an assurance of safety on which he was entitled to rely.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1077; Dec. Dig. ⊜288(5).]

2. MASTER AND SERVANT ⊜228(1)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—EMPLOYERS' LIABILITY ACT.

In an action under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, §§ 8657–8665), which provides that contributory negligence shall not bar recovery, but that the damages shall be diminished in proportion to the amount of the negligence attributable to him, a recovery for injuries to a servant is not defeated by proof of his negligence, unless it is shown that such negligence was the sole cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 670; Dec. Dig. ⊜228(1).]

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Action by Z. E. Mays against the Southern Railway Company to recover for personal injuries. Judgment for plaintiff, and defendant brings error. Affirmed.

Thomas B. Gay and Eppa Hunton, Jr., both of Richmond, Va., for plaintiff in error.

Volney E. Howard and Irvin P. Whitehead, both of Lynchburg, Va., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. In disposing of the questions involved herein the defendant in error will be referred to as plaintiff, and

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

*Rehearing denied February 28, 1917.

the plaintiff in error as defendant; such being the relative positions occupied by the parties in the court below.

The plaintiff was an employé of defendant, and brings this action to recover for personal injury, pursuant to an act of Congress known as the federal Employers' Liability Act. Among other things it is agreed:

"That the defendant was a common carrier by railroad engaged in interstate commerce, that it was operating the railroad mentioned in the declaration as an interstate railroad in interstate commerce, and that the plaintiff was actually engaged as an employé of the defendant in the performance of interstate work on said railroad at the time of receiving the injuries complained of in the declaration."

It appears that the plaintiff was a member and the "foreman" (called "derrick foreman") of a gang of six men, employés of defendant, called a "wrecking crew," with headquarters at Monroe, Va., whose duty it was, upon receiving orders, to go with the Monroe "wrecking train" to any needed point for the purpose of removing wrecked cars or other obstructions from defendant's tracks. This wrecking train consisted of a tool car, truck car, flat car, camp car, and a derrick car. Upon the latter were installed a derrick and a steam engine for operating the same, weighing 74 tons. When the wrecking train was to be moved from one place to another, and while it was out in service, as on this occasion, it was occupied by the wrecking crew as their place of abode at all times when they were not actually at work; and in all of its movements, in shifting on the side tracks or when running on the road, it was in charge of and operated by a regular "train crew," and was drawn by a regular locomotive engine. This train crew consisted of a conductor, an engineer, a fireman, and two brakemen.

The wrecking crew and the wrecking train of which the plaintiff was foreman was sometimes called an "outfit," and this one was called the "Monroe outfit." This outfit, along with a similar outfit from Spencer, N. C., had been engaged for two days in removing a wreck which obstructed defendant's track at Reedy Fork, in the state of North Carolina. On the evening of April 6, 1914, the removal of the wreckage not being completed, the Monroe outfit (the wrecking crew and wrecking train) had been assembled at Brown's Summit, a short distance from Reedy Fork, for the purpose of being taken to Greensboro for the night, to be returned to the scene of the wreck the following morning, for continuing the work. During the day a number of disabled cars had been taken from the wreck and assembled at Brown's Summit. It was a part of the defendant company's program that these disabled cars and the five cars composing the Monroe wrecking train should be made up into a single train, and that this train as thus made up should be run from Brown's Summit to Greensboro.

Preparatory to being placed into this train, the five or six disabled cars had been coupled or chained together by the wrecking crew, with the aid of Conductor Moore of the train crew (as was his duty) under the general supervision of the plaintiff. After the completion of this work, it is insisted by plaintiff that the duty of himself and the other members of the wrecking crew was ended. After the plaintiff had informed Conductor Moore that this work was done, the plaintiff and

all of his crew repaired to the cars of the wrecking train to arrange the tools in these cars for the trip to Greensboro and to eat supper, all of which was in the line of their duty. Thereupon Conductor Moore took charge of the situation; it being the duty of himself and his train crew to assemble and couple the disabled cars to the cars of the wrecking train, making them into a single train, and, after thus making up the train, to run it into Greensboro, all under his sole direction. The plaintiff and his crew took no part in this work, it not being a part of their duty.

It appears that at this juncture the two brakemen of Conductor Moore's train were absent, and that the conductor undertook to move the train by the use of the locomotive engine, without the aid of the brakemen or any other person. It is insisted by plaintiff that the conductor was anxious to start for Greensboro, and therefore did not wait until he could get aid from his own crew, or from Conductor Tarleton and his crew; that, instead of moving the train at that time, he should have waited until it could have been moved with reasonable safety. However, it appears that the conductor succeeded in shifting and getting all the cars together and coupled up on one of the side tracks, with the engine in front looking north, and on a very steep downgrade with five or six disabled cars placed next to the engine, and all the "wrecking train," including the 74-ton derrick car, which was coupled behind and next to the disabled cars, all coupled into one train. The train as thus made up could not be operated by air brake control from the engine, because the air brake apparatus as well as the hand brakes on the disabled cars had been crippled, and air brake connections with the wrecking train could not be made, because they were all behind the disabled cars. The conductor caused the engineer to put the train in motion in this unprotected condition, which caused the coupling between two of the disabled cars to break, thus parting the train, and subsequently the rear part of the train crashed into the forward part from lack of control, causing a collision which was so violent in its nature that two of the wrecking crew were thrown many feet and prone upon the floor of the car, others were knocked against the wall of the car, stoves and tables were wrenched from their fastenings, and the heavy trucks were displaced and thrown from the flat car, so that it required a derrick to replace them. The plaintiff was thereby injured.

At the close of the evidence the defendant moved the court to direct the jury to find a verdict in its favor, which motion was refused, and the case was submitted to the jury with instructions, and the jury found for the plaintiff and assessed his damages at $7,500, from which judgment the defendant sued out a writ of error.

[1] There are a number of assignments of error, but upon argument in this court it was practically conceded that the real question involved in this controversy is as to whether the plaintiff assumed the risk incident to his employment, and therefore is not entitled to recover. It is urged in support of this contention that the plaintiff knew of the unsafe condition of the cars and especially the manner in which they were coupled together, and that in boarding the train at that time he

assumed all the risks incident thereto, and that the court below erred in refusing to direct a verdict in favor of defendant upon these grounds. It appears from the record that plaintiff relied solely on the second count of the declaration. Among other things, the court below in its charge made the following statement as to the grounds set forth in the declaration upon which plaintiff relied for a recovery in this case:

"The jury will not be concerned with any matter contained in the first, third, and fourth counts; the plaintiff not asking anything under those three counts of the declaration. The plaintiff, however, relies on the negligence alleged in the second count of the declaration. The acts of negligence alleged in the second count and relied on by the plaintiff are the following, namely: Negligence on the part of the conductor (1) in causing or permitting the train, as it was then made upon the side track, to be put in motion while the wrecking cars which were then occupied by the plaintiff and other members of his crew were coupled to said train; and (2) without any provision for controlling the movements of said train, or any car thereof, either by air brake or by hand brakes; and (3) in negligently failing to keep any reasonable or adequate lookout or watch for the purpose of ascertaining if the said train or any portion thereof should become parted from another portion thereof; (4) or for stopping the rear part if it should become parted; (5) or to provide for such lookout or watch."

The position occupied by the plaintiff required the performance of certain duties, and a careful examination of the evidence leads us to the conclusion that he did everything on this occasion required of him as foreman of the wrecking crew. From the very nature of things the plaintiff as foreman of this crew had charge of the rerailing of the cars, and, among other things, it follows that he was required to determine as to whether the cars rerailed were capable of being moved. We find nothing in the record to show that any of the cars rerailed were not capable of being hauled to Greensboro.

The duty of moving the train, as we have stated, likewise devolved upon the train crew, under the direction of the conductor. The plaintiff, who testified in his own behalf, after having described the location of the tracks, and referring to the fact that he had performed all the duties required of him, except to fasten the derrick down with screws, and to chain it so as to keep it from turning around when the car was in motion, said:

"We had to stop and wait for him to make this coupling, and to keep him from pushing over us while we were fastening down, and cleaning out the ash pans and fixing the machine up in general to run, and when we got through with our work we walked down to the lower end—the north end—of the cars where the engine was, and the conductor then asked if he could move down to the switch. I told him, 'Yes;' and I asked him the question what was he going to do, and he said, 'Pull them out and shove them up on the main line, all of them;' and I told him that he had his train made up in the position he wanted to run, that if I was in his place I would not handle them, that those cars (the crippled cars) were not in condition to handle them, with a heavy 70-ton derrick on the far end of them, and the engine on the other end; and he did not say anything more. I suggested that he * * * might put his engine out on the main line, and let his cars drop out when he got ready to go, and let them couple up; that he was going to take the crippled cars to Greensboro."

The plaintiff further testified that:

"It was not reasonably safe to start a train coupled up as it was at that time without air brakes and without anybody at the hand brakes; that it was not safe at all, otherwise he would not have called the conductor's attention to it; that he would have just taken it for granted that he knew it was dangerous, and would not have undertaken to move them; that he called the conductor's attention to it before he went into the car; * * * that it was unusual to move a train in that condition."

We find the following in the evidence of the witness Harvey:

"Q. * * * Now, I want to ask you if it was, or was not, a safe and prudent thing to put that train in motion, on a downgrade, without anybody to man the hand brakes of the wrecking train, and with no air on the train? A. No, sir; I would not consider it prudent or safe by any means."

This witness also said that, if the exigency was such as to require the train to be moved at once and without waiting for the brakemen, the conductor should have "given the signal to the engineer and have handled the brakes his own self." It is true that there was a conflict between the evidence offered by plaintiff's and defendant's witnesses as to the way in which the train was made up, etc., but all such questions were submitted to and passed upon by the jury. It also appears from the evidence that the foreman and wrecking crew, while not engaged in work, lived in the camp car; that is to say, took their meals in this car and also slept there, and were, among other things, by virtue of their employment, required to accompany the wrecking train whenever and wherever the defendant might desire to take it in the course of doing the particular work which this crew was required to do.

It is true that the foreman called the conductor's attention to the fact that it was unsafe in his opinion to move the cars as then made up, and especially in view of the fact that the car with the heavy derrick was attached to the rear of the bad-order cars, which caused an unusual strain on the temporary couplings that were being used on some of the crippled cars. From this circumstance it is argued by counsel for defendant that the plaintiff had full knowledge of the dangerous and unsafe manner in which the train had been made up, and that therefore as a matter of law he assumed any risk incident to boarding the train while in that condition. In this respect counsel seems to overlook the fact that the defendant owed the duty to the plaintiff to make up the train in a reasonably safe condition, and likewise to operate the same in a reasonably safe way. The fact that the conductor, after having been warned by the plaintiff as to the condition of the train, failed to adopt the suggestions of the plaintiff and proceeded to move the train as then made up, under the circumstances was in the nature of an assurance to the plaintiff that the train was in a reasonably safe condition at that time.

While, according to plaintiff's own testimony, it was more or less hazardous to move the train in its then condition, yet he testified that if the conductor had required the services of the brakemen, so as to control the movement of the train, the accident would not have occurred. The plaintiff, having performed his duty, had a right to

expect that the conductor would employ such means as might be necessary to insure safety in moving the train, and this proposition was submitted to the jury, and the issue thus raised was found in favor of the plaintiff; i. e., that the proximate cause of plaintiff's injury was due to the negligent manner in which the train was moved under the immediate direction of the conductor. The plaintiff only assumed such risks as were incident to the condition of the cars of which he had knowledge, or by diligence could have known. For instance, if he had rerailed a car with a broken axle or other defect, with full knowledge at that time of the existence of such defect, and that it rendered the car incapable of being safely transported, he would have assumed any risk incident to the moving of such car.

From the evidence it appears that the cars were in condition to be moved, and that the wreck was due to the fact that they were improperly placed, and, owing to the absence of the brakemen, improperly handled. Therefore his injury was due to the negligence of the conductor, which resulted in bringing about a condition that plaintiff could not have reasonably anticipated, and under such circumstances it would be manifestly unfair to hold that he had assumed the risk incident to a condition over which he had no control, and which had been created by the negligent acts of a fellow servant. This would be especially true when we consider, as we have already stated, that plaintiff was compelled to accompany the wrecking train from place to place under the direction of the defendant. At any rate, the question as to whether the defendant assumed the risk was one for the jury to determine.

[2] It appears, among other things, from the testimony, that a link had been used for the purpose of coupling the cars, and that this coupling was the one that broke and caused the wreck. It is therefore insisted by counsel for defendant that inasmuch as plaintiff made the coupling with this link, instead of chaining the cars together, he thereby contributed to his own injury. This cannot avail the defendant for two reasons: (1) It appears that the conductor furnished the link used for this coupling and was present when the coupling was made; and (2) the doctrine of contributory negligence does not so apply in an action of this character as to prevent any recovery; also the statute under which this suit was instituted provides that contributory negligence "shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé."

In considering the facts in this case we should keep in mind the distinction between the consequences of contributory negligence and assumption of risk. Under the federal Employers' Liability Act one is only barred from recovery where it appears that he assumed the risk incident to his employment. On the other hand, contributory negligence is not a bar to recovery, and can only be considered in ascertaining the extent to which damages are to be mitigated. In the case of Illinois Central Railway Co. v. Skaggs, 240 U. S. 66, 36 Sup. Ct. 249, 60 L. Ed. 528, the Supreme Court said:

"It may be taken for granted that the statute does not contemplate a recovery by an employé for the consequences of action exclusively his own; that is, where his injury does not result in whole or in part from the negligence of any of the officers, agents, or employés, of the employing carrier, or by reason of any defect or insufficiency, due to its negligence, in its property or equipment. * * * But, on the other hand, it cannot be said that there can be no recovery simply because the injured employé participated in the act which caused the injury."

From the foregoing it follows that, to defeat a recovery, it must be shown that the sole cause of the injury was due to the negligence of the plaintiff, and in the light of the facts in this case it would be absurd to say that the plaintiff alone contributed to the cause of his injury. In the case of Seaboard Air Line Railway Co. v. Horton, 239 U. S. 595, 36 Sup. Ct. 180, 60 L. Ed. 458, the Supreme Court, in referring to the difference between assumed risk and contributory negligence, said:

"That there was a constant danger that the tube might explode was abundantly proved, and was admitted by plaintiff. * * * The jury might reasonably believe that such a water glass would probably not explode in the ordinary use of it, unless it was imperfect * * * in some respect other than the absence of the guard glass, and that, since there was no evidence of this, Horton was justified in assuming that the danger of an explosion was not immediately threatening. * * * It would require a much plainer case than this to justify taking the question from the jury."

At an earlier hearing of the case of Seaboard Air Line Railway Co. v. Horton, 233 U. S. 503, 34 Sup. Ct. 639, 58 L. Ed. 1070, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, the Supreme Court also held that, as a general rule, assumption of risk is one of fact for the jury, except in cases where it is clearly established by the evidence that plaintiff had assumed the risk. Then it becomes a question of law to be decided by the court. In referring to this point the court said:

"The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employé; and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his own safety as ordinarily prudent employés in similar circumstances would use."

It is earnestly urged that the court below erred in refusing to grant certain instructions as tendered by defendant. An examination of these instructions shows that in the main they were given as requested, but it does appear that they were modified so as to conform to the theory upon which the case was tried, which we think was correct. It therefore follows that the assignments of error which pertain to those facts of the case are without merit.

For the reasons stated, the judgment of the lower court is affirmed.

## SPRING COAL CO. v. KEECH et al.

(Circuit Court of Appeals, Fourth Circuit. December 21, 1916.)

No. 1435.

CORPORATIONS ⟸568—INSOLVENCY AND RECEIVERS—DISTRIBUTION OF ESTATE —INTEREST.

Under the general principles of equity in the administration of the estate of an insolvent corporation through a receivership, where there are claims of different rank, the holders are entitled to interest until the time of payment, even though the holders of claims of inferior rank may receive no dividend at all; and this is especially true where the right to such interest during a receivership is expressly given to a prior lienholder by his contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2288, 2289; Dec. Dig. ⟸568.]

Appeal from the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge.

Suit in equity by Thomas T. Boswell and others against the Big Vein Pocahontas Coal Company. From an order confirming report of Edward P. Keech, Jr., and Harry H. Heiner, late receivers, the Spring Coal Company, intervener, appeals. Affirmed.

Charles C. Bucknam, for appellant.

W. H. De C. Wright and Robert R. Carman, both of Baltimore, Md., for appellees.

Before KNAPP and WOODS, Circuit Judges, and JOHNSON, District Judge.

JOHNSON, District Judge. The Big Vein Pocahontas Coal Company was a corporation organized under the laws of West Virginia and owned coal property and operated it in the state of Virginia. On May 1, 1909, the said company by indenture conveyed certain of its property to the Colonial Trust Company, a Maryland corporation, as trustee, to secure the payment of an issue of 6 per cent. sinking fund gold coupon bonds, par value $1,000 each, aggregating $400,000. Of these, bonds of a par value of $275,000 were issued and outstanding on October 28, 1910. Of the outstanding bonds, $212,000, were held by bona fide purchasers for value and $63,000 were held by creditors as collateral security for various loans and obligations of the company. On October 28, 1910, Thomas T. Boswell, Andrew C. Snyder, and Merville H. Carter, creditors and bondholders, on behalf of these and all other creditors and security holders, filed a bill in equity against the said Big Vein Pocahontas Coal Company in the United States District Court for the Western District of Virginia. The bill alleged the present inability of said company to meet its obligations. Paragraph 17 said:

"Your orators verily believe and therefore aver that the property and assets of the defendant coal company far exceed in value the amount of its indebtedness, provided its integrity is maintained and its operation continued, and

the dissipation, loss, and waste which would inevitably result from the levying of execution upon the same prevented."

Continuing, the complainants set forth the great value of the company's property, and the importance of keeping it in operation as a going concern, in order that it might be sold for its fair value. They continued to aver:

"Your orators confidently believe and therefore aver that within a comparatively short time either a reorganization of the financial affairs of the defendant coal company can be effected or a sale of its property made upon terms which will satisfy all said creditors and security holders, but in order to bring about such a result, and to prevent the dissipation and waste of the assets of the defendant coal company, it is absolutely necessary that this honorable court should interpose and by its receiver or receivers take possession of all the property and assets, both real and personal, of the defendant coal company, with leave and direction to continue to operate the same and with power and authority to borrow money."

Upon the filing of this bill the court appointed receivers, and authorized and directed the receivers to take possession of the property of the defendant company, and to operate the same under the terms of the order then issued, or under such orders as might thereafter be issued by the court. On November 4, 1910, the Colonial Trust Company, trustee, filed an intervening petition in the said District Court, reciting the facts relative to the issue of the bonds issued under the deed of trust of May 1, 1909, alleging default in regard to the same, together with the request of the bondholders that the trustee file a petition of intervention. The trustee further stated that it was willing to adopt and be bound by the averments of the bill of complaint filed by the complainants, and prayed that it be admitted as a party plaintiff in the proceedings. On November 10, 1910, such petition of the trustee was allowed, and it was made a party plaintiff in the proceedings, and will therefore be considered one of the petitioning creditors.

The property was operated by the receivers from the 28th day of October, 1910, until the date of the sale on December 31, 1914. The profits of the mining department alone amounted to $282,465.31. It thus appears that the defendant company was operated with very great success and with very large profits by the receivers. During the time of operation of the property by the receivers, certain litigation was going on with the Brownings in regard to the amount due by the company as purchase money.

The decree of sale provided among other things as follows:

"In case said parcel No. 1 be purchased by any holder of the bonds of the defendant coal company, he shall have the option and right to make payment for the said parcel No. 1 in the said bonds or coupons, or both, any such bonds or coupons thereon shall be receivable in payment as cash for the amount of such dividend or distribution as will be payable to the same out of the proceeds of the sale of parcel No. 1."

The property was purchased by a committee of the bondholders for $350,000, and in payment thereof they deposited with the court bonds and matured coupons thereon to the amount of $273,000, and the remainder of the purchase money was paid in cash or its equivalent.

Article 16 of the deed of trust hereinabove referred to provided:

"In case the coal company make default in the payment of principal or interest of the coupon bonds, the trustee shall personally or by duly constituted agents or attorneys in the premises take possession of, manage, and control the same and receive the income, rents, issues, and profits thereof until such time as each and all of said bonds then outstanding and all coupons thereon then matured or which shall mature and become payable during the possession of said real and personal property by the trustee, its agents, or attorneys shall have been paid, in which case the trustee shall apply any money arising from the operation of said real estate or personal property first to the expenses of the trust, etc.; second, to the payment of the matured and maturing interest coupons on said bonds then outstanding; and thereafter to the payment of the principal sum of said bonds."

It was further provided that in case any sale of the real and personal property conveyed be made in pursuance of the terms of the deed of trust, or in the course of foreclosure or any other proceedings for the enforcement of the trust, the proceeds of the same together with any income arising from said real or personal property in the hands of the trustee or of any receiver or other officer of the court should be applied as follows: First, to the payment of costs, etc.; second, to the payment of the whole amount of the principal and matured interest and interest upon overdue interest.

The Spring Coal Company filed its petition of intervention and appealed from the order confirming the report of the receivers. Some question is made in the argument to the effect that the decree of sale which provided that the bonds and the interest thereon could be deposited by the purchasers was final, and that the appeal should have been taken from that decree and not from a formal order of the court confirming a report of the receivers. We prefer to put that question to one side, and to meet the real question presented by this appeal upon its merits, and that is: Were the bondholders entitled to interest on the coupons that matured from October 28, 1910, when the receivers were appointed until the sale of the property on December 31, 1914?

The appellant contends that when the receivers were appointed the property passed into the custody of the court, which was equivalent to the equitable levying of an execution in behalf of all the creditors in proportion to their claims upon the funds in the hands of the court, and that any delay incident to the administration of the estate is the delay of the court and not the default of the debtor and that all interest ceased from the time the court took charge of the property. Numerous authorities are cited to sustain this proposition. We have examined all the cases cited from the decisions of the United States courts. There are three classes of cases referred to. Quite a number of cases arising out of the settlement of insolvent national banks are cited. Such cases have no application to the case in hand. In the case of Cook County National Bank v. United States, 107 U. S. 448, 2 Sup. Ct. 561, 27 L. Ed. 537, the court said:

"We consider that act (National Banking Act) as constituting by itself a complete system for the establishment and government of national banks. * * * Everything essential to the formation of the banks, * * * the

winding up of the institutions, and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates."

It follows, therefore, that all the cases arising out of the settlement of insolvent national banks have been settled according to the courts' construction of the national banking act and not in accordance with the general principles of equity.

Many cases are cited by appellant which arose under the Bankruptcy Acts. The Supreme Court in Bank v. United States, 107 U. S. 452, 2 Sup. Ct. 567, 27 L. Ed. 537 referring to the Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) said:

"That enactment was dealing with the estates of persons adjudged to be insolvent under that law and covers only the distribution of their estates. It has no further reach."

All the bankruptcy cases referred to arose either under the act of 1867 or the Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544), and they are settled by the courts' construction of the provisions of the bankruptcy laws, and have no reference to the general principles of equity jurisprudence.

Eliminating the authorities arising under the statutes referred to, we come now to the broad question as it arises in the settlement of insolvent estates according to the general principles of equity. Courts of equity no more than courts of law have power to make contracts for persons or corporations, nor can courts substitute their judgment for the judgment of the parties to a contract. It is the duty of courts to construe and to enforce valid contracts as the parties made them. A careful reading of all the authorities will show that this principle has not been departed from. The fact that courts of equity have allowed certain claims priority over lien debts has sometimes erroneously been construed to mean that courts had exercised a power to modify or change a contract. The basis of such an allowance, however, is found in the fact that property in the custody of the court must be preserved for the benefit of the creditors, and the cost of such preservation must, of course, be borne by the property itself. For example, the court might borrow money to insure property covered by lien, and the cost of such insurance would have priority over the lien debts. If cases have gone beyond this and violated this principle, it seems to us that they have gone further than the court had any right to go.

We do not understand that the courts have ever declared that interest upon contracts which provided for interest must stop in any and all events when property passes into the hands of the court. That is a rule adopted by the court for its convenience in the distribution of insolvent estates and when all claims are of equal rank or dignity. When the estate is insolvent, it is immaterial to the creditor whether the dividend is calculated on the basis of the principal alone, or of the principal and interest combined. But where there are debts of different rank or dignity, this general rule does not apply. Mr.

Justice Lamar, in the case of the American Iron Co. v. Seaboard Air Line Railway, 233 U. S. 261, 34 Sup. Ct. 502, 58 L. Ed. 949, said:

"Principal as well as interest, accruing during a receivership, is paid on debts of the highest dignity, even though what remains is not sufficient to pay claims of a lower rank in full"—citing Central Co. v. Condon, 67 Fed. 84, 14 C. C. A. 314; Richmond v. Richmond Railroad Co., 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625; First National Bank v. Ewing, 103 Fed. 168, 43 C. C. A. 150.

In the case of Central Trust Co. v. Condon, 67 Fed. 84, 14 C. C. A. 314, Circuit Judge Taft, in delivering the opinion of the court, said:

"This is not a case where the distribution is to be made pro rata between the lienholders and the bondholders, in which case, of course, interest is not to be calculated upon the claims after the time of the sequestration of the property for sale and distribution, so long as the claims cannot be paid in full"—citing Bank v. Armstrong, 16 U. S. App. 465, 8 C. C. A. 155, and 59 Fed. 372. "In the distribution of the proceeds of a common security between liens of different priorities, we know of no principle by which interest can be stopped on the amount of the superior lien until its satisfaction. As between the bondholders and the lienholders, the lienholders are entitled to interest to the day of payment."

In the case of Richmond Construction Co. v. Richmond Railroad Co., 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625, Mr. Justice Lurton, delivering the opinion of the court, quotes Mr. Justice Matthews as saying:

"Where it [interest] is reserved expressly in the contract, or is implied by the nature of the promise, it becomes part of the debt, and is recoverable as of right; but, when it is given as damages, it is often matter of discretion."

Continuing in his own language, the justice said:

"In Thomas v. Car Co. [149 U. S. 116, 13 Sup. Ct. 824, 37 L. Ed. 663], heretofore cited, there seems to have been no definite time agreed upon as to payment, and interest was disallowed because, as the court said, the delay in payment 'was occasioned by resisting demands made by the car company, which the result of the litigation shows were excessive, if not extortionate.' The contract company was in default, and interest is properly allowable from the time it failed to pay according to its promise, by way of compensation for the delay in payment. Neither is there anything in the fact that the railroad company is insolvent, nor in the fact that the allowance of interest will diminish the fund to which the bondholders may look for the payment of their bonds. The language relied upon in support of the decree disallowing interest, from the opinion in Thomas v. Car Co. that 'as a general rule, after property of an insolvent passes into the hands of a receiver, or of an assignee in insolvency, interest is not allowable on the claims against the funds,' was not a point upon which that case turned, and was doubtless intended to apply only to a case where the fund is insufficient to pay all, and the creditors are all of the same rank. * * * This is not a case of the distribution of an insufficient fund among lienors of the same rank. The lien claims of the subcontractors are by the statute preferred over the mortgage, and the bondholders are entitled only to that which remains after senior liens are satisfied. If interest is properly due, as between creditor and debtor, the interest is just as much a part of the principal claim as the principal thereof."

In the case of First National Bank v. Ewing, 103 Fed. 190, 43 C. C. A. 150, the court, after referring to the case of Thomas v. Car Co.,

which has been so often quoted in cases of this kind and which has not always been read in its proper meaning, said:

"The general rule announced by the Supreme Court is applicable to the cases where the fund is to be shared by creditors without liens, or by those having liens of equal and common rank, but where there are claims of several classes with liens of different priorities, the holders thereof are entitled to interest down to the date of the decree."

Mr. Justice Lamar, in the case supra, said:

"Manifestly, the law does not contemplate that either the debtor or the trustees can, by securing the appointment of a receiver, stop the running of interest on claims of the highest dignity."

In the case now under consideration the deed of trust not only secured the payment of the principal of the bonds, but it specifically provided that in case of receivership, the profits arising from the operation of the mine should be applicable to the interest due or to become due during the receivership, indicating clearly as language can the intention of the parties that the bonds should bear interest in case of a receivership. Under the terms of the contract, it was not only in the contemplation of the parties that the bonds should bear interest during the receivership, but such interest was made a lien, not only on the property included in the deed of trust, but upon proceeds from the operation of the property. This application was not made. The $282,000 of net profits which accrued from the operation of the mines was applied to preferred claims upon the real estate, but not to the preferred claims upon the profits arising from the real estate. That inured greatly to the benefit of nonlien creditors. As the property embraced in the deed of trust sold for a sum exceeding the principal and interest, the holders of the bonds and the coupons thereto attached are entitled to be paid in full, not only according to the terms of the contract, but, as we believe, under the general principles of equity. It would be highly inequitable to deprive lien creditors of interest for more than four years, while the mines were profitably operated for the benefit of the nonlien creditors.

The case most generally referred to is the case of Thomas v. Western Car Co., where the court said:

"As a general rule, after property of an insolvent passes into the hands of a receiver, * * * interest is not allowed on the claims against the funds."

The court then proceeded in that case to deny the car company interest upon its claim and said:

"We see no reason in departing from this [general] rule in a case like the present, where [the claim for car rentals] will be paid out of moneys that fall short of paying the mortgage debt."

We think a careful reading of all the authorities will show that where estates are insolvent and all the claims are of like dignity, the court declares the dividend upon the basis of the amount of principal due at the time the property passed into the hands of the court,

because it is immaterial whether the dividend is calculated upon the interest and principal combined, or the principal alone; but where there are claims of different classes, and one is secured by a mortgage of real estate, the holder of such mortgage is entitled, not only to the principal, but to the interest that accrues up to the time of satisfaction, even though nonlien creditors may not receive any dividend at all. This must be so if the court enforces contracts as parties made them. It is especially true when the court retains control of the property upon which there is a specific lien and operates that property for a long period of time at great profit for the benefit of nonlien creditors. The lower court did not err in allowing interest on the bonds during receivership. Its judgment should be affirmed.

Affirmed.

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## WING v. DILLINGHAM et al.

(Circuit Court of Appeals, Fifth Circuit. February 5, 1917.)

No. 2808.

1. CORPORATIONS ⟸312(5)—TRANSACTIONS WITH DIRECTORS—OPTIONS.
Where a director of a corporation acquired timber land from the corporation under an agreement giving the corporation an option to purchase within a time fixed, the director, notwithstanding the nature of the contract, is bound to pay value, and cannot take the land at an immense profit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1383, 1385, 1386, 1388, 1389; Dec. Dig. ⟸312(5).]

2. CORPORATIONS ⟸312(5)—DIRECTORS—KNOWLEDGE OF.
A director, who acquired land from his corporation, is charged with knowledge that the corporation had acquired such land from a second company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1383, 1385, 1386, 1388, 1389; Dec. Dig. ⟸312(5).]

3. CORPORATIONS ⟸312(5)—DIRECTORS—TRANSACTIONS.
Where a director purchased corporate property, the corporation may avoid the sale, at its option, unless the sale was fairly made, and the price was fair, and it was subsequently ratified by the stockholders, or the corporation delayed too long in seeking to avoid the sale.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1383, 1385, 1386, 1388, 1389; Dec. Dig. ⟸312(5).]

4. CORPORATIONS ⟸312(5)—TRANSACTIONS WITH DIRECTORS—PRICE.
Where the director of a corporation acquired from it timber land patented only a year before acquisition, the inadequacy of price cannot be justified on the ground that the director took the title subject to attack by adverse holders, for limitations do not run against the state, and no title by limitations could have been perfected within the time title was out of the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1383, 1385, 1386, 1388, 1389; Dec. Dig. ⟸312(5).]

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5. CORPORATIONS ⊂=312(5)—TRANSACTIONS WITH DIRECTORS—PRICE.
Where a corporate director acquired from his company timber land recently patented by the state to a third person, such director cannot justify the inadequacy of price on the ground that the right of the patentee to acquire the land was being brought into question, for that issue could not arise in collateral proceedings.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1383, 1385, 1386, 1388, 1389; Dec. Dig. ⊂=312(5).]

6. CORPORATIONS ⊂=312(7)—TRANSACTIONS WITH DIRECTORS—DELAY IN SETTING ASIDE.
Where the director of a corporation, which was in financial difficulties, acquired timber land belonging to it, advancing sums of money to discharge corporate debts, a delay of about 20 months in attacking the sale is not such a delay as will prevent the corporation from avoiding it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1391; Dec. Dig. ⊂=312(7).]

7. CORPORATIONS ⊂=312(5)—TRANSACTIONS WITH DIRECTORS—VACATION.
Where a director of a corporation acquired timber land belonging to it at a price allowing him approximately $250,000 profit, the transaction is voidable at the option of the corporation or its receiver; the rule being the same, though the director had paid value.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1383, 1385, 1386, 1388, 1389; Dec. Dig. ⊂=312(5).]

8. CORPORATIONS ⊂=312(7)—DIRECTORS—VACATION OF SALE.
Where a corporate director, at the request of the president, who was its general counsel, and his codirectors, six of whom were attorneys, acquired land belonging to the corporation, advancing sums to discharge its liabilities, such director is entitled, having been assured that the transaction was not objectionable, to an allowance of attorney's fees on the vacation of the sale at the suit of the receiver of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1391; Dec. Dig. ⊂=312(7).]

Appeal from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Suit by Charles Dillingham, as receiver for the Houston Oil Company of Texas, and others against Wilson D. Wing. From a decree for complainants, defendant appeals. Affirmed.

The following is the opinion below of Burns, District Judge:

This is a suit in equity by the Houston Oil Company, a Texas corporation, and its receiver, Charles Dillingham, to recover 12 sections of land from the defendant, Wilson D. Wing. The defendant was a director and stockholder in the corporation plaintiff. The corporation, at and prior to said time, was the owner of more than 850,000 acres of timbered lands situated in different counties in the eastern and southeastern parts of Texas. At a meeting of the directors of said company, held in the city of New York in November, 1903, the board of directors, consisting of nine members, six of whom were lawyers; the company being in great financial distress, urged their codirector, the defendant herein, to advance for its account the money necessary to pay the balance due Wallis, Landes & Co. upon a purchase of 12 sections of land and the timber thereon. There was at said time a balance of $5,672.45 due upon said timber contract; said note being due November 14, 1903, and being the

last of a series of five notes. On October 27, 1903, having theretofore purchased the timber, Wallis, Landes & Co. purchased from the state of Texas said 12 sections of land, paying $2 per acre therefor, receiving patents thereto in the month of November of the same year. January 14, 1901, Wallis, Landes & Company conveyed said lands and the pine timber growing thereon to the Beaumont Lumber Company. Under date of January 15, 1904, the Beaumont Lumber Company, at the instance of the Houston Oil Company, conveyed said lands and timber to defendant, Wilson D. Wing.

The defendant having agreed to advance the money necessary to pay off the debt due Wallis, Landes & Company, the Houston Oil Company, at a meeting of its directors in the city of New York, on the 26th day of January, 1904, adopted the following resolution; Wilson D. Wing not voting:

"Resolved, that the president of this company be and he is hereby authorized on behalf of this company to execute contract with Mr. Wilson D. Wing, in re Wallis, Landes & Co. lands, form of which contract is now before this board."

Acting under said resolution, the Houston Oil Company and Wilson D. Wing, the defendant herein, on January 27, 1904, executed the following contract:

"State of Texas, County of Harris.

"This agreement, entered into this day by and between Wilson D. Wing, of Bangor, Maine, party of the first part, and the Houston Oil Company of Texas, party of the second part, the said Houston Oil Company of Texas being a private corporation, duly incorporated under the laws of the state of Texas, and being authorized to make this agreement by resolution of its board of directors, duly passed, witnesseth:

"First. That Wilson D. Wing has purchased and now owns the following twelve tracts of land, each situated in Jasper county, Texas, and each patented to Wallis, Landes & Co. by the state of Texas, viz.: [Being the land described in the original bill in this suit.]

"Second. That said Wilson D. Wing hereby binds himself, his heirs, legal representatives, or assigns, to convey all of his right, title, and interest in and to the hereinbefore described lands to the Houston Oil Company of Texas, on or before six months from the date hereof, for the consideration of $6,749.12, and whatever sum said Wilson D. Wing may have to pay to his attorney or others for expenses connected with the sale of said lands to the said Beaumont Lumber Company by Wallis, Landes & Co. to the said Wilson D. Wing, and all taxes, and any counsel fees, traveling or other expenses which said Wing may deem it proper to incur in protecting the title to said property, or in caring for or protecting said lands or the timber thereon, and for the further consideration of the payment or assumption of payment by the Houston Oil Company of five certain promissory notes, each for the sum of $3,060.50, executed by the Beaumont Lumber Company to Wallis, Landes & Co., each bearing 10 per cent. per annum interest from October 27, 1903, payable semiannually, and each bearing date the ——— day of ———, 19—, payable to the order of Wallis, Landes & Co. in one, two, three, four, and five years after October 27, 1903, respectively, and for the further consideration of the payment by the said Houston Oil Company of Texas of 10 per cent. per annum interest on the said $6,749.12, and the expenses above referred to.

"Third. And the said Houston Oil Company of Texas, for the consideration above recited, agrees to purchase said lands from the said Wilson D. Wing on or before six months from this date, and to pay the cash consideration hereinbefore provided for, together with the interest as therein provided, and to pay or assume to pay the several notes to Wallis, Landes & Co. hereinbefore provided for.

"Fourth. If the Houston Oil Company of Texas, on or before six months from this date, shall pay the cash consideration hereinbefore provided for, including expenses as hereinbefore provided, and shall likewise pay or assume to pay the five certain promissory notes hereinbefore referred to, then the said Wilson D. Wing will execute and deliver to the said Houston Oil

Company of Texas a deed conveying to it all of his right, title, and interest in and to the said several tracts of land, with warranty clause against any one lawfully claiming or to claim any of said lands, by, through, or under said Wilson D. Wing, and no further.

"Fifth. It is specially understood and agreed that time is made the essence of this agreement, and that should the Houston Oil Company of Texas fail to pay the considerations, as hereinbefore provided, with interest thereon, as hereinbefore provided, within six months from this date, the five certain promissory notes, then the obligation of said Wilson D. Wing to sell said lands to the Houston Oil Company of Texas, and the obligation of said Houston Oil Company of Texas to purchase said lands from said Wilson D. Wing, shall each and both finally terminate, so that neither the said Wilson D. Wing, his heirs, representatives, or assigns, nor the Houston Oil Company of Texas, shall be any further liable in any manner whatsoever under this agreement, or have any damages for failure to comply with same.

"Sixth. It is specially understood that the Houston Oil Company of Texas shall, ten days before it calls for any conveyance hereunder, give to the said Wilson D. Wing notice in writing, by registered mail addressed to him at Bangor, Maine, that it is ready to close said purchase, and the close of the matter shall be made at the Merrill Trust Company, Bangor, Maine, all payments then to be made by the said Houston Oil Company of Texas, to be made either in cash or by certified check of a New York bank or trust company.

"Seventh. It is specially understood and agreed that this agreement is entered into in the state of Texas, and that it is to be governed by the laws of said state."

On the following day the Maryland Trust Company filed its bill of complaint against the Houston Oil Company and the Kirby Lumber Company with the clerk of this court at Houston, and receivers of said company were appointed on February 1st thereafter. The Oil Company and its receiver not being able to repay the said Wing the money so advanced within the time named in said contract, and the said defendant not consenting to extend the time for such payment, this suit, in the nature of a supplemental and ancillary bill, was filed March 20, 1906, a little less than 20 months from the expiration of said contract. The plaintiff tenders all sums of money expended by defendant with 10 per cent. interest upon each item of expenditure from the date thereof, and prays that defendant be adjudged to hold the title to said lands and timber growing thereon in trust for said Houston Oil Company. The defendant stands upon his contract and prays that he go hence with his costs.

It appears from the "Agreement as to Facts" and testimony upon the trial that the defendant arranged and subsequently paid the balance of the purchase money due upon the timber contract, said sum so due and paid, with interest, being $6,734.12, and assumed to pay the five notes, aggregating $15,000, due Wallis, Landes & Co. upon the sale of the land. It should be stated that the purchase price for the timber was $20,785, with interest at 10 per cent. from November 14, 1898, evidenced by five notes executed by the Beaumont Lumber Company in favor of Wallis, Landes & Co. due in one, two, three, four, and five years, respectively, from date; four of said notes being in the sum of $3,778.20 each, and the last note in the sum of $5,672.45, which last note was paid by defendant, Wing. The first and second notes were paid by the Beaumont Lumber Company; the third and fourth notes were paid by, or at the request and for the benefit of, the Houston Oil Company. It is stipulated between the parties that: "For the purpose of this case, it is agreed, if no other evidence is offered at the trial, that the amount of standing timber on the land in question at the date of Wing's purchase was 46,000,000 feet; but it is further agreed that at said time, and until after July, 1904, he had only a general knowledge as to the quantity of timber on said land."

Upon the trial further evidence was offered by the complainant, showing that each and every survey had been cruised and the timber thereon esti-

mated by experts, said work being completed in January, 1909, with the following result:

| | Survey. | Number of Feet. |
|---|---|---|
| 1. | 246 | 5,937,920 |
| 2. | 152 | 7,025,200 |
| 3. | 146 | 7,556,195 |
| 4. | 144 | 5,120,000 |
| 5. | 142 | 4,480,000 |
| 6. | 140 | 6,400,000 |
| 7. | 136 | 4,811,000 |
| 8. | 114 | 5,163,760 |
| 9. | 110 | 6,660,000 |
| 10. | 108 | 10,560,000 |
| 11. | 106 | 5,952,000 |
| 12. | 112 | 5,457,500 |
| | Total | 75,123,575 |

The evidence fixes the market value of the timber at $5 per thousand feet (testimony of John H. Kirby), and under the stumpage contract between the Houston Oil Company and the Kirby Lumber Company the latter was to pay said sum for each thousand feet so cut, which contract was well known to defendant.

[1] It would be well to examine the profit to the defendant as the result of this transaction. January, 1904, the defendant paid the sum of $6,734.12, being balance due for said timber, and assumed to pay five notes of $3,000 each, due in one, two, three, four, and five years, with interest at 10 per cent. from October 27, 1903; said notes with interest have been discharged by the defendant. The land thus acquired, without the timber, may be presumed to equal or exceed in value all that was paid therefor. The standing timber, under the evidence, is in excess of 75,000,000 feet, and at $5 per thousand reaches the sum of $375,000, showing a profit to the defendant by reason of the timber alone of more than one-third of $1,000,000. This of itself is all that equity will require to avoid the contract between the parties, and there are reputable authorities to the point that such a contract is absolutely void. This state of facts, perhaps, has never been witnessed before. Even if the transaction should be deemed an option to buy, the director would be required to pay the value of said option.

Under all the evidence, it clearly appears that the Beaumont Lumber Company held the land and timber in trust for the Houston Oil Company, and prior to the contract between the plaintiff and defendant conveyed by deed all lands and assets of every description to John H. Kirby, said deed being dated January 3, 1904, and said John H. Kirby held under said conveyance in trust for the Oil Company.

[2, 3] As a director, the defendant by law is charged with the knowledge that in 1901 the plaintiff acquired the holdings of the Beaumont Lumber Company. It was a matter generally known and had been given wide publication. The defendant became a holder of stock in the Oil Company in July, 1901, and conveyed large timber holdings to said company in exchange for the stock of said company. The option, running for six months, from Wing to plaintiff, may be eliminated. For illustration: Say that no option to buy was granted, would this change the status. If the Oil Company held the legal title to the land in question, and made fee simple conveyance to the defendant, would this aid or change the transaction? Surely not. It has never been held that a director can buy anything of value from the corporation he serves, unless the purchase is fairly made and to the advantage of the company. In all cases it is the uniform holding that the sale must be fairly and openly made and for a fair consideration, and then the sale is voidable at the election of the company. Wherever there has been a sale by the corporation to the director, in a suit to annul and avoid the same, if the plaintiff failed to recover, it was upon the grounds: First, the sale was fairly made;

second, the thing sold brought its value; third, the sale was subsequently ratified by the stockholders; or, fourth, the party at interest delayed too long.

[4] Defendant insists that he assumed the hazard of adverse litigation, in that he found squatters in possession of some of the land. This contention is not entitled to serious consideration. The title remained in the state until November, 1903, when patents issued. It requires a squatter to squat and so continue for ten years before he acquires title. His claim of title by limitation could only commence in this case after issuance of patent; limitation does not run against the state.

[5] Another suggestion of hazard and risk assumed by defendant, as he alleges, is that parties were bringing into question the right of Wallis, Landes & Co. to acquire the lands by purchase from the state. This issue could not arise in collateral proceedings. The state alone could complain, in a proper proceeding had for that purpose. Upon the authority of Twin Lick Mining Company v. Marbury, 91 U. S. 587, 23 L. Ed. 328, and upon all Texas authorities bearing upon the principle involved in this case, the plaintiff is clearly entitled to the relief for which he prays.

[6] In the case cited the purchase was made from the trustee at public sale after timely notice, and not from the corporation, and the decision concludes with this statement: "We think, both on authority and principle—a principle necessary to protect those who invest their capital and their labor in enterprises useful, but hazardous—that we should hold that plaintiff has delayed too long." The doctrine is well settled that the option to avoid such a sale must be exercised within a reasonable time. In the case referred to the bill was filed four years after sale by the trustee, and for this reason it is held that plaintiff waited too long.

[7] One of the most frequent frauds perpetrated upon a corporation and its stockholders is where one or more of the directors purchase property from the corporation, directly or indirectly, or participate in the profits of such a purchase. The law is well settled that a director's purchase of property from the corporation is voidable at the option of the corporation, even though the director paid fully as much as the property is worth. Cook on Corporations, § 653.

[8] The defendant is entitled to have returned to him all sums of money by him properly expended, with interest at 10 per cent. from date thereof. This the plaintiff tenders, and, upon said items of expenditure being ascertained and paid into the registry of the court, the plaintiff may have a decree for the land and timber involved. By reason of the facts in this case, the defendant having relied upon the statement of the president of the company, who was also its general counsel, familiar with Texas law, and recognized as a lawyer of experience and ability, should he, in equity, be compensated for the additional expense which he has incurred in preparing and defending this cause? If the court adopts this view, the solicitors of record agree that the court may fix the fee due and earned by his counsel, though plaintiff does not admit any liability upon this item.

It seems to me that conscience and good morals both require, under the peculiar facts of this case that the defendant should be made whole. Equity demands that the plaintiff do full justice in the premises. The defendant, by reason of yielding to the urgent importunities of the president and his co-directors, six of whom were lawyers, should not be required to sustain loss. The law does not permit him to profit. Equity would decree, by reason of his reliance upon the statements of so many lawyers of good repute, and moved to action thereby, that the defendant should not suffer a substantial injury. A fee of $10,000 to his counsel will be allowed, and the decree will so provide.

Henry C. Coke, of Dallas, Tex., for appellant.

H. O. Head, of Sherman, Tex., and T. M. Kennerly, of Houston, Tex., for appellees.

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

PER CURIAM. The judge who heard this case gave elaborate reasons for the decree rendered, and from our examination of the entire record, in the light of exhaustive briefs and oral argument, we find that the equities are with the appellees, and we concur in the reasoning and conclusions reached.

The decree appealed from is affirmed.

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ARZUAGA et al. v. GONZALEZ et al.

(Circuit Court of Appeals, First Circuit. January 12, 1917.)

No. 1239.

PRINCIPAL AND AGENT ⟸171(9)—AFFIRMANCE OF CONTRACT—EFFECT.

For one, knowing all the facts, to sue her agent for the money received by him on a sale he had made on her behalf, is an affirmance of the sale, whereby she waives right to maintain action to avoid it on the ground of his lack of authority or fraud.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 655; Dec. Dig. ⟸171(9).]

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

Suit by Isabel Gonzalez y Gonzalez and another against Francisco Arzuaga e Izaguirre and others. From an adverse decree, defendants appeal. Reversed and remanded, with directions.

Francis H. Dexter, of San Juan, Porto Rico (Jacobs & Jacobs, of Boston, Mass., on the brief), for appellants.

Jos. Anderson, of San Juan, Porto Rico (J. Weston Allen and Henry W. Packer, both of Boston, Mass., on the brief), for appellees.

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

BINGHAM, Circuit Judge. This is a bill in equity brought by Isabel Gonzalez, a citizen of Porto Rico, against the defendants, José Ignacio Arzuaga and Francisco Arzuaga, subjects of his majesty the king of Spain, and against the heirs composing the succession of Juan Bautista, seeking the cancellation of a deed dated January 12, 1907, alleged to have been given by the plaintiff's agent, without authority and through fraud of her rights, to the said José Ignacio Arzuaga and Francisco Arzuaga; the half interest of José Ignacio Arzuaga having been conveyed by him August 10, 1908, to Juan Bautista, who has since died. In the District Court a decree was entered in favor of the plaintiff, and the defendants appealed, assigning various errors.

It appears: That the plaintiff, in 1898, and before her marriage, acquired a certain farm in the district of Loiza, Porto Rico, known by the name of "Lot Sixteen." That on the 27th day of November, 1905,

the plaintiff, her husband, Juan de la Mata Silva, being absent, and his whereabouts unknown, and having left at the time of his departure a commercial establishment known as "El Sol," executed a power of attorney constituting her uncle, Rodolfo Gonzalez, her agent. That the power of attorney recites that:

"She has decided to give and confer to her uncle * * * the most absolute and effective power of attorney, not only for the purpose that he represents her in all the matters concerning her private property, but also in everything in connection with the share that her husband has in the mercantile establishment aforesaid, giving him further the following special powers: To make loans of sums in cash, whether with interest or not, stipulating the agreements that he might deem proper in regard to the payment thereof. To incumber the property of his principal with mortgages as security for the loans that he may contract, with all the requisites and formalities that might be necessary according to law, and which might be required. To cancel and redeem mortgages which exist on the property belonging to her. To sell the real or personal property or live stock owned, or that may hereafter be owned, by the maker of this document, for which her attorney shall endeavor to get the best price, and for the sale of a rural estate or property which she owns in the district of Loiza, known as 'Lot Sixteen,' before effecting which sale he shall receive her written consent."

That on the 3d day of January, 1906, said Rodolfo Gonzalez, acting in pursuance of said power of attorney, procured a loan for the benefit of the plaintiff in the sum of $4,000 from said José Ignacio Arzuaga and Francisco Arzuaga, one-half of said amount being payable to each of them on the 3d day of January, 1910, and secured the loan by a mortgage in their favor on the farm in Loiza, known as "Lot Sixteen." That on January 12, 1907, while the mortgage was still in existence, Rodolfo Gonzalez, purporting to act in pursuance of said power of attorney, executed a deed of the farm known as "Lot Sixteen" to José Ignacio Arzuaga and Francisco Arzuaga for the sum of $5,500, the same to be paid by a cancellation of the mortgage of $4,000 existing in favor of the purchasers and a cash payment of $1,500. That in the authentication of the deed, making it a public instrument, the notary stated that:

"The attorney in fact of the vendor states that he has secured the consent in writing of his principal to effect this sale, as shown in the power of attorney under which he acts; that the other incumbrances on the property have been canceled, and that there is no necessity for the attendance of the absent husband, as the property referred to herein was acquired by the vendor before her marriage."

That in procuring the sale and consummating the trade for the farm the defendants, José Ignacio and Francisco Arzuaga, were represented by their agent, Juan José Arzuaga, who, at the time of the trial of the cause, was dead. That upon procuring the deed, Juan José Arzuaga, in behalf of his principals, caused the mortgage held by them to be canceled and the sum of $1,500 to be paid to the plaintiff's agent, Rodolfo Gonzalez. That upon offering the deed for registration in the public records the registrar declined to enter the same upon the records without the presentation of the written consent of the plaintiff called for in her power of attorney; and that, on the 9th day of May, 1907, a letter purporting to be the consent of the plaintiff and reading as follows:

"San Juan, January 2, 1907.

"Dear Godfather: I am agreeable to the sale which you propose to me of the rural property in Loiza, known as lot number 16, by virtue of which I authorize you to sell. I remain your affectionate godchild,

"Isabel G. de la Mata.

"Don Rodolfo Gonzalez."

—was duly authenticated as a public instrument before the same notary before whom the deed was authenticated, and as a supplement to the deed.

It also appears that, on the 14th day of August, 1905, the plaintiff, represented by her husband, Juan de la Mata Silva, leased the farm known as "Lot Sixteen" to a mercantile firm, doing business under the name of Sobrinos de Ezquiaga, for six years, from the 2d day of June, 1907 (when an old lease under which they were then occupying the property would expire), with an option on the part of the lessees to renew the same for six additional years by giving six months' notice, at a rental of $400 per year, payable monthly at the rate of $33.33⅓ per month, that in the mortgage given by the plaintiff to the defendants, it was provided that the interest on the loan, amounting to $30 a month, should be payable out of the rent, and that the same should be paid monthly by the mercantile firm of Sobrinos de Ezquiaga to the mortgagees.

The plaintiff's contention was, and her evidence tended to prove, that she was practically blind, and was not aware of the sale of the farm by her agent until the latter part of May or early in June, 1907; that if she signed the written consent of January 2, 1907, she did not do so knowingly, but on the representation of her agent, Rodolfo Gonzalez, that it was a letter addressed to the lessees of the farm requesting them to increase the rent (which she understood they had agreed to do) to $70 a month; that her discovery in May or June, 1907, that the farm had been sold came about by her going to the mercantile firm of Sobrinos, to learn from them further in regard to the matter of increasing the rent; that shortly after learning of the sale, and in the month of June, 1907, she revoked the authority of her agent, Rodolfo Gonzalez, and shortly thereafter received a renunciation of his power of attorney; that accompanying the renunciation were two notes, each payable to the plaintiff, one for $1,200, signed by José Cazuela Geigel, and the other for $434, signed by José E. Lucero; and that her agent, Rodolfo Gonzalez, stated that these notes represented the $1,500 cash balance of the sale which he had loaned for her to the parties named in the notes. She also claimed and introduced evidence tending to show that the farm was worth from $10,000 to $14,000, and that Juan José Arzuaga, agent for the purchasers, knew that it was worth more than the price agreed upon in the deed.

The defendants claimed, and their evidence tended to prove, that at the time the sale was made the plaintiff was in straitened circumstances and in need of money; that the written consent of January 2, 1907, was signed in the plaintiff's handwriting; that the price agreed upon was not inadequate; that the parties to the mortgage had set the value of the property at $6,000, at which it should be taken in case of foreclosure; and that in no event, as the farm was incumbered with a lease

for six years from June 2, 1907, with a right of renewal for six years more at the option of the lessees, was it worth more than $6,500 or $6,600, and such being the case, the price fixed in the sale could not be regarded as grossly inadequate and indicative of fraud on the part of the defendants or any of them.

The defendants also took the position that the plaintiff's signature to the written consent of January 2, 1907, was not procured through the fraud and deceit of her agent, Rodolfo Gonzalez, and offered evidence tending to show that she recognized the validity of his acts in making the sale, and claimed the benefit of them, and that, if her signature was procured through the fraud and misrepresentation of her agent, she afterward ratified and adopted his acts in making the sale by claiming its benefits, and waived her right, if any, to maintain this suit for the cancellation of the deed.

It appears that, after revoking the power of attorney given to Rodolfo Gonzalez, the plaintiff authorized her husband, Juan de la Mata Silva, to take such action in her behalf as might be deemed necessary to protect her rights, in view of the action of Rodolfo Gonzalez in making the sale of the farm, and that, in pursuance of such authority, he consulted an attorney at law with this object in view; that, prior to doing this, to wit, on the 21st day of June, 1907, he procured from the notary a copy of the public instrument in which the deed of January 12, 1907, had been authenticated, by which he became fully aware of the terms of the sale and the authority under which Rodolfo Gonzalez had acted in making the same; that thereafter, on the 19th day of April, 1909, the plaintiff, acting through her husband and agent, and in pursuance of legal advice, caused a suit to be brought in her name against Rodolfo Gonzalez, in the district court of San Juan, to recover the sum of $1,500, in which she set forth the power of attorney given by her on the 27th day of November, 1905, to Gonzalez, and stated that on the 12th day of January, 1907, said Gonzalez, as her attorney in fact, sold to José Ignacio and Francisco Arzuaga the farm which she owned, in the district of Loiza, for the amount of the mortgage, $4,000, and a cash payment of $1,500; that with the intention of defrauding the plaintiff the said Gonzalez "simulated that he had loaned the said one thousand five hundred (1,500) dollars, cash balance of the sale," and had taken therefor the two notes in her favor, hereinabove referred to, for $1,200 and $434; that he was not authorized to make loans, and much less to effect transactions such as above set forth; and that, by reason of the acts aforesaid, plaintiff had "not received the cash balance of the sale, amounting to the sum of $1,500, and prayed judgment for the same.

It further appears that, during the pendency of the suit against him, Rodolfo Gonzalez, on the 17th day of August, 1909, filed a voluntary petition in bankruptcy in the District Court of the United States in the District of Porto Rico, and was adjudged a bankrupt, and that, on the 20th day of October, 1909, the plaintiff, through her attorney at law, appeared at the first meeting of creditors and proved, and had allowed, a claim against the bankrupt for the sum of $1,600.

It also appears that after Rodolfo Gonzalez had gone into bankruptcy, the plaintiff's husband on the 30th day of March, 1910, swore

out a complaint charging that Rodolfo Gonzalez, on or about the 15th day of May, 1907, embezzled and converted to his own use the money which he had received from the sale of the farm in his capacity as agent for the plaintiff.

In view of the evidence presented it seems to us that the defendants, José Ignacio and Francisco Arzuaga, were not guilty of fraud in purchasing the property, and that, if any fraud was perpetrated upon the plaintiff, it was brought about by her agent, Rodolfo Gonzalez, in procuring her signature to the document of January 2, 1907. There is certainly no evidence in the case that would justify us in finding that the farm, subject to the incumbrance of a lease of from six to twelve years, was sold at a grossly inadequate price; and the values testified to by plaintiff's witnesses were, without doubt, based upon an unincumbered title. This appears to be the view taken by the court below, for in the opinion where this question is considered that court does not find that the defendants were guilty of fraud, but that the circumstances were such that they were put upon inquiry as to the authority exercised by plaintiff's agent.

If it be assumed that the plaintiff's signature to the written consent of January 2, 1907, was procured by her agent, Rodolfo Gonzalez, through fraudulent representations, the question is whether, under all the circumstances above set forth, the plaintiff ratified and adopted his acts in effecting the sale, and, by bringing suit against him for the $1,500, waived her right to maintain this action for a cancellation of the deed.

The doctrine of election and waiver is applicable where an aggrieved party has two remedies by which he may enforce inconsistent rights growing out of the same transaction; and, being cognizant of his legal rights and of such facts as will enable him to make an intelligent choice, brings his action by one of the methods. Under such circumstances the law says he shall not thereafter adopt the alternate remedy, and that the defendant against whom the action is brought is estopped to show the true nature of the act or acts complained of to defeat the suit. Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52; Noyes v. Edgerly, 71 N. H. 500, 504, 53 Atl. 311, and cases there cited. An election presupposes the existence of at least two remedies from which a choice may be made for the enforcement of inconsistent rights. It is not enough that the party supposes he has them; he must have them in fact.

Before the plaintiff brought the action against her agent, Rodolfo Gonzalez, for the $1,500 received by him in the sale of the land, she could have elected either one of the following remedies for the enforcement of her rights: She could have decided to bring an action of assumpsit against her agent for the $1,500, thereby affirming the sale, or to bring the present proceeding against the defendants for a cancellation of the deed based upon her agent's fraud or want of authority in making the sale. But by adopting either course, and being aware of all the facts necessary to a free choice, she would be bound by her election and would waive her right to pursue the other.

It is apparent from the evidence that the plaintiff, at the time she brought the suit against her agent, was aware of all the facts essential

to a choice of the remedies that were open to her. That suit was brought in 1909, some two years after she knew that the sale had been made, and at which time she was aware of the terms of the sale and the conditions under which it took place; for her husband, who was then acting as her agent, had long before procured a copy of the public instrument in which the terms of the sale were set forth. In fact, the terms of the sale in substance were embodied in the complaint stating her cause of action in the suit brought against the agent. She also, at that time, knew whether her written consent to the sale had been procured or not. If it had not been procured, or had been obtained fraudulently, she had no right to the purchase money, unless she affirmed the sale. By bringing the suit for the purchase price, knowing all these facts, she must be held to have affirmed the sale and waived her right to maintain the present proceeding based upon a disaffirmance of the sale.

The decree of the District Court is reversed, the case is remanded to that court, with instructions to enter a decree for the defendants below, and the appellants recover their costs in this court.

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## GATEWOOD v. NEW RIVER CONSOL. COAL & COKE CO.

(Circuit Court of Appeals, Fourth Circuit. December 12, 1916.)

No. 1434.

1. TRIAL ⟸11(3)—FEDERAL COURTS—TRANSFER OF CAUSE FROM EQUITY TO LAW SIDE.

Where a bill states a cause of action cognizable in equity, the denial of a motion made under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv) to transfer the cause to the law side of the court is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 30; Dec. Dig. ⟸11(3).]

2. PRINCIPAL AND AGENT ⟸81(4)—CONTRACT OF AGENCY—CONSTRUCTION.

Defendant, which was sales agent for a number of coal mining companies, but produced no coal itself, entered into a contract by which it employed complainant's predecessor, whom he succeeded, on a commission basis, as its "sole agent in the matter of the sale of its product" in certain territory. *Held*, that the contract could not be construed to embrace sales of coal by the mining companies themselves on which defendant received no compensation; the situation and course of business having been known to both parties.

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

3. PRINCIPAL AND AGENT ⟸89(7)—BREACH OF CONTRACT—SUIT FOR ACCOUNTING—EVIDENCE.

In a suit for an accounting for commissions on sales by the mining companies within complainant's territory, the relation between defendant and such companies was pertinent to the issues, and complainant was entitled to production of the contracts between them.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 236; Dec. Dig. ⟸89(7).]

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4. PRINCIPAL AND AGENT ⟸81(4)—COMPENSATION OF AGENT—COMMISSIONS ON SALES BY PRINCIPAL.

Under a contract giving an exclusive agency for sale of a product on commission within a certain territory, the agent is entitled to commissions on sales within such territory by his principal or another agent.

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

Johnson, District Judge, dissenting in part.

Cross-Appeals from the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Suit in equity by John M. Gatewood against the New River Consolidated Coal & Coke Company. From the decree, both parties appeal. Affirmed in part, and reversed in part.

Hunsdon Cary, of Richmond, Va., for appellant and cross-appellee.

Robert S. Spilman, of Charleston, W. Va., and Robert E. Scott, of Richmond, Va., for appellee and cross-appellant.

Before KNAPP and WOODS, Circuit Judges, and JOHNSON, District Judge.

KNAPP, Circuit Judge. The New River Consolidated Coal & Coke Company, defendant below, is the sales agent of a group of coal mines, some 12 or 14 in number, in the New River district of West Virginia. It does not itself engage in the business of mining or producing coal. In June, 1910, this company made a written contract with one Saunders whereby he became, on a commission basis, "its sole agent in the matter of the sale of its product at and east of Clifton forge inland and southern coastwise (all government coal not to be included in this agreement)." He had been employed on a salary the year before as "manager of sales." On December 1, 1910, Saunders formed a partnership with Gatewood, the plaintiff, to whom he assigned a half interest in this contract, and the firm of Saunders & Gatewood continued the business with the assent of the company. Effective April 1, 1911, there was a supplemental agreement which extended the contract, on an agreed commission, to include "the United States government business, that prior to April 1, 1911, has been handled on our individual account." In July, 1912, Gatewood bought out Saunders, and thereafter conducted the agency for his own benefit until the company terminated the arrangement, as it had the right to do, on March 31, 1913. In November following this suit was brought to recover commissions alleged to be due under the terms of the contract on certain sales of coal as follows:

(a) Coal sold to the Chesapeake & Ohio Railway Company between April 1, 1911, and April 1, 1912, to the aggregate of about 100,000 tons.

(b) Coal sold in 1911, through officers of the government, to the Panama Railroad Company.

(c) Coal sold by Blake & Co. to various customers in the territory covered by the contract and while the same remained in force.

(d) Coal delivered to the United States collier Sterling after the termination of the contract.

The trial court decided against plaintiff on the first two of these claims, but upheld his right to recover on the other two claims. Both parties appealed.

[1] We first consider briefly a preliminary question. It is apparent that plaintiff's grievance is an alleged breach of contract, for which his ordinary remedy would be an action at law. But, instead of instituting such a suit, he filed a bill in equity, alleging that he did not know the amount of coal which had been sold in the territory covered by the contract, and on which commissions had not been paid, nor the prices obtained therefor, and that the defendant "has in its possession full information concerning the sale and selling price of all coal shipped by it, or by any and all of the individual mines hereinbefore set out, none of which knowledge is in the possession of your orator." He therefore prayed for a discovery of the facts in this regard, including inspection of defendant's books and records, and for an accounting. We are of opinion, without arguing the point, that the allegations of this bill present a case for equitable cognizance, and are therefore sufficient to give jurisdiction to a court of equity.

After the defendant's answer was filed, plaintiff made a motion for the production of the contracts between defendant and the companies for which it acted as sales agent, to allow an examination of defendant's books of account, and to require answers to certain interrogatories which were attached to the notice of motion. The trial court denied this motion, for the stated reason that defendant's answer was sufficient, "save as to the sales alleged to have been made through the Blake agency, as to which the court is of the opinion that the claimant is entitled to a fuller answer." In the same order the court also denied defendant's motion to dismiss the bill of complaint on the ground that the facts therein stated did not entitle the plaintiff to the relief demanded. The defendant, however, refrained from asking that the cause be transferred to the law side of the court, but consented that it be retained and proceeded in as a suit in equity.

Following this decision, the defendant filed an amended answer, with an "exhibit statement" appended, which showed in detail all the sales made by Blake & Co. in the described territory. The plaintiff then made a further motion to transfer the cause to the law side of the court, under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), and the denial of this motion is assigned as error. It seems enough to say that if, as we hold, and as plaintiff surely cannot deny, the allegations of the bill are sufficient to give jurisdiction to a court of equity, that jurisdiction was not lost by the circumstance that plaintiff's motion was disallowed, except as above recited. The bill makes a case for equitable relief, and therefore it does not appear that the suit "should have been brought as an action on the law side of the court." In other words, the rule in question is without application to this case, and it follows that the court did not err in denying the motion to transfer.

[2] Upon the merits of the controversy one or two general observations may be made before taking up the several claims in suit. In the first place, the proofs indicate that neither the plaintiff himself, nor the firm of Saunders & Gatewood, had anything to do with the sales of coal on which commissions are now demanded. It appears to be the fact that those sales were made without regard to the Richmond agency, and without the aid of those who conducted that agency. In short, the plaintiff predicates his right to recover, not upon any substantial service performed, or attempted to be performed, for the defendant, but solely upon the language of the written contract, as he insists that language must be construed. And this leads, in the second place, to plaintiff's basic contention, which is that the term "product," as used in the contract, means the product of the mines of which defendant was sales agent; that defendant, by making Saunders "its sole agent in the matter of the sale of its product," asserted or represented that it had the right and authority to sell the entire output of those mines; and therefore that Saunders and his successors were entitled to commissions on all coal produced by the mines which was sold in the territory covered by the contract.

We are unable to sustain this contention. Having reference especially to the coal furnished to the Chesapeake & Ohio Railroad, it seems clear to us that such a construction of the contract would not be warranted. Saunders had been with the defendant company for four years altogether, the last year as "manager of sales." He was perfectly aware that defendant owned none of the mines or the coal they produced, that it was merely an agent for the sale of such coal as might be intrusted to it for that purpose, and it is certainly difficult to believe that he expected to get commissions on coal which neither he nor the defendant sold, and on which the defendant itself received no commission or other compensation. This being so, we think it cannot reasonably be held that the word "product," an inapt and doubtful word as applied to the subject-matter of an agency, was intended or understood to mean the entire output of the mines represented by defendant. On the contrary, looking at the contract as a whole, the word in question would appear to mean the coal which was turned over, so to speak, to the defendant for sale, or in respect of which the defendant in some manner represented the producing companies. And this view is confirmed by the situation of the parties, their previous relations, the knowledge thus acquired by Saunders of the nature of defendant's connection and course of dealing with the mining companies, and all the circumstances surrounding the making of the contract. Evidence of the facts here referred to was properly received. Such evidence did not tend to contradict or vary the terms of the written instrument, nor was it offered for that purpose, but it did serve to explain and make more certain the true meaning and intent of an ambiguous agreement.

[3] On the present record, therefore, we are of opinion that the court below rightly refused to award commissions on the Chesapeake & Ohio coal. But the fact that defendant did not sell that coal, or receive any compensation on account of its sale, is not conclusive upon

the question of plaintiff's right to recover. The prima facie case against him, as the matter now stands, might be overcome, and defendant's liability established, or at least the burden of proof shifted, if the contracts between defendant and the several mining companies it served were put in evidence. We think it clear that plaintiff is entitled to the production of those contracts, for such support of his contention as they may afford, and it follows that the denial of his motion in that regard was an error which calls for a partial reversal of the decree. As to this item of plaintiff's claim the case must be remanded, with instructions to require the contracts to be produced, to allow both parties to present such further proofs as the introduction of the contracts may make competent and proper, and then, upon all the evidence, to determine anew the right of plaintiff to commissions on the Chesapeake & Ohio coal.

As to coal for the Panama Railroad Company, the facts relating to this claim appear to be these: In March, 1911, a purchasing officer of the government asked for bids on 550,000 tons of semi-bituminous coal for the Panama Railroad. The defendant declined to submit a bid for this coal, or to allow Saunders & Gatewood to do so, and the contract was awarded to the Pocahontas Fuel Company. It seems, however, that four of the mines represented by defendant furnished a portion of the tonnage, amounting to about 28,000 tons, and on this tonnage the plaintiff claims commissions. We are of opinion that the claim is not well founded. The original contract with Saunders excepted broadly "all government coal"; that is, all coal sold to the United States government. The supplemental agreement took out from this exception and included in the contract "the United States government business that prior to April 1, 1911, has been handled on our individual account." Saunders himself testified that the only prior business with the government were sales to the Navy Department, through the Bureau of Supplies, for bunker use in government vessels. Saunders first, and his firm afterwards, took charge of these sales, at least to some extent, and made a number of trips to Washington, for which they received only their expenses. This was the kind of government business, and no other, on which they were afterwards to get the commission stated in the supplemental contract. Subsequent to the date therein named more or less of this business was secured, and defendant paid commissions on the same according to agreement. But the coal furnished to the Panama Railroad Company was business of a distinctly different character. That coal was not sold to the Navy Department for bunker or other use in government vessels, nor was the sale effected through the Bureau of Supplies. We are clearly of opinion that this transaction, in which the four mines participated to a very limited extent, was not one to which the supplemental agreement applied. In other words, that agreement did not take the coal in question out of the exception of "all government coal" in the original contract. And this leaves out of account the defendant's further contentions that sales to the Panama Railroad Company, a corporation, were not in any sense "government business," and that coal shipped to the Canal Zone is not embraced within the contract description of "south-

ern coastwise." Assuming, without deciding, that neither of these contentions is sustainable, we nevertheless hold that this claim of plaintiff must be rejected because the sale on which it is based is not covered by the supplemental agreement.

[4] The sales through Blake & Co. stand on a different footing. Those sales were concededly made in the territory covered by the contract, and the coal sold by this agency was coal intrusted to defendant by the mines it represented for sale in the open market. The contract with Saunders made him "sole agent" in a defined territory. In that territory he was in effect given a monopoly of the business, and this entitled him to the agreed commissions on all coal sold therein which the defendant had in its hands for sale. The contract rights of Saunders excluded sales by defendant itself or by any other agent, and it was a breach of the agreement to allow any one else to sell in the territory belonging exclusively to him. The law relating to contracts of exclusive agency, and the measure of damages for breach of such contracts, is well settled, and we deem it sufficient to say that we find nothing in the circumstances of this case to form an exception to the general rule. Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 N. E. 695; Wier v. Am. Locomotive Co., 215 Mass. 303, 102 N. E. 481; Marshall v. Canadian Cordage & Mfg. Co., 160 Ill. App. 114; Illsley v. Peerless Motor Car Co., 177 Ill. App. 459; Sparks v. Motor Car Co., 85 Kan. 29, 116 Pac. 363, Ann. Cas. 1912C, 1251.

The claim for commissions on coal furnished to the collier Sterling is not open to serious question. The transaction was clearly within the scope of the supplemental agreement, for the coal was sold to the Navy Department for bunker use in a government vessel, and the circumstance that it was not delivered until after the termination of the contract cannot affect the plaintiff's right to recover.

As to the last three claims in suit the decree is affirmed. As to the first claim the decree is reversed, and the case remanded for further proceedings in accordance with the views above expressed.

JOHNSON, District Judge (dissenting in part). I concur in so much of the decree as remands the cause for further proceedings. I think that when plaintiff shows the sale of coal in the territory in which he had the exclusive agency, his right to commissions thereon follows, and the burden is on the defendant to show that commissions are not due him. Defendant must not only show that it did not make the sale, or that it did not receive commissions thereon, but that under its contract with the mining corporations it did not have the right to make the sale or to demand commissions. The mere waiver by the defendant of its rights to commissions, if it had such rights, could not deprive plaintiff of his rights. The evidence shows that the coal for the Chesapeake & Ohio Railroad was sold through the Richmond office when Saunders had charge of that office and was working for the defendant on a fixed salary. When he was changed to a commission basis, he had a right to expect commissions on the same line of sales that he had had charge of when on a salary.

We now come to the Panama Railroad coal. The District Court and this court assume that the coal sold to the Panama Railroad is a

sale to the government. The Panama Railroad is a corporation, as distinct as the Pennsylvania Railroad or any other railroad corporation. It is true that Army and Navy officers hold the principal offices. That is because the government owns the stock and controls the election of directors and officers, but any contract with the Panama Railroad is a contract with a corporation and not with the government. It is operated as a corporation by its officers and agents. The plaintiff is entitled to his commissions on the sale of this coal unless the defendant can show, not only that it did not receive any commissions, but that it had no right to receive commissions on such sale. The plaintiff having made out his prima facie case, it is no hardship on the defendant, who is in possession of all the contracts with the mining companies, vouchers, checks, books, etc., to produce them and show that neither it nor its agent is entitled to commissions on a given sale.

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## WARREN BROS. CO. v. WRIGHT.

(Circuit Court of Appeals, Fourth Circuit. November 23, 1916.)

No. 1432.

TRIAL ⊜223—MODE OF CHARGING JURY—DISCRETION OF COURT.

A statement by a trial judge that he desired to give only written instructions in a case, and requesting counsel to prepare and present requests, to which they assented, did not preclude him from giving an additional oral instruction to present an issue on which he had refused an instruction requested.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 514–516; Dec. Dig. ⊜223.]

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action at law by J. M. Wright against the Warren Bros. Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. M. Head, of Boston, Mass. (Chilton, MacCorkle & Chilton, of Charleston, W. Va., and Arthur Drinkwater, of Boston, Mass., on the brief), for plaintiff in error.

Buckner Clay, of Charleston, W. Va., and J. B. Cessna, of Erie, Pa. (Price, Smith, Spilman & Clay, of Charleston, W. Va., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and JOHNSON, District Judge.

JOHNSON, District Judge. In the District Court John M. Wright was plaintiff and Warren Bros. Company was defendant. The litigation grows out of an alleged contract between plaintiff and defendant and plaintiff's services thereunder. The contract was never reduced to writing, but on April 24, 1903, the defendant wrote plaintiff in effect:

"The understanding in regard to the agreement in force with you is: You are to have general management of the Michigan business of the company under general direction of the president of Warren Bros. Company and under conditions consistent with its general policy to be more fully set forth in a contract to be drawn and executed by both parties. For one year, from May 1, 1903, you are to receive a salary of $500 per month. You are to receive annually $4,000 of the common stock of Warren Bros. Company for a period of five (5) years. You are to devote your entire time to the affairs of the business, provided that the company after the first year increase your income directly or indirectly by dividends on said stock, by bonus, or by salary by not less than $1,000 a year. You are to continue in the company's service for ten years at the company's option, and in case of dismissal for any cause, you are to receive the balance of the common stock due according to the agreement before dismissal is effected. The company agrees to purchase the common stock from you at the expiration of ten years at par, if not previously disposed of by you. You are to give Warren Bros. Company a chance to purchase at one (1) per cent. over any bona fide offer you may have. In case Warren Bros. Company, after paying dividends on first and second preferred stock and interest on bonds, fail to pay or show on the present capital actually issued April 24, 1902, net profits exceeding three (3) per cent. per annum, then you are to continue in our employ at $6,000 per annum until such time as the common stock shall earn three (3) per cent. You undertake to operate the promotion part of the business at an expense not to exceed twenty (20) cents per square yard of pavement laid, you not to assume expense exceeding twenty cents in any one city without consent of the president. It is provided that no pavement shall be bid at less than $2 per square yard without the consent of the president of Warren Bros. Company and that no work shall be taken that shall not show certain profits. If we desire to dispense with your services at any time after May 1, 1904, we agree to give you three months' notice or in lieu thereof to pay you three months' salary."

As stated, the formal contract was never executed, though the board of directors of Warren Bros. Company authorized the president to enter into a contract with Wright along the lines of the correspondence. There was evidence that the defendant treated the letter as a sufficient writing of the contract and that both parties acted under it. Plaintiff, a citizen of New York, moved to Michigan and managed the defendant's Michigan business from May 1, 1903, to May 17, 1907. The latter date he was deposed as president of the Central Bitulithic Company in which capacity he had attended to the defendant's Michigan business. The defendant had the stock in the Central Bitulithic Company, which stood in the name of Wright, though it belonged to the defendant, transferred to some one else. Thereby Wright, not being a stockholder, was ineligible as a director and president of said company, and in this way was discharged. Plaintiff during the entire time of his service received from the Central Bitulitic Company $500 per month. At the end of the first year he received $4,000 of the common stock of Warren Bros. Company from that company. This action in assumpsit sought the recovery of the value of the remaining $16,000 of common stock of Warren Bros. Company, the increase in salary after the first year, and the salary for so much of the ten years as plaintiff was not permitted to serve. Defendant stubbornly resisted plaintiff's demands. His defenses may be briefly summarized as follows:

(1) The alleged agreement of April 24, 1903, was a nullity, because not signed by two officers of Warren Bros. Company, as provided by its by-laws.

(2) That the plaintiff violated the terms of the said agreement by becoming president of the Central Bitulithic Company, a West Virginia corporation, from April, 1903, to May, 1907, and was paid by said corporation for his services.

(3) That plaintiff in carrying on defendant's business violated his contract by exceeding the promotion expense of 20 cents a square yard without the consent of its president, and in that way paid out and expended more than $54,000 of the defendant's money.

(4) The defendant alleges that it advanced to the plaintiff divers sums of money aggregating more than $26,000 to be used for its benefit in the management of its business and that plaintiff appropriated the same to his own use.

On the first trial in the District Court it was ruled that the plaintiff could not recover for the unexpired time of the ten years, and he had judgment for more than $21,000, a very much smaller sum than he had sued for. The defendant sued out a writ of error. The plaintiff took a cross-writ. The opinion of this court on the former appeal (204 Fed. 231, 122 C. C. A. 503) held that, under section 53 of chapter 53 of the Code of West Virginia (sec. 2885), the plaintiff as agent of the defendant corporation could not be employed except during the pleasure of the directors. The ruling of the District Court that he could not recover for the time that he was not permitted to serve was therefore sustained. It also followed that the plaintiff could not recover for three months' salary after his discharge without notice. He can recover for such time only as he performed services according to the terms of the contract. With the former opinion of this court as a guide, the second trial in the District Court should have been confined to the determination of three or four important questions upon which the case depends. These questions may be briefly summarized as follows:

(1) Was there a contract?

(2) Did it contemplate that plaintiff's services in behalf of the defendant corporation should be conducted and carried on in the name of the Central Bitulithic Company, a subsidiary?

(3) Did the plaintiff perform the services according to the contract honestly and faithfully?

(4) If there were any variations from the terms of the contract, did the defendant order such variations or consent thereto?

This court also indicated that the defendant might take advantage of two positions it had contended for on the appeal. Those propositions were:

(1) That it was unlawful for the plaintiff to be paid anything in his capacity as a director as such of the defendant company. The burden was on the defendant to show that the plaintiff was paid or promised anything as an officer or director as such.

(2) That there were minority stockholders of the Central Bitulithic Company who did not consent to the plaintiff's employment by the defendant, the burden being on the defendant to show the extent and character of such minority holdings.

Defendant did not offer any evidence on the second trial to establish either of the above propositions, and they go out of the case.

The main questions upon which this case hinged were submitted to the jury under instructions that were clear, relevant, and fair. Defendant complains because of the manner in which one of the instructions was given to the jury by the court. The record shows that when the evidence was all in the court said:

The Court: The next thing will be the preparation of instructions. Have you any instructions, gentlemen?

Mr. Head: I have not.

The Court: I have no disposition to hurry you in the matter. I would like that matter, in so far as you deem the questions of law are involved, to be as fully treated as you can. I am not well, and have not been for the last two days, and I do not desire, if I can avoid it, to do anything in the way of a charge to the jury. I prefer to give them such proper written instructions, which, by the way, is the ordinary practice in this state.

Mr. Chilton: That will be satisfactory.

The Court: I will be glad if you will exchange your views and serve a copy on each side.

Mr. Chilton: How would it do, your honor, for us to prepare, say in the afternoon sometime, we would give a copy to counsel upon the other side, so that you might have an opportunity to glance over them before the court convenes in the morning?

The Court: That will be satisfactory, and I will let the jury go until morning.

Mr. Cessla: Quite satisfactory to us.

The following day the court instructed the jury in accordance with the written requests of the parties to the action. Some of the instructions were refused. The case was argued, and after the argument of counsel to the jury the court said:

"Gentlemen of the jury, I had intended to say nothing more to the jury at all, but it may be that I ought to on one point. I think it should be called to the attention of the jury as an issue, as a possible issue in this case. An instruction was offered on the point by counsel for the defendant, but it was asked in such a form that I felt compelled to reject it; but I will take the responsibility upon my own motion of just calling the attention of the jury to that question. Gentlemen of the jury, in addition to the instructions that have been given in writing, I desire to offer you a short instruction, and that is that a contract of employment involves as one of its features of obligation on the part of the person employed to exercise with his ability good faith and honesty. The defendant here introduces certain checks for amounts aggregating something over $10,000, and for which no vouchers have been filed in the office of the Central Bitulithic Paving Company. The plaintiff made a verbal explanation in regard to the matter, and asserted that his method of disbursement of those funds without taking vouchers therefor was in accordance with the understanding and agreement of the president of the Warren Bros. Company, and that these were disbursed in the entire interest of the business managed by him. The only way in which this matter is important is as it touches the honesty and good faith of the plaintiff. If you believe that this money was honestly expended in the interest of the business under the management of Mr. Wright, it cannot affect this suit; but, if, on the other hand, you believe that in respect to this matter he did not exercise honesty and integrity, he would not be entitled to recover."

This instruction was entirely proper. It is not true that the remarks of the court amounted to a stipulation that the court would not give the jury any instructions except such as were reduced to writing. The

object of a trial is to help to ascertain the truth and to do justice, and the manner of conducting the trial must be left largely in the sound discretion of the trial judge. This was one of the defendant's material defenses. It had requested instructions upon this point, but in a form in which the judge could not grant them, so in the interest of truth and a fair trial the court of its own motion gave the instruction above set out. The defendant certainly had no room to complain of that instruction. There was no error of law, and there was no abuse of the sound discretion of the court. An examination of the whole record shows that all the issues were fairly, clearly, and fully submitted to the jury. In the light of the evidence, the verdict was exceedingly favorable to the defendant.

The judgment below should be affirmed.

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## CAROLINA, C. & O. RY. CO. v. STROUP.

(Circuit Court of Appeals, Sixth Circuit. February 6, 1917.)

No. 2899.

1. MASTER AND SERVANT ⊜286(33)—INJURIES TO SERVANT—JURY QUESTION.
In an action by a brakeman for injuries received while attempting to cut some cars of a train from the rest, the question of the negligence of the engineer in failing to set the brakes on the rear cars, which the brakeman contended pressed down and injured him, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1020; Dec. Dig. ⊜286(33).]

2. TRIAL ⊜139(1)—JURY QUESTION—CONFLICTING EVIDENCE.
Where, under the evidence, reasonable men may honestly draw different conclusions, the question is one for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341; Dec. Dig. ⊜139(1).]

3. TRIAL ⊜178—PROVINCE OF COURT AND JURY—DIRECTED VERDICT.
On defendant's motion to direct a verdict, it is the duty of the trial court to take that view of the evidence most favorable to plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401–403; Dec. Dig. ⊜178.]

4. APPEAL AND ERROR ⊜997(3)—REVIEW—DENIAL OF MOTION FOR NEW TRIAL.
In reviewing the trial court's denial of a motion for a new trial, the fact that he had seen and heard the witnesses should be considered in support of his action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2024; Dec. Dig. ⊜997(3).]

5. APPEAL AND ERROR ⊜995—REVIEW—VERDICT.
An appellate court cannot weigh the evidence with a view of determining whether it is sufficient to sustain a verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3907; Dec. Dig. ⊜995.]

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6. APPEAL AND ERROR ⊜928(2)—REVIEW—PRESUMPTIONS.
Where defendant did not complain of the charge given, there is a presumption that the instructions were as favorable to defendant as the case warranted.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3750; Dec. Dig. ⊜928(2).]

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

Action by George W. Stroup, by next friend, Mary Stroup, against the Carolina, Clinchfield & Ohio Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

J. R. Simmonds, of Johnson City, Tenn., for plaintiff in error.
Robert Burrow, of Bristol, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This was an action to recover damages for personal injuries sustained through alleged negligence of the railway company. The action was brought and concededly was maintainable under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]); and the plaintiff below recovered verdict and judgment for $2,500. The evidence is embodied in the record, though the court's charge to the jury is not. At the close of all the evidence the railroad presented motion to direct a verdict in its favor; this motion and also a motion for new trial were denied. The railroad prosecutes error. The only question presented here is whether the verdict can be sustained upon the evidence.

The plaintiff below, Stroup, was a brakeman on a freight train of 80 cars, and the injury occurred in the railroad yard at Bostick, N. C. Stroup had been previously told to cut 18 cars out of the forward portion of the train upon reaching Bostick, and to take them from track No. 2, on which the train would enter the yard, and set them on track No. 1. These two tracks were maintained along north and south adjacent lines, track No. 1 lying on the west of track No. 2. The switch connection led from track 2 northwardly into track 1 and was quite a distance south of the point at which the train was to enter the yard; this required the train partially to pass the switch point before the cars to be cut out could be conveniently released from the train and backed into track No. 1.

The train entered the yard from the north on track 2 about 4 o'clock in the morning of December 2, 1914, and continued southwardly until the eighteenth car reached the clearing post, which stood between the tracks and some 200 feet north of the point of the switch leading northwardly, as stated, into track 1. Admittedly, the execution of Stroup's order required him to go between the ends of the eighteenth and nineteenth cars to separate the air hose; and Stroup testified that before reaching Bostick he advised the engineer of the order to cut out

the 18 cars. While the train was approaching the place designed to carry out the order and moving slowly, Stroup, with his lantern, signaled the engineer to stop. The engineer cut off the steam, but seemingly failed to apply the brakes. Stroup says, however, that the train stopped—"at least the 18 cars had stopped"; that he stepped between the eighteenth and nineteenth cars to part the hose, and turned the angle cock on the car nearest to the engine; that he "was fixing to turn the one on the other car when the cars (that is, the rear cars) began to move ahead; * * * the rear part of the train moved up on me and caught me." It is here that the issue of fact arises.

The railroad contends that under the existing physical conditions, if the front portion of the train, comprising 18 cars, had in truth stopped, the rear portion could not have "moved up" and "caught" Stroup —in other words, that in view of the grade of the track the theory of stoppage of the front portion of the train and continued movement of the rear portion is opposed to the law of gravity—and hence that Stroup must have gone between the cars while the train was in motion, and in violation of a rule of the company with which he was admittedly familiar. Evidently, then, the grade of the track and the potential slack in the rear portion of the train form the basis of the controversy. The negligence alleged in the declaration is that the engineer stopped the train "on a dip in the road, without applying the air brakes on said train, by reason whereof said train, moving by gravity, started while plaintiff was between two cars and before he could extricate himself from his dangerous position was caught and crushed," etc. Among other features of Stroup's testimony this appears in respect of the alleged "dip" in the track:

"If a car is turned loose without brakes on and left to gravity at 'B' (meaning the clearing post before mentioned between tracks No. 2 and No. 1, and the point where the accident occurred), it will roll to the center of the track there; a car will drop back there in the direction from which we came, that is, north. Q. If that is true, what was it, or why, I will ask you, why was it these 62 cars back on this end dropped in toward you and caught you? Why would they drop in that direction? A. We pulled in there, and the slack, I guess it was, out there in those rear cars, and it shoved up. The way that track is elevated there would make them drop this way; the rear portion of the 62 cars would be on this curve back there, high up on the curve, so as to press down toward the clear post."

The locomotive engineer, called by the company, testified that he "stopped the whole train; to stop shut off the steam, and the brakes were partially applied by the pressure retaining valves"; and, further:

"If cars are left on a grade with retainers on, it may leak out, and the car start. I can tell from the engine whether or not the retainers are on."

The company introduced a profile of track No. 2, as to which the company's civil engineer stated:

"The vertical scale of the blueprint is in feet; it is ten times as small in the lineal direction as it is in the vertical direction."

It is insisted in Stroup's behalf that the profile is misleading. The complaint in substance is that its lineal scale is too much reduced to give an adequate understanding of admitted variations in the grade of

the track; but, assuming the profile to be technically correct, it differs in some important features from the testimony of the civil engineer, while it does not in material respects contradict the testimony of Stroup. Otherwise stated, the profile discloses a depression in the grade of the track within the limits of the train, and of course opposing grades toward the ends of the train. It is not necessary to dwell on the distances given by the engineer between points indicated on the profile, nor upon the lengths given by Stroup of the cars, nor upon his statement of the distances between the cars as they were placed and operated, in the rear portion of the train. Enough is shown to point out the nature of the controversy and the difficulty of its solution. In denying the motion for a new trial, Judge Sanford in part stated his reasons for overruling the company's motion to direct a verdict:

"The undisputed physical facts did not, in my opinion, necessarily require a verdict to be directed for the defendant. While it appears that the engineer shut off steam while his engine was on an ascending grade and the engine stopped, and the nature of the tracks and grade were such that many of the succeeding cars would also have stopped, it is not impossible or improbable that after the cars in the front of the train had stopped back of the eighteenth car, the cars at the rear of the train would be still in motion and in part apparently on a descending grade, and that the subsequent forward motion of these cars, not arrested by brakes, through the shock transmitted from car to car, finally gave an impact which caused the car to move forward in front of which plaintiff had stopped, resulting in the accident. The question whether, under all the circumstances, there was negligence in not putting on the brakes so as to stop each car and prevent such taking up of the slack was, in my opinion, one for the jury. * * *

"And while my view as expressed or suggested at the trial was in favor of the defendant, on reflection I am of opinion that I did not then give sufficient weight in my own mind to the probable continued forward movement of the rear end of the train, and on the whole, after careful consideration, I have concluded that the verdict of the jury, importing a finding of negligence on the part of the defendant, is not so clearly against the evidence or the decided weight of the evidence as to require it to be set aside. Furthermore, in so far as the plaintiff's own conduct in going in between the cars under the circumstances with the knowledge that the brakes had not been shut off, constituted contributory negligence, this was apparently taken into consideration by the jury in a substantial reduction of the plaintiff's damages."

[1, 2] We observe the contention of counsel that the trial judge apparently reversed the order in which slack in a moving train is taken up; but this criticism fails to notice that the eighteenth and nineteenth cars, and perhaps some other adjacent cars, were on an ascending grade when Stroup was injured, and so the slack in that portion of the train might not have been and probably was not taken up when the effect of the impact of the oncoming cars from the rear, which in substantial portion were apparently on a descending grade, reached the place of the injury. Certainly upon all the evidence pertinent to this feature of the controversy reasonable men might honestly have drawn different conclusions, and this is the settled token for submission of a cause to the jury. Marbury v. Illinois Cent. R. Co., 176 Fed. 9, 15, 16, 99 C. C. A. 483 (C. C. A. 6). And see Cincinnati, N. O. & T. P. Ry. Co. v. Jones, 192 Fed. 769, 773, 113 C. C. A. 55, 47 L. R. A. (N. S.) 483, and citations (C. C. A. 6).

[3-5] Moreover, while it is perhaps sufficient to restate the established rule that in disposing of defendant's motion to direct, it was the duty of the trial court to take that view of the evidence which was most favorable to the plaintiff, yet it may be added that since the judge was entitled to weigh the evidence when passing on the motion for a new trial, the fact that he had seen and heard the witnesses is to be considered in connection with his opinion denying that motion. Meers v. Childers, 228 Fed. 641, 642, 143 C. C. A. 162. Further, an appellate court cannot weigh the evidence with a view of determining whether it is sufficient to sustain a verdict. Toledo, St. L. & W. R. Co. v. Howe 191 Fed. 776, 780, 112 C. C. A. 262, and citations (C. C. A. 6).

[6] We are the more content thus to dispose of the case because of the company's failure either to complain of the charge of the court or to include it in the record; for such an omission gives rise to a presumption that the court instructed the jury as favorably for the defendant as the merits of the defense deserved. Leonard-Martin Const. Co. v. Highbarger, 175 Fed. 340, 341, 344, 99 C. C. A. 128 (C. C. A. 6).

The judgment will be affirmed, with costs.

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In re JACOBSON.

(Circuit Court of Appeals, Third Circuit. January 11, 1917.)

No. 2156.

BANKRUPTCY ⊂=455—PROCEEDINGS—APPEALS.

A petition was filed against an alleged bankrupt, it being asserted that he had transferrred all his property to a corporation, through which he transacted business; all the stock, save a few shares issued to dummies, being held for the benefit of the bankrupt by his wife. An order being made for his examination, the bankrupt requested that the examination be stayed until he should effect settlements with his creditors, and the stay was granted on condition that the bankrupt should deposit funds for the payment of certain undisputed claims, and execute bonds to secure payment of other claims and for attorney's fees. The claims were all settled between the parties, and the court then made an allowance for the fees of the petitioning and intervening creditors, payment of which fees was secured by bond. From such order, the bankrupt appealed, on the ground that the allowances were unreasonable and excessive. *Held*, that the proceeding was not one in bankruptcy, but rather one to avoid bankruptcy, and, as the court acted as an arbitrator under the authority given by the bond, no appeal could be taken under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (Comp. St. 1913, § 9608), providing for review by appeal of controversies in bankruptcy.

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

Appeal from the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

In the matter of Jacob Jacobson, alleged bankrupt. From an order fixing attorney's fees, the alleged bankrupt appeals. Dismissed.

Edward P. Stout, of Jersey City, N. J., for appellant.

Edwin G. Adams, of Newark, N. J., George D. Hendrickson, of Jersey City, N. J., and Kessler & Kessler, of Newark, N. J., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal from an order, made ostensibly in a bankruptcy proceeding, allowing counsel fees.

The facts of this peculiar case are these: A petition in bankruptcy was filed against Jacob Jacobson, an alleged bankrupt, followed by an amended petition, in which it is averred substantially that the alleged bankrupt had concealed his property from his creditors, to whom he was heavily indebted, by conveying it to a corporation which he had caused to be formed for that purpose and through which he transacted business; that all the stock of the corporation, save a few shares issued to dummies, was held by his wife; that the said corporation was solvent, in fact very prosperous, and that the alleged bankrupt was the true owner of the stock of the corporation. The alleged bankrupt moved to vacate the order, on the ground that the petition did not allege an act of bankruptcy. The motion was dismissed and an order made for an examination of the bankrupt under section 21a, Bankruptcy Act (Comp. St. 1913, § 9605). Fearing, as suggested by the court, that the examination might divulge such facts as would involve the corporation and justify the court in extending a receivership of the bankrupt to the corporation (In re Muncie Pulp Co., 139 Fed. 546, 71 C. C. A. 530; In re Rieger, Kapner & Altmark [D. C.] 157 Fed. 609), the alleged bankrupt was induced to ask that the examination be stayed until he could effect settlements with his creditors. This motion was granted and the examination stayed, upon conditions, however, appearing in the court's order, that the alleged bankrupt deposit with the Referee in Bankruptcy $4,500 with which to pay certain undisputed claims; and deliver to the Referee a bond for $24,000 with surety, to secure the payment of any judgment that might be recovered against him upon the suit of a certain creditor; another bond for $1,000 with surety, to secure the claim of another creditor; and a third bond "in the sum of three thousand dollars ($3,000) with such surety as shall be approved by court, conditioned to pay any counsel fee that may hereafter be allowed by this court to counsel for the petitioning creditors and all other counsel in this proceeding."

Following this order, the alleged bankrupt went among his creditors and settled with them upon the best terms he could obtain, and thereafter came into court, and by petition, showing that he had paid all debts not covered by the cash and securities deposited, and that he had otherwise performed the conditions required of him by the recited order, prayed that the petition be dismissed. Whereupon the court made an order dismissing the petition, directing the distribution of the fund, and fixing fees for counsel for the petitioning and intervening creditors in the following words:

"And it is further ordered that the said Jacob Jacobson pay to the said Kessler and Kessler the sum of $1,500 as counsel fee and for their disbursements in this matter; and to the said George D. Hendrickson the sum of $750 as counsel fee and for his disbursements in this matter; * * * and upon the said Edward P. Stout (counsel for Jacobson) presenting to the said Charles M. Mason (Referee in Bankruptcy) receipts that the foregoing moneys have been paid, the bond of $3,000 of Jacob Jacobson, as principal, and National Surety Company, as surety, filed with the said Charles M. Mason on May 22, 1916, conditioned to pay any counsel fee that might thereafter be allowed by this court to counsel for the petitioning creditors and all other counsel in these proceedings, shall be delivered by the said Charles M. Mason to the said Edward P. Stout."

From this order this appeal was taken, and the error charged is that the allowances are unreasonable and excessive.

Aside from a defense on the merits, the appellees raised a question of the jurisdiction of this court to entertain the appeal. Being before us on appeal and not on petition to review and revise, there developed the ever-present controversy concerning what is meant by "controversies arising in bankruptcy proceedings," reviewable by appeal under section 24a and section 25a, and what are "proceedings of bankruptcy," reviewable by petition to review and revise under section 24b of the Bankruptcy Act (Comp. St. 1913, §§ 9608, 9609). Upon the face of the appeal it would seem that we are called upon to consider and decide this question, but an examination of the record discloses a situation which, though not addressed to our attention by counsel, nevertheless so intimately concerns our jurisdiction, that we must inquire whether, upon another ground, this case is properly in this court, and whether, therefore, our views respecting "controversies arising in bankruptcy proceedings" and "proceedings of bankruptcy," if expressed, would have the force of a decision.

Pursuing this inquiry at the risk of repetition, it must appear from this brief recital, that the facts of this case are unusual. No receiver was appointed, no trustee was elected, and no estate came within the administration of the bankruptcy court. A petition was filed and an order of examination made. Motions and counter-motions were made and hearings held in an atmosphere surcharged with bad feeling. The ultimate result of it all was an agreement reached between counsel for several groups of creditors and for the alleged bankrupt, with the approval of the court, that the alleged bankrupt be given a chance to settle with his creditors, conditioned, as before stated, upon the payment of a certain sum to satisfy undisputed claims, and the giving of bonds to secure two disputed claims and to insure the payment of counsel fees. The alleged bankrupt complied with these preliminary conditions, and set about making settlements with his creditors. These settlements, which were finally effected, were not in composition of his debts in the sense contemplated or under the procedure prescribed by the Bankruptcy Act, but were settlements informally made out of court upon such terms as the debtor could obtain. When the settlements were completed, the alleged bankrupt came into court, and, showing that he had paid all his debts excepting those secured by his deposits, asked that the petition be dismissed. Pursuant to the agreement to which all were parties and in

which the judge had acquiesced, the petition was dismissed and the alleged bankrupt ordered to pay counsel fees fixed by the judge.

This does not appear to us to be a proceeding in bankruptcy—certainly not such a proceeding as is contemplated by the Bankruptcy Act. It was rather a proceeding arising out of bankruptcy, inspired, carried along and perfected *to avoid* proceedings in bankruptcy. A bankrupt estate was not administered by the bankruptcy court. What was administered was a fund advanced by the corporation, not paid by the alleged bankrupt, and voluntarily handed the Referee in Bankruptcy in lieu of the surrender of the alleged bankrupt's estate, and what was awarded counsel was not a part of bankruptcy assets nor even of the fund deposited, but was an order made upon the alleged bankrupt in his personal capacity, that he pay counsel fees according to the tenor of his bond. The understanding, which included the giving of a bond as security for payment of fees, invested the judge with power to fix fees. The judge was thus made the arbitrator of the matter of fees, and the power conferred was only limited by the amount of the bond. Having conferred this power upon the judge, neither the attorneys nor the alleged bankrupt can complain of his decision, when within the limit prescribed. As his decision was that of an arbitrator rather than of a court, manifestly this court has no jurisdiction to review his action, either by appeal or upon a petition to revise. What the judge really did was to lend a hand in straightening out a tangled situation, and this he did, not along lines prescribed by the Bankruptcy Act, but according as the parties had themselves agreed.

We are clearly of opinion that we have no jurisdiction of this case, and therefore direct that the appeal be dismissed.

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## BOSSELMAN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 24.

1. OBSTRUCTING JUSTICE ⊜15—EVIDENCE—ADMISSIBILITY—INDICTMENT.
   In a prosecution for obstructing justice by causing alteration of books material to an inquiry by the grand jury, the indictments found by the grand jury in that inquiry are admissible to show what subject it was investigating.
   [Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 31; Dec. Dig. ⊜15.]

2. CRIMINAL LAW ⊜508(1)—EVIDENCE—TESTIMONY OF ACCOMPLICE—NECESSITY OF CORROBORATION.
   Though defendant's employés, who altered his books under his direction, were accomplices, they were competent witnesses in the federal courts, even if their testimony was uncorroborated.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1099, 1100, 1103, 1112; Dec. Dig. ⊜508(1).]

3. CRIMINAL LAW ⊜780(1)—INSTRUCTIONS—TESTIMONY OF ACCOMPLICE.
   It is not necessary to give the usual and proper instruction cautioning jurors against convicting upon the uncorroborated testimony of an ac-

complice, where the accomplices, though called by the government, testified favorably to defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1859; Dec. Dig. ⊂⊃780(1).]

4. OBSTRUCTING JUSTICE ⊂⊃16—EVIDENCE—SUFFICIENCY.

In a prosecution for obstructing justice by causing alterations in the books of defendant concerning a matter under inquiry by the grand jury, evidence *held* sufficient, though circumstantial, to sustain a conviction.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 32; Dec. Dig. ⊂⊃16.]

5. CRIMINAL LAW ⊂⊃1054(1)—APPEAL—EXCEPTIONS—NECESSITY.

Where a witness called by the government testified so favorably for the defendant that the prosecuting attorney was properly permitted to cross-examine her, the conviction will not be reversed for permitting him to read extracts from her testimony before the grand jury, where that testimony was made contemporaneously with the matters testified about, so that it could have been read to the witness to refresh her recollection, and no exception was taken to reading those extracts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2662; Dec. Dig. ⊂⊃1054(1).]

6. OBSTRUCTING JUSTICE ⊂⊃5—JUDICIAL PROCEEDINGS—EVIDENCE BEFORE GRAND JURY—"CORRUPTLY."

Any attempt by one whose conduct was being investigated by the grand jury to obstruct such investigation, by causing his employés to alter entries in his books, is "corruptly" impeding justice, within Criminal Code (Act March 4, 1909, c. 321) § 135, 35 Stat. 1113 (Comp. St. 1913, § 10305), though no bribery accompanied it.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 14; Dec. Dig. ⊂⊃5.

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

7. OBSTRUCTING JUSTICE ⊂⊃15—ADMISSIBILITY OF EVIDENCE.

In a prosecution for obstructing justice, by altering books material to investigation by the grand jury of the charge that defendant had shipped obscene statues, those statues were admissible in evidence to show the motive in making the alterations.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 31; Dec. Dig. ⊂⊃15.]

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

Andreas C. Bosselman was convicted of corruptly influencing, obstructing, and impeding the due administration of justice, by directing and requesting others to make certain erasures, changes, and insertions in his books and records, material to a matter under inquiry by the grand jury, and he brings error. Affirmed.

Pratt, Koehler & Boyle, of New York City (Addison S. Pratt and Francis E. Hamilton, both of New York City, of counsel), for plaintiff in error.

H. Snowden Marshall, of New York City (F. E. Carstarphen and Joseph A. Burdeau, Asst. U. S. Attys., both of New York City, of counsel), for the United States.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is a writ of error to a judgment of conviction upon an indictment charging that the defendant, in violation of section 135, U. S. Criminal Code, had corruptly influenced, obstructed, and impeded the due administration of justice by directing and requesting one Wieland and one Barberi to make certain erasures, changes, and insertions in the books and records of Andreas C. Bosselman & Co. material to a matter under inquiry by the grand jury. The section reads:

"135. Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

Andreas C. Bosselman & Co. is a corporation of which the defendant at the time in question was president and treasurer. Between March 10 and 24, 1914, the grand jury had under consideration two indictments against him, the first charging him with a conspiracy to commit an offense against the United States in violation of section 37 of the United States Criminal Code (Comp. St. 1913, § 10200), by importing certain obscene bisque figures, and the second charging him with the shipment to Florida of certain obscene bisque figures, in violation of section 245, U. S. Criminal Code (section 10415). These two indictments were found by the same grand jury at the same session which found the indictment on which the defendant was tried.

[1] At the opening of the trial the United States Attorney offered these two indictments in evidence, and they were admitted by Judge Sessions over the defendant's objection and exception, for the purpose of showing what subject the grand jury were investigating at the time when the defendant was charged with corruptly impeding the administration of justice. We see no error in this. The Bosselman Company's salesmen forwarded orders taken by them on the road to the office in New York. The stenographer there made two copies of every order, one of which was kept by the bookkeeper and the bill to the customer prepared from it, and the other was given to the shipping clerk to enable him to make proper entries of shipment in the shipping book.

Sales of the figures in question to three separate customers in Florida were proved. Clara Wieland, the bookkeeper, in pursuance of a subpœna duces tecum served upon her, produced before the grand jury the Bosselman Company's shipping book and sales lists, upon which erasures and changes appeared in the entries relating to these three orders. The original bills in two of the sales lists called expressly for these figures; the bill in the case of the third sale had been lost. It also appeared that changes in the shipping book were made by Barberi, the shipping clerk, while the grand jury were investi-

gating; but in respect to the changes in the sales lists the bookkeeper, Miss Wieland, did not think she had made them at that time, but thought that she must have done so when she was posting, after making out the bill or checking up stock, and before she was called as a witness by the grand jury. She testified directly, and Barberi by necessary implication, that the defendant did not direct or request the alterations to be made while the grand jury was in session.

[2, 3] It is objected that these witnesses were accomplices, and therefore that the court should have charged the jury to give no credence to their testimony, being uncorroborated. As they could have been indicted for the same offense for which the defendant was being tried, they were accomplices; but an accomplice is a competent witness in the federal courts, even though his testimony be uncorroborated. It is usual and proper for courts to caution jurors against convicting a defendant upon the uncorroborated testimony of an accomplice. This, however, is not essential. Diggs v. United States, 220 Fed. 545, 136 C. C. A. 147. Such a caution would have been entirely out of place in this case, because these witnesses, though called by the government, testified throughout favorably to the defendant.

[4] The defendant further insists that, the proof against him being altogether circumstantial, a verdict should have been directed by the court in his favor. If men could not be convicted upon circumstantial evidence, many, if not most, serious offenses would go unpunished. In this case a very persuasive body of circumstantial testimony was proved. The sales lists and the shipping book of the Bosselman Company were altered, so far as appears, only in connection with the entries concerning the three sales as to which charges against the defendant were under investigation by the grand jury. The alterations were made by employés who had no personal interest in the matter whatever, and were made by two clerks who had charge of different stages in the course of business. It is difficult to believe that this was done independently and accidentally. The defendant being the only person having any interest in having the alterations made, we cannot say the verdict was not sustained by substantial proof. The jury were correctly instructed that they must be satisfied beyond a reasonable doubt of the defendant's guilt.

[5] The testimony of Miss Wieland at the trial was so favorable to the defendant that the United States Attorney cross-examined her. This he was entitled to do in the case of a hostile witness. But the defendant claims he had no right to read to her extracts from her testimony before the grand jury. It is to be noted, however, that the defendant took no exception to this. It would have been permissible for the government to refer to this testimony for the purpose of refreshing the recollection of the witness, provided the testimony was given contemporaneously with the matters inquired about. Putnam v. United States, 162 U. S. 687, 16 Sup. Ct. 923, 40 L. Ed. 1118. As the subject of inquiry was in respect to alterations claimed to have been made between March 10th and 24th and the testimony was given between those dates, we think the notes of the testimony were contemporaneous within the above decision.

The witness stood by her testimony as given at the trial, so that the

effect of the examination was to disclose an inconsistency going to her credibility. But the defendant insists that the court treated these extracts from her testimony before the grand jury as substantive proof of the facts there testified to. We see no evidence of this in the record. If the defendant had asked the court to charge the jury that such testimony was not to be treated by them as anything but showing inconsistency going to the credibility of the witness, there is no reason to doubt that he would have done so.

[6] It is further insisted that, even if the defendant did ask or direct Barberi and Miss Wieland to make the alterations, there is no evidence that he did so "corruptly" within the meaning of the statute; that is, by bribery. The word "corruptly" is capable of different meanings in different connections. As used in this particular statute, we think any endeavor to impede and obstruct the due administration of justice in the inquiries specified is corrupt. To construe the acts as requiring that such an effort should be accompanied by payment or promises of payment of money would quite unreasonably restrict the obvious purpose of the legislation.

[7] Finally, it is objected that the court erred in allowing specimens of the bisque figures to be put in evidence. It is said that, if the erasures had been made in connection with entries as to bolts of cotton or cars of coal, the court would not have permitted any examination of the circumstances attending the sale, or the production of samples of the cotton or coal. This may be entirely true. When, however, the entries involved articles alleged to be obscene, the production of the articles threw light upon the motive in making the erasures.

The judgment is affirmed.

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## SUCESORES DE L. VILLAMIL & CO., S. EN C., v. MERCED et al.

(Circuit Court of Appeals, First Circuit. December 11, 1916.)

No. 1204.

1. JUDGMENT ⊜570(1)—CONCLUSIVENESS—MATTERS CONCLUDED—JUDGMENT ON MERITS.

A judgment in an action to recover money, in which the property of defendants was attached, and in which defendants filed a cross-complaint, alleging that there was nothing due plaintiffs, and claiming damages for the attachment, which cross-complaint was dismissed because the damages had not been proven, is res judicata in a subsequent action by those defendants to recover the same damages for the attachment, in which the allegations were the same as those of the cross-complaint.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1028, 1036, 1165; Dec. Dig. ⊜570(1).]

2. JUDGMENT ⊜700—CONCLUSIVENESS—IDENTITY OF PARTIES.

The parties to an action in the district court for San Juan between two copartnerships, in which judgment was rendered on the merits, are the same as in a subsequent action in the United States District Court, though in the former action the partnerships, as permitted by civil law, sued and were sued by their firm names only, while in the latter action

the names and citizenship of the partners had to be given to show the jurisdiction of the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1225; Dec. Dig. ⊂=700.]

3. COURTS ⊂=438—JURISDICTION—UNITED STATES DISTRICT COURT FOR PORTO RICO.

Under Act March 2, 1901, c. 812, § 3, 31 Stat. 953 (Comp. St. 1913, § 3786), providing that jurisdiction of the District Court of the United States for Porto Rico in civil cases should extend to controversies where the parties, or either of them, are citizens of the United States, or subjects of a foreign state or states, the court has jurisdiction of a suit by members of a firm located in Porto Rico against subjects of Spain, though the citizenship of the members of the plaintiff firm is not given.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⊂=438.]

4. JURY ⊂=37—INFRINGEMENT OF RIGHT TO JURY—DETERMINATION ON APPEAL.

The Circuit Court of Appeals, on reversing a judgment of the lower court for failure to direct the verdict because the matter had been previously adjudicated, will remand the case for a new trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 220; Dec. Dig. ⊂=37.]

In Error to the District Court of the United States for the District of Porto Rico; Peter J. Hamilton, Judge.

Action by Casto Merced and another against Sucesores de L. Villamil & Co., S. en C. Judgment for plaintiffs, and defendants bring error. Reversed and remanded.

T. D. Mott, Jr., of South Bend, Ind., for plaintiff in error.

Joseph Anderson, Jr., of San Juan, Porto Rico (J. Weston Allen, of Boston, Mass., on the brief), for defendants in error.

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

BINGHAM, Circuit Judge. This is a writ of error from a judgment of the United States District Court for Porto Rico in an action brought by Casto Merced and José Salagado, partners doing business under the firm name of C. Merced & Co., against José León Nuñez, Gumersindo Suarez Garcia, Enrique Mitjans Juliá, Manuel Lomba Peña, and Doña Mercedes Fernandez y Fernandez, partners doing business under the name of Sucesores de L. Villamil & Co., S. en C. The members of the plaintiff partnership are alleged to be residents of Bayamón, Porto Rico, and those of the defendant partnership to be subjects of his majesty the king of Spain.

The action is tort for an alleged wrongful attachment placed by the defendants, Sucesores de L. Villamil & Co., S. en C., on the goods and effects of the plaintiffs, C. Merced & Co., in an action brought in the district court of San Juan, May 25, 1914, against C. Merced & Co., to recover the sum of $1,499.34, interest, costs, and attorney's fees.

It is alleged in the complaint that Villamil & Co. brought the action in the district court of San Juan against C. Merced & Co., and caused their property to be attached, knowing that C. Merced & Co. did not owe them anything, the indebtedness of the latter to them having

been liquidated by a public instrument and not yet become due; that, inasmuch as Villamil & Co. knew that the suit was unfounded, the attachment and the taking into custody of the goods was an abuse of process, and wrongful. The elements of damage sought to be recovered were: (1) Loss or depreciation in value of the goods attached; (2) loss of the good will of the firm; and (3) loss of credit.

In their answer the defendants admitted bringing the action against C. Merced & Co. to recover $1,499.34, and that they procured an order for the attachment of sufficient property to secure any judgment which they might recover, including attorney's fees, costs, and interest, and that the marshal of the court attached certain goods of the firm of C. Merced & Co., but denied that they directed the marshal in the levy or in the valuation of the goods. They also denied that, at the time of bringing the suit, or procuring the attachment, or making the levy, they knew that the firm of C. Merced & Co. did not owe them the sum of $1,499.34, or that said sum, if owed, was not then due and payable. They alleged as a defense to the action that the matter in issue between the parties was res adjudicata, the same having been determined in a cross-complaint brought against them by C. Merced & Co. in the district court of San Juan, on May 25, 1914.

In the trial of the case the plaintiffs introduced in evidence the entire record in the suit brought by Villamil & Co. against them in the district court of San Juan, including the cross-complaint which they had brought against Villamil & Co., and at the close of the plaintiffs' evidence the defendants moved that the action be dismissed for the reason that the matter complained of had been adjudicated in the cross-complaint. The court overruled the motion, the trial proceeded, and, the case having been submitted to the jury, a verdict was returned for the plaintiffs in the sum of $1,900.

The defendants contend that the court erred in overruling their motion to dismiss the suit and direct a verdict in their favor, and in refusing to instruct the jury to find a verdict for them, on the ground that the matter here in controversy was decided and determined by the judgment of the district court of San Juan on the cross-complaint.

[1] Is the matter in controversy res adjudicata? In the cross-complaint C. Merced & Co. alleged that whatever indebtedness they were owing Villamil & Co., on the date the latter brought their suit, was embodied in a public document by the terms of which nothing was then due, and that, notwithstanding Villamil & Co. knew that Merced & Co. had complied with the contract embodied in the public document, and that nothing was due thereon, they had brought against them the suit for $1,499.34, of May 25, 1914, procured the order of attachment, and caused the same to be levied upon their property; that by reason of these acts they had been damaged in their commercial credit, their property had depreciated in value, and that the damages already so caused, and those to be thus caused, would amount to $4,000. In answer to the cross-complaint, Villamil & Co. admitted that the indebtedness of Merced & Co. to them was embodied in a public instrument as alleged, but denied that Merced & Co. had complied with the obligations and conditions of that instru-

ment, denied that they knew that Merced & Co. had complied with the contract, and denied that they had been damaged by reason of the suit and attachment. They also alleged and claimed that the contract embodied in the public document was rescinded by reason of the failure of Merced & Co. to adjust the claims of creditors other than those provided for in the public document. By the judgment it appears that, when the case was called for trial in the district court of San Juan, both parties appeared by counsel, and, the pleadings having been read and the parties having presented oral and documentary proofs, and made their arguments thereon, the court entered judgment dismissing the cross-complaint, "because the damages alleged therein * * * [had] not been satisfactorily proven."

It is apparent from the foregoing that the cross-complaint put in issue the very matters complained of in the present action, that a trial was had upon the merits of the controversy, and that judgment was rendered in favor of the present defendants.

[2] Not only were the matters in issue in the two proceedings the same, but the parties thereto were the same. It is true that the cross-complaint in the district court of San Juan was brought in the name of C. Merced & Co. against the Sucesores de L. Villamil & Co., S. en C., without naming the partners composing the respective firms, while in the present action the partners of the firms are named. The reason for this is that, under the civil law, the members of a partnership can sue, and be sued, in the firm name, without joining the members of the partnership; but, in order to confer jurisdiction upon the court, in an action brought in the District Court of the United States for Porto Rico, it was necessary to state who the members of the respective firms were and allege the requisite citizenship. Great Southern Fireproof Hotel Co. v. Jones, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842; Carnegie, Phipps & Co., Limited, v. Hulbert et al., 53 Fed. 10, 3 C. C. A. 391.

We are therefore of the opinion that the matter in controversy was res adjudicata, and that the defendants' motion and request for a directed verdict should have been granted.

[3] The defendants have also contended that the District Court erred in taking jurisdiction of the present case. But we are of the opinion that it had jurisdiction of the cause, under section 3 of the act of March 2, 1901, although the complaint does not allege the citizenship of the partners of the plaintiff firm.

Section 3 of the act of March 2, 1901, provides:

"That the jurisdiction of the District Court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the act of April 12, 1900, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign state or states, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum * * * of one thousand dollars."

In the complaint it was alleged that the partners composing the defendant firm were subjects of his majesty the king of Spain, and that the members of the partnership of C. Merced & Co. were residents of Bayamón, Porto Rico; and the defendants, at the trial, ad-

mitted they were subjects of the king of Spain, as alleged. If it is to be presumed that the members of the plaintiff firm were citizens of Porto Rico, the citizenship necessary to confer jurisdiction on the United States District Court for Porto Rico under the above act was complied with; and, if it is to be presumed that they were citizens of the United States, of Spain, or of any foreign power, the citizenship necessary to confer jurisdiction is likewise present.

[4] For the foregoing reasons, the judgment of the District Court will be reversed, the verdict set aside, and the case remanded to that court for a new trial. Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029. We do not think it necessary to consider the other assignments of error.

The judgment of the District Court is reversed, the verdict is set aside, and the case is remanded to that court for further proceedings not inconsistent with this opinion; and the plaintiffs in error are awarded costs in this court.

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## WALL v. UNITED STATES MINING CO.

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

No. 4675.

EASEMENTS ⊂=32—MINING TUNNEL—EXTINGUISHMENT BY ADVERSE POSSESSION.

Plaintiff's predecessors in title of a mining claim about 1875 constructed a tunnel to such claim through claims then owned by predecessors of defendant, the entrance being on one of such claims. A flume was also constructed through the tunnel for drainage purposes, through which water flowed to the entrance. Plaintiff's predecessors ceased using the tunnel in 1880, and in 1887 the predecessors of defendant took possession of it, replaced the flume, constructed a reservoir, and extended a pipe from the entrance to carry the water to their works. They also boarded up the entrance, and since that time have held exclusive possession. It did not appear in what manner plaintiff's predecessors acquired the easement to construct and maintain the tunnel through the property now owned by defendant. *Held* that, however the same was acquired under the laws of Utah it was extinguished by the open, notorious, and exclusive possession and use of the tunnel by defendant and its predecessors for more than 20 years.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 84; Dec. Dig. ⊂=32.]

Appeal from the District Court of the United States for the District of Utah; J. A. Marshall, Judge.

Suit in equity by Enos A. Wall against the United States Mining Company. Decree for defendant, and complainant appeals. Affirmed.

William H. King, of Salt Lake City, Utah, for appellant.

Russell G. Schulder, of Salt Lake City, Utah (W. H. Dickson and A. C. Ellis, Jr., both of Salt Lake City, Utah, on the brief), for appellee.

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

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

SMITH, Circuit Judge. The appellant, Enos A. Wall, is now the owner of what is known as the Ashland No. 2 mining claim, and the appellee, the United States Mining Company, is the owner of the Mountain Gem extension, the Fanny Bemis, and the First South extension of the Galena mining claims, all in the West Mountain mining district, in Salt Lake county, Utah. These all extend from the northeast to the southwest, but the side lines are not exactly parallel. In 1874 Senator George Hearst became the owner of the Ashland No. 2, either alone or in company with R. C. Chambers and J. B. Haggin. About April, 1875, they commenced the excavation of a tunnel to work the Ashland No. 2 claim and to drain it. This tunnel started on the First South extension of the Galena, and ran, generally speaking, northwest, through the claim on which it started, and through the Fanny Bemis and the Mountain Gem extension, and through and beyond the Ashland No. 2. Two other tunnels had previously been excavated on and to the Ashland mine. The new tunnel was lower than the others, and, as already stated, was for the purpose of working the Ashland mine, and to draw off any water there struck. The exact sum spent in the construction of the tunnel does not appear. Substantially all the parties to the transactions of those early days are now dead, but R. C. Chambers was the manager of the property at that time, and his books of account are in evidence. It appears therefrom that $21,000 was spent in 1874, but this was before any work was done on the tunnel in question. They show that the disbursements in 1875 were $26,813.07; that these fell off in 1876 to $13,783.29, in 1877 to $5,884.13, in 1878 to $1,473.75, in 1879 to $50, and in 1880 to $51.37. The receipts fell off, though not in the same ratio. The total receipts from 1875 to 1880, inclusive, were $13,710.13, and the total expenses during those years were $48,055.61. Thus there was a net loss during these years of over $34,000. This same report shows that about 1881 or 1882 negotiations were being carried on to lease or sell this tunnel to the owners of the Last Chance, which lies northwest of the Ashland No. 2, and it was contemplated to sell or lease it to the owners of some other claims lying north of the Ashland. This may explain why the tunnel was excavated about 160 feet beyond the lines of the Ashland. For aught that appears, the tunnel was completed, and work on the Ashland through it ceased, not later than December, 1880, though work on and through it may have ceased at a much earlier date.

There is no evidence as to what right, if any, Hearst and his associates had to start this tunnel on the First South extension of the Galena, or to penetrate the Fanny Bemis or what is now the Mountain Gem extension. We may say in passing that the record seems to show the latter claim was government land at the time the tunnel was put through it. It was not located until September 27, 1892. Attention has not been called to any authority Hearst and his associates had to run the tunnel through unlocated government land. The tunnel as constructed had a small flume down the center to carry the water off. There was a wooden railroad track along it. At and prior to the construction of the tunnel a number of people had taken up their abode

near where the mouth of the tunnel was located. Soon after the Hearst interests ceased work on the tunnel, some one at least in the interest of these settlers put a door in the mouth of the tunnel and placed a barrel in the dump, into which the water from the tunnel was conducted, and used the water from this source for domestic purposes. In 1884 the predecessors of the defendant took at least a partial possession of the tunnel and the water. Some time in 1887 the predecessors of the defendant, the door having rotted down, closed the mouth of the tunnel by nailing plank up across the first of the timbering in the tunnel. Numerous witnesses so testify, and no one but Emanual Beck contradicts them, if he may be said to do so. He testifies the door was there in 1897. It is claimed this was a mistake upon the part of the witness, and it is true that the last thing in the condensed statement of the evidence in the cross-examination of this witness is:

"In 1887 the door was so rotten he could not use it any more, and put boards on it."

We think the witness meant 1887 when he said 1897; but, whether he did or not, the overwhelming weight of the testimony is that in 1887 the end of the tunnel was closed by plank nailed on. The mouth of the tunnel has thus been kept planked up, so that no one could enter the tunnel without removing the plank, ever since, and never after 1887 was there any access to the tunnel, except by tearing these planks loose. The defendant and its predecessors put from time to time new timbers in the tunnel, replaced the flume, put an embankment in the tunnel, which in effect established a reservoir, and placed a pipe from the mouth of the tunnel to the works of the defendant. The complainant claims title to the tunnel and the dumping ground at its portal as appurtenant to its ownership of the Ashland claim. The prayer is that the court "decree it is declared and adjudged that the complainant is the owner of said premises, and that the defendant has not any estate or interest whatsoever in and to said tunnel and the space occupied for dumping purposes, and also that said defendant be forever debarred from asserting any claim thereto, or to any part thereof, adverse to the complainant," and for general equitable relief.

Upon the argument the complainant urges that his predecessors acquired the right to construct the tunnel in such a way as to imply a license from the original owners of the soil, that the digging of the tunnel without objection operates to estop the owners to assert that the predecessors of plaintiff did not have a license to construct it, and this his predecessors acquired an easement to construct and maintain the tunnel by prescription. Let it be conceded that the predecessors of plaintiff acquired a license or easement, or that there was an estoppel upon the predecessors of the defendant in some of the ways suggested. Having made this concession, there was nothing to prevent the defendant or its predecessors from reacquiring the property by any method that it could be acquired by the plaintiff and its predecessors. In its answer the defendant says:

"That for more than 29 years last past it and its predecessors in interest have been, and this defendant now is, in the open, notorious, peaceful, exclusive, and adverse possession of the said tunnel and the whole thereof, includ-

ing the portal thereof and the dump at and near the said portal, lying and being in or beneath the surface of the said First South extension of Galena lode mining claim, U. S. lot 364. And this defendant further alleges that it and its predecessors have, during all of said period of 29 years, and this defendant is now, using the said tunnel and the water issuing therefrom for its and their own sole and exclusive use and benefit; and defendant further alleges that, in order to enable it to use the said tunnel and the water flowing therefrom, it did, more than 29 years ago, make and construct in the said tunnel, at and near the portal thereof, a flume or conduit to conduct the water issuing therefrom to tanks or barrels, for domestic and culinary purposes by the employés of this defendant and its predecessors in interest, and that at the time of so constructing and erecting the said conduit or flume for conveying the said water, as aforesaid, the predecessors in interest of this defendant, at the mouth or portal of the said tunnel, erected an obstruction or barrier, by which all persons, except the predecessors in interest of this defendant, were entirely excluded from the said tunnel and not permitted to enter therein; that ever since the time of the erection of the said barrier or obstruction, to wit, more than 29 years ago, down to the present time, the said predecessors in interest of this defendant, and this defendant, have caused the said barrier and obstruction to be and remain at the mouth or portal of the said tunnel, and have, from thence hitherto, excluded and prevented all persons, except the agents and employés of the predecessors in interest of this defendant and this defendant, from entering in, or having any access whatever to, the said tunnel, or to any of the waters flowing therefrom."

This defense is sustained by the evidence, and if the plaintiff or its predecessors acquired title by any of the means indicated, the defendant from 1887 to August, 1913, a period of over 26 years, had such open, notorious, peaceable, exclusive, and adverse possession of the tunnel, and of the entrance thereto, that it must under the laws of Utah be presumed to have been acquired in right, and it cannot now be disturbed. Chapter 3, tit. 88, of the Code of Civil Procedure of Utah of 1907, fixes the limitations upon actions to recover real property. Section 2860 provides that no cause of action shall be effectual unless the person prosecuting the action or his ancestor or predecessor or grantor was seised or possessed of the property within 7 years. Section 2862 provides for acquiring property under color of title. Section 2863 defines what possession shall be necessary to that end, and thereunder (subdivision 2), "where it has been protected by a substantial inclosure." Section 2864 provides for acquiring property under claim of right without color of title, and section 2865, in defining what possession is necessary thereunder, includes subdivision 1: "Where it has been protected by a substantial inclosure."

These laws have been in force from an early time in Utah, but in Harkness v. Woodmansee, 7 Utah, 227, 26 Pac. 291, Funk v. Anderson, 22 Utah, 238, 61 Pac. 1006, and Coleman v. Hines, 24 Utah, 360, 67 Pac. 1122, the Supreme Court of Utah held that the 7-year statute of Utah did not apply to the acquisition of an easement, and that to acquire an easement by prescription the party must show that he had exercised the easement under a claim of right, and that his possession of it was peaceable, without interruption, open, notorious, and exclusive for the period of 20 years. If the complainant based his title entirely upon prescription, we must hold that within the 20 years the defendant and its predecessor took possession of the tunnel in such

a way as to wholly exclude the plaintiff's predecessor from any use of the alleged easement. The claim that the circumstances imply a license from the original owners of the soil is not sustained, because there is no evidence that the defendant or its predecessors knew that the plaintiff's predecessor was constructing the tunnel; and the same objection exists to the plaintiff's title by way of estoppel, but whether the defendant or its predecessor, in reacquiring the title by limitation after it was once acquired by the plaintiff's predecessor, would be governed by the 7-year statute, or the 20-year rule established by the courts of Utah, the defendant and its predecessor have, by closing and keeping closed the mouth of the tunnel for more than 26 years, extinguished any claim of the plaintiff.

This finding being in harmony with the decision of the District Court, its decree dismissing the plaintiff's bill is affirmed.

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INDRA LINE, Limited, v. PALMETTO PHOSPHATE CO. et al.

(Circuit Court of Appeals, Fourth Circuit. December 12, 1916.)

No. 1464.

1. SHIPPING ⟸81(1)—ACTION FOR WRONGFUL DEATH—DEFENSES.
That a ship was in charge of a compulsory pilot at the time of a collision for which she was in fault does not absolve her from liability for the death of persons caused by the collision under Code Va. 1904, § 2902.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 344, 345, 347; Dec. Dig. ⟸81(1).]

2. SHIPPING ⟸209(1)—PROCEEDINGS FOR LIMITATION OF LIABILITY—COSTS—FEES OF COMMISSIONER.
In a proceeding by a shipowner for limitation of liability, the petitioner is primarily liable for such compensation as may be awarded by the court to the commissioner appointed to ascertain the value of the vessel and her pending freight, and to report upon the claims against her, and where a rule of court requires an appellant to pay all costs before delivery to him of the record on appeal, the petitioner on an appeal by him may be required to pay as part of such costs the fees of the commissioner.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646, 648–651, 653, 654; Dec. Dig. ⟸209(1).]

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

Proceeding in admiralty by the Indra Line, Limited, owner of the steamship Indrakuala, against the Palmetto Phosphate Company and others, for limitation of liability. From a decree holding the ship in fault for a collision and allowing claims against her, petitioner appeals. Affirmed.

Edward R. Baird, Jr., of Norfolk, Va., and J. Parker Kirlin, of New York City (John M. Woolsey, William H. McGrann, and Kirlin, Woolsey & Hickox, all of New York City, on the brief), for appellant.

Edward E. Blodgett, of Boston, Mass., Floyd Hughes, of Norfolk, Va., and William F. Purdy, of New York City (Blodgett, Jones, Burn-

ham & Bingham, of Boston, Mass., Barry, Wainwright, Thacher & Symmers, of New York City, Hughes & Vandeventer, of Norfolk, Va., and Macklin, Brown & Purdy, of New York City, on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. Judge Waddill, in his opinion in the District Court (219 Fed. 600), has stated the facts fully. The owners of the Indrakuala here assail so much of his conclusions as holds that ship in fault. Their case has been presented with ability and force. Nevertheless a minute examination of the record leaves us unable to say that he was wrong.

[1] At the time of the collision the Indrakuala was in charge of a compulsory pilot. Her advocates now contend that under such circumstances her owners cannot, in this proceeding instituted by them to limit their liability to the value of their ship and its freight, be held answerable for the personal injuries and deaths resulting from the collision. Their argument is: There is no personal liability on the part of a shipowner for the torts of a pilot forced on him by law (Homer Ramsdell Co. v. Comp. Gen. Trans., 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155), and that a proceeding to limit liability is in personam and not in rem (In re Morrison, Petitioner, 147 U. S. 34, 13 Sup. Ct. 246, 37 L. Ed. 60). True enough, but what of it? By filing his petition to limit his liability, a shipowner does not make himself personally responsible for claims for which he would not otherwise have been bound; but it is equally true that to the extent of her value the ship remains liable for all the maritime liens upon her. In the very case last cited the Supreme Court said that where, instead of surrendering his vessel, the shipowner stipulates for her value, as was done in the case now at this bar, the stipulation stands in the place of the ship. To the amount of the stipulation, the stipulators must pay all claims found to have constituted valid liens upon the ship. Subject to some well-defined limitations, when the individuals hurt are members of the ship's company, it has never been doubted that she is liable for personal injuries wrongfully inflicted by her.

The further contention is made on behalf of the appellant that in any event the claimants for the damage done to them by the drowning of those whose lives were lost as the result of the collision have no standing in this court. It is urged that the liability imposed by the Virginia statute (Code 1904, § 2902) upon a ship or a vessel for a wrongful death is limited to those cases in which the owner of the ship would have been personally liable, and it is said that in the case of a death resulting from the negligence of a compulsory pilot the shipowner would not be responsible. It seems to us that the language of the statute is the best answer to this contention. We have recently held that it imposed a lien in rem. The Anglo-Patagonian, 235 Fed. 92, —— C. C. A. ——. The statute itself declares that such a lien arises when the wrong done was such that, if death had not ensued, the party injured would have

been entitled to proceed in rem against the ship. If the persons who died as a result of the sinking of the Luckenbach had been rescued before life was extinct, they could have held either or both ships for whatever injuries they had suffered. As they perished, those damaged by their deaths have a like right.

[2] In accordance with the requirements of the statute, and upon the petition of the appellant, a commissioner was appointed to ascertain the value of its ship and her pending freight, and to report upon the claims against her. Apparently, at the instance of the appellant, the commissioner so appointed went to New York and took testimony there as well as at Norfolk. He subsequently made his report. For his services in ascertaining the value of the vessel he was allowed a fee of $1,000, and for reporting upon the claims $2,000, or $3,000 in all. No question is made as to the reasonableness of these allowances. We must assume that their amount is not open to attack, although to us they seem sufficiently liberal, and it is always desirable that the costs of litigation, so far as they are under the control of the court, shall be kept within the most moderate bounds. The matter complained of here is of another character. For many years a rule of the District Court for the Eastern District of Virginia has required that, before the clerk delivers a record upon appeal to an appellant, the latter shall pay all the costs. It is said that the commissioner's fees are not part of the costs. We think they are. But even so, appellant says that it should not have been required to pay these fees to the commissioner, but should have been allowed, as it asked permission to do, to deposit them in the registry of the court, there to remain until after this court had passed on its appeal. As we understand it, we are not dealing with the question as to whether a supersedeas bond or stipulation may not sometimes, on appeal, take the place of actual payment, even so far as concerns costs. The real issue here is whether, as between the commissioner and the petitioner, in a limited liability proceeding, the latter is primarily liable to him for such reasonable compensation as shall be allowed by the court. If it is, it will usually make little difference whether payment is made before the appeal is perfected or after the mandate of the appellate court comes down.

We have no doubt that there is such primary liability. The petitioner is the moving party. The statute requires the appointing of a commissioner. In its petition it asks that one be named. As between it and him it is bound to see that he is paid for the services he renders. If the amount of work he is required to do or the time consumed by him is increased by the presentation of claims which in the end turn out to have been unfounded, the court may and should decree that the allowance made to him for what he did in connection with such claims, having been paid by the petitioner, shall be repaid to it by the persons who made such claims. Where claims are obviously unfounded, or clearly have at the best nothing more than a very slender foundation, or when claimants whose contentions are more serious go into unnecessary detail in the presentation of their case, or in the cross-examination of petitioner's witnesses, it is always the duty of the court, upon proper application, to put the claimants under such terms as will afford rea-

sonable protection to the petitioner. In a disputed case it may be proper to require a claimant to give security for the payment of such costs as may be decreed against him, including therein his reasonable proportion of such fees as may be allowed the commissioner, provided that the pecuniary circumstances of the claimant are such that to impose such a requirement would not amount to denial of justice to him. The rule for which the appellant here contends would not in the long run be to the interests of the petitioners in such cases. In many instances it would amount to a notice to the commissioner that he would get no pay for his work, unless the petitioner was held liable for the claims presented.

Affirmed.

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## PETERBOROUGH R. R. v. BOSTON & M. R. R.

(Circuit Court of Appeals, First Circuit. January 9, 1917.)

No. 1232.

1. EVIDENCE ⟸22(1)—JUDICIAL NOTICE—CITIZENSHIP OF PARTIES.
In an action by a New Hampshire corporation against a railroad company incorporated in Massachusetts, the federal court will take judicial notice that defendant was also incorporated under Laws N. H. 1835, c. 14, and Laws 1841, c. 6, and doing business in such state, and was therefore a citizen thereof.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 26; Dec. Dig. ⟸22(1).]

2. COURTS ⟸314—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.
The federal District Court for New Hampshire is without jurisdiction on the ground of diversity of citizenship over an action by a New Hampshire corporation against a railroad company incorporated, not only in Massachusetts, but also in New Hampshire, for the court will regard the corporation intended as defendant as the one created and existing by the laws of New Hampshire.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 860; Dec. Dig. ⟸314.]

3. COURTS ⟸299—FEDERAL COURTS—JURISDICTION—SUIT ARISING UNDER LAWS OF UNITED STATES.
A suit by a railroad company, which leased its line, to compel the lessee company to issue passes pursuant to the lease agreement, is not one over which the federal courts have jurisdiction under Act Aug. 13, 1888, c. 866, 25 Stat. 433, as a suit arising under the Constitution and laws of the United States, because the lessee's probable defense, based on the inhibition against the issuance of passes found in the acts to regulate commerce (Act June 29, 1906, c. 3591, 34 Stat. 584, and Act June 18, 1910, c. 309, 36 Stat. 539), was anticipated and attacked on the ground that such defense was unavailing under the Constitution.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 841; Dec. Dig. ⟸299.]

Appeal from the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Bill by the Peterborough Railroad against the Boston & Maine Rail-

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

road. There was a decree for defendant, and complainant appeals. Reversed, and case remitted, with instructions to dismiss.

H. A. Cutter, of Nashua, N. H., for appellant.

Archibald R. Tisdale, of Boston, Mass., for appellee.

Before DODGE and BINGHAM, Circuit Judges, and HALE, District Judge.

BINGHAM, Circuit Judge. This is a bill in equity for the specific performance of a contract. The suit was brought in the federal court for the District of New Hampshire. The plaintiff is alleged to be a New Hampshire corporation and a citizen of that state. The defendants are alleged to be Massachusetts corporations and citizens of that state. The contract in question is embodied in a lease given by the plaintiff corporation to the defendant, the Boston & Lowell Corporation, and by it assigned to the defendant, the Boston & Maine Railroad. By the lease the Peterborough Railroad leased its property and tracks situated in New Hampshire for and during the term of 93 years from and after the 1st day of April, 1893, to the Boston & Lowell, its successors and assigns. In it the Boston & Lowell covenanted, among other things, to "furnish the directors of the lessor, not exceeding five in number, and the treasurer and clerk of the lessor with free annual passes over the railroads operated by the lessee by the Boston & Maine Railroad, during the continuance of the lease." It is alleged in the bill that on the 18th day of May, 1894, the Boston & Lowell assigned the lease to the Boston & Maine, its successors and assigns, for and during a fixed term and subject to the performance by the Boston & Maine of all the obligations of the Boston & Lowell incurred under the lease, which were to be assumed by the Boston & Maine upon its acceptance of the assignment; that the Boston & Maine entered into possession of the leased property and assumed all the obligations incurred by the lessee under the lease; and that on the 1st day of January, 1913, the Boston & Maine failed to furnish the directors and officers of the Peterborough Railroad with free annual passes as agreed, and has ever since refused and now refuses to do so, claiming that it is prevented from so doing by virtue of an act of Congress to regulate commerce, found in chapter 3591, 34 Stat. at Large, and chapter 309, 36 Stat. at Large.

In the District Court it was ruled and found that the plaintiff by virtue of the lease became a nonoperating corporation; that it was not a common carrier within the meaning of the act; and that, although the act operated as an interdiction upon the defendants, it did not in this respect offend the Constitution of the United States; and dismissed the bill.

The case is now here on the plaintiff's appeal from the foregoing decree. The contention is that the court erred in construing the act of Congress as precluding the Boston & Maine Railroad from issuing passes, good for an interstate trip, to the officers of the plaintiff corporation in pursuance of the agreement which it assumed, and in holding the act constitutional if such was its proper construction.

[1, 2] We do not feel called upon to decide these questions, as we

are of the opinion that the District Court did not have jurisdiction of the cause.

While the Boston & Maine Railroad is alleged to be a citizen of Massachusetts, this court takes judicial notice of the fact that it is also a public corporation organized and existing under the laws of the state of New Hampshire, doing business in said state, and is therefore a citizen thereof. Laws N. H. 1835, c. 14, p. 223; Laws N. H. 1841, c. 6, p. 583; P. S. N. H. c. 157, §§ 1, 2, 3, and chapter 5, §§ 1, 2, 3, 6; Hall v. Brown, 58 N. H. 93, 95, 96; Western & A. Co. v. Roberson, 61 Fed. 592, 594, 9 C. C. A. 646; Case v. Kelly, 133 U. S. 27, 10 Sup. Ct. 216, 33 L. Ed. 513; Unity v. Burrage, 103 U. S. 447, 454, 455, 26 L. Ed. 405; Texas & Pacific Ry. Co. v. Cody, 166 U. S. 606, 610, 17 Sup. Ct. 703, 41 L. Ed. 1132. Such being the case, the question is whether the District Court had jurisdiction of the cause.

If its jurisdiction depended upon diversity of citizenship, and the Peterborough Railroad and the Boston & Maine Railroad are citizens of New Hampshire, the diversity requisite for federal jurisdiction would be wanting.

In Lake Shore & M. S. Ry. Co. v. Eder, 174 Fed. 944, 945, 98 C. C. A. 556, 557, it was held that:

"Whenever a corporation is sued in a state by whose laws it has been created and the question of its citizenship is involved, the court will regard the corporation intended as defendant as the one created and existing by the laws of that state."

In Boston & Maine R. R. v. Hurd, 108 Fed. 116, 118, 47 C. C. A. 615, 56 L. R. A. 193, which was an action brought in the federal court for the district of New Hampshire, it was held that the Boston & Maine Railroad was a citizen of New Hampshire by virtue of its incorporation there, and that the requisite diversity of citizenship existed, as the plaintiff, the administrator, was a citizen of Massachusetts.

In Railway Co. v. Whitton, 80 U. S. (13 Wall.) 270, 283, 20 L. Ed. 571, the action was brought in the United States Circuit Court for the Eastern District of Wisconsin, the plaintiff was a citizen of the state of Illinois, and the defendant was a corporation created under the laws of Wisconsin, and also under the laws of Illinois. It was held that, inasmuch as it was sued in the Circuit Court for the Eastern District of Wisconsin, it could "only be brought into court as a citizen of that state, whatever its status or citizenship may be elsewhere." See, also, Goodwin v. N. Y., N. H. & H. R. R. (C. C.) 124 Fed. 358, and cases there cited; Horne v. Boston & Maine Railroad, 62 N. H. 455.

[3] Neither was jurisdiction conferred upon the court below on the ground that the case was a "suit * * * arising under the Constitution or laws of the United States." 25 Stat. at Large, 433, 434.

"It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would

arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution." Louisville & Nashville R. R. v. Mottley, 211 U. S. 149, 152, 29 Sup. Ct. 42, 43 (53 L. Ed. 126), and cases there cited.

For these reasons we think that the court below was without jurisdiction.

The decree of the District Court is reversed, and the case is remitted to that court, with instructions to dismiss the suit for want of jurisdiction.

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## CITY OF SUPERIOR v. OLT.

(Circuit Court of Appeals, Seventh Circuit. November 29, 1916.)

No. 2388.

1. MUNICIPAL CORPORATIONS ⟸764(1)—STREETS—INJURIES TO PERSONS UPON —DUTY OF MUNICIPALITY—"SUFFICIENT STREET."

Under St. Wis. 1915, § 1339, declaring that if any damage shall happen to any person by reason of insufficiency or want of repair of any road in any town, city, or village, the person damaged shall have a right of action against the town, city, or village, a sufficient street is a relative term; the same care not being required with respect to the carriageway that is required of the sidewalks, though where the sidewalk is blocked, so that pedestrians will be forced to use the carriageway, the city must anticipate that and govern itself accordingly.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1616, 1619, 1620; Dec. Dig. ⟸764(1).]

2. MUNICIPAL CORPORATIONS ⟸821(8)—STREETS—JURY QUESTION.

In an action by a pedestrian, injured in a fall caused by a brick in the street, which she used because the sidewalk was obstructed with building material, the question whether the city was liable under St. Wis. 1915, § 1339, *held* for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1748; Dec. Dig. ⟸821(8).]

3. MUNICIPAL CORPORATIONS ⟸821(26)—STREETS—USE OF—RIGHT OF PEDESTRIANS.

A pedestrian is entitled to use any part of a street for public travel, including the carriageway, though bound to proceed cautiously if knowing of obstructions, and so is not guilty of contributory negligence as a matter of law in using the carriageway of a street when the sidewalk is obstructed.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. ⟸821(26).]

4. MUNICIPAL CORPORATIONS ⟸821(26)—INJURIES TO PERSONS IN STREET—JURY QUESTION.

Whether a pedestrian, who used the carriageway on finding the sidewalk obstructed, used ordinary care under the circumstances, *held* a question for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. ⟸821(26).]

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

Action by Katherine Olt against the City of Superior. There was a judgment for plaintiff, and defendant brings error. Affirmed.

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

Action for damages. Verdict and judgment for plaintiff. While walking on Fourteenth street in the city of Superior on the evening of November 16, 1914, plaintiff stepped upon or stumbled over some bricks, or pieces of broken brick, and fell, breaking her ankle, for which she brought this action. Neither the plaintiff nor her witnesses testified just how the accident occurred. It was about 7:30 p. m., and only the plaintiff describes the occurrence. She says that she was walking carefully along the street, "and my foot hit a brick, and I fell. * * * When I fell, I hurt my knee, * * * and when I reached down to get up, I felt the bricks there, and then I knew it must have been a brick. * * * I imagine it must have been a light brick, because the scar on the shoe was kind of light like brick, and when I went to get up I cut my hand on some of the bricks there; that is, half bricks." At the time of the injury she was near the center of the street, her departure from the usual course being occasioned by the presence of a large amount of building material, unloaded on the south side of the street and adjacent to the abutting building, the material having been placed there by the owner by permission from the city.

Fourteenth street runs east and west; the roadway was, at the time of the injury, brick paved for a width of 40 feet and on either side there was a tree bank and then a 6-foot cement sidewalk. Travel on the south sidewalk was blocked by the presence of the building material. Plaintiff stated that she did not go to the north sidewalk, because it was icy, a condition disputed by the defendant. A city ordinance granting a lot owner the privilege of using part of the street for temporary deposit of building material required the user to build a 2-foot plank walk around the same. This sidewalk was never constructed, as the street was newly paved with brick, and when unobstructed appellant claims was fairly comparable in safety to the cement sidewalk or to any temporary plank walk required by the ordinance.

Plaintiff stated that she had frequently, during the preceding weeks, taken the course followed that evening and had always found some stray bricks in the street. In fact, she said there was a path that pedestrians used, and which she was following that evening, which was free from and partially lined on either side with brick. This was disputed by the defendant, whose witnesses stated that a few loose brick fell daily from the wagons, but each night they were removed from the street. There had been no hauling for at least two days prior to the date of the accident.

The city, having appropriately raised the questions, contends that the court erred in refusing to hold the plaintiff guilty of contributory negligence as a matter of law, and also erred in holding the evidence sufficient to support a verdict of negligence.

T. L. McIntosh, of Superior, Wis., for plaintiff in error.
John A. Cadigan, of Superior, Wis., for defendant in error.

Before MACK, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). Viewing the facts most favorably to the plaintiff, the question for determination on the issue of negligence is whether the presence of bricks or pieces of bricks, under the then existing circumstances, in a street otherwise sufficient for travel, presents a jury question.

[1] The liability of a city for damages occurring through defects in the streets is in Wisconsin fixed by statute. Section 1339 of the Revised Statutes of Wisconsin reads as follows:

"If any damage shall happen to any person, his team, carriage or other property, by reason of insufficiency or want of repair of any * * * road in any town, city, or village, the person sustaining such damage shall have a right to sue for and recover the same against any such town, city or village."

See Kawiecka v. City of Superior, 136 Wis. 613, 118 N. W. 192, 21 L. R. A. 1020; Morrison v. Eau Claire, 115 Wis. 538, 92 N. W. 280, 95 Am. St. Rep. 955; Kleiner v. Madison, 104 Wis. 338, 80 N. W. 453.

"A sufficient street" is at best a relative term. The same care is not required of a city in reference to its carriage way as to its sidewalks. The city is required to keep its streets in a reasonable state of repair, but it meets the duty imposed upon it by the statute when it maintains the respective portions of the street in a reasonably safe condition in the light of the purpose for which such portions are intended.

The fact that a part of the sidewalk and tree bank as so blocked as to make it necessary for pedestrians to take the carriage way is urged as a reason why the question of negligence should be left to the jury in the present case. Having by its action blocked travel on one sidewalk and a portion of the carriageway the city must anticipate that pedestrians would use the carriageway, and govern itself accordingly.

[2] The evidence tends to show the presence of several brick and pieces of brick where the plaintiff fell. The failure of the city to require the contractor to construct the two-foot board walk made it impossible for the plaintiff to pursue any well-defined course. The failure to fence off the pile of material required her to keep towards the center of the street. The accident occurred on Monday, and if, as was testified to, no brick had been hauled for several days next preceding the accident, the jury may have concluded that the brick had so lain in the street all that time. Viewing all these facts as we are required to do, on this review of the court's denial of a motion to direct a verdict for the defendant, we are unable as a matter of law to say that the street was sufficient. Whether the presence of brick in the numbers and condition and for the time shown by the testimony was a defect presented a jury question.

[3] Defendant's contention that the plaintiff was guilty of contributory negligence as a matter of law is untenable. Plaintiff was within her right when she took the carriageway. The street and all of it was for public travel. Of course, knowing that stray bricks were on the carriageway, she was required to proceed cautiously.

[4] Whether she exercised such care as the ordinarily careful person under like or similar circumstances would have exercised was also a question for the jury to determine. Dralle v. Reedsburg, 130 Wis. 347, 110 N. W. 210; Kelley v. Fond du Lac, 31 Wis. 179; Gerrard v. La Crosse C. R. Co., 113 Wis. 258, 89 N. W. 125, 57 L. R. A. 465; Nelson v. Shaw, 102 Wis. 274, 78 N. W. 417.

We find no error in the record, and the judgment is affirmed.

## SMITH v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Second Circuit. January 12, 1917.)

No. 114.

1. MASTER AND SERVANT ⊜285(7)—INJURIES TO SERVANT—PRESUMPTIONS—RES IPSA LOQUITUR.

Plaintiff, a brakeman in defendant's employ, while walking between two tracks to reach the cars on which he was working, was passed by another train and struck and injured by some object which he thought felt like iron. There was no showing that anything projected from the passing train, although it was contended that firemen frequently allowed hooks used in raking the fire to extend over the side, and that under the doctrine of res ipsa loquitur the burden of explaining the injury was upon defendant. *Held* that, as the presumption which the jury may make cannot serve as the foundation for another presumption, and as trains frequently catch and throw heavy objects which may injure those in proximity, plaintiff's showing was not enough to take the case to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1016; Dec. Dig. ⊜285(7).]

2. NEGLIGENCE ⊜121(2)—PRESUMPTIONS—RES IPSA LOQUITUR.

Before a defendant is called upon to explain how an injury is received, there must be facts showing a surrounding situation which in ordinary course would not permit or produce injury, and that something under defendant's control did inflict the injury; the doctrine of res ipsa loquitur not converting the general issue into an affirmative defense.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 218, 225, 271; Dec. Dig. ⊜121(2).]

3. EVIDENCE ⊜54—PRESUMPTIONS—BASIS.

While the jury may in some cases presume the existence of a fact from other facts, no presumption can be based on that presumption which the jury is authorized to make.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 74; Dec. Dig. ⊜54.]

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

Action by Roy W. Smith against the Pennsylvania Railroad Company. There was a judgment dismissing the complaint at the close of plaintiff's case, and he brings error. Affirmed.

Kellogg & Baker, of Buffalo, N. Y. (Francis F. Baker, of Buffalo, N. Y., of counsel), for plaintiff in error.

Rumsey & Adams, of Buffalo, N. Y. (H. J. Adams, of Buffalo, N. Y., of counsel), for defendant in error.

Before WARD, ROGERS and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. Plaintiff was a brakeman in defendant's employ, and while walking between two tracks, in order to reach the cars on which he was working, was passed by a Pennsylvania train running on one of the tracks. At this time he received injuries, and brings this action to recover damages therefor.

The complaint alleges that, while plaintiff was proceeding along the roadbed as above stated, he was "struck by a piece of iron which was negligently and carelessly allowed to project out beyond the side of a passing car or engine" of the moving train aforesaid. No one did, or apparently could, testify to the occurrences immediately before injury, except Smith himself. The substance of his evidence is that as the train went by, he being distant from it less than 4 feet, something hard hit him on the head; he did not know what it was, though he thought it "felt like iron."

Testimony was offered tending to show that firemen of locomotives use an iron hook about 10 feet long wherewith to rake the engine fire, and that after so raking and getting the end of the tool hot, they swing it outboard—i. e., over the side—in order to get it back into the body of the tender, where it lies when not in use. There was no evidence that this had occurred on the passing train. The action is at common law, no statute is invoked by either side. The trial court held that there was no proof of negligence, and dismissed complaint accordingly.

Plaintiff now contends that it was for the jury to say whether the rake hook was swung out on the train near which he was injured, and also whether he was hit by such hook; there being no suggestion of any other possible projection that could have injured him.

[1-3] In the confessed absence of any positive or direct evidence as to how Smith was injured, or what hit him, the principle of res ipsa loquitur is relied on. This doctrine is stated in San Juan, etc., Co. v. Requena, 224 U. S. 89, 32 Sup. Ct. 399, 56 L. Ed. 680, and Sweeny v. Erving, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann Cas. 1914D, 905, where it is pointed out that, however applicable it may be, in no case is the general issue converted into an affirmative defense; and this is true, though the burden of explanation may rest on the defendant. Kraljer v. Snare, etc., Co., 221 Fed. 256, 137 C. C. A. 108. Before, however, any defendant is called upon to explain how (e. g.) an injury was received, there must be facts proved affirmatively showing a surrounding situation which in ordinary course would not permit or produce injury, and also that something under defendant's control did notwithstanding inflict the injury complained of. With proof in this shape, the jury may infer negligence from the occurrence of injury.

The plaintiff's difficulty in this case is that there is no proof that any definitely indicated thing wrought the injury, nor that the circumstances rendering it possible for the injuring thing suggested (i. e., the rake hook) to reach or touch him existed at the time and place of damage. A jury may in some cases presume the existence of a fact from the existence of other facts which have been proved; but the presumed fact must have an immediate connection with the established facts from which it is inferred. Manning v. Insurance Co., 100 U. S. 697, 25 L. Ed. 761. But a presumption which the jury is to make is not a circumstance in proof, and is not, therefore, a legitimate foundation for a presumption. The circumstances must be proved, and not themselves be presumed. United States v. Ross, 92 U. S. 284, 23 L. Ed. 707. And, generally speaking, there cannot be a verdict based on inferences

from inferences; "one presumption cannot be built on another." Looney v. Metropolitan, etc., Co., 200 U. S. at 488, 26 Sup. Ct. 303, 50 L. Ed. 564.

Applying the foregoing: All that was shown below might justify an inference, from the habit of some firemen, somewhere, to swing rake hooks, that the fireman on the train passing Smith then and there did so; from which the further inference must be drawn that the hard substance which struck Smith was the rake hook so swung. This is inadmissible under the rules above referred to, and unreasonable in view of the one admitted fact in this case, viz. that Smith was walking or standing in a place where common knowledge teaches that objects quite heavy and hard enough to injure a man's face or head are caught up and thrown by rapidly passing trains.

The very earnest argument for plaintiff on this writ relies upon authorities whereof Fordham v. Gouverneur Village, 160 N. Y. 541, 55 N. E. 290, is a good example. The plaintiff's decedent there died of injuries received in falling on a bridge to which changes were being made. She was found fatally hurt near a plank nailed over a hole in the bridge walk, producing an unaccustomed irregularity or unevenness in the public highway. This temporary cover was not revealed by any lighting, and the injury was received at night. The jury was permitted to infer, from the circumstances shown, that death was caused by tripping on the plank. This case perfectly exhibits the difference between an inference from established facts and the inference from an inference urged upon us in this cause.

The dismissal complained of was right, and the judgment is affirmed.

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## MOORE FILTER CO. v. TAUGHER. *

(Circuit Court of Appeals, Ninth Circuit. February 5, 1917.)

No. 2843.

1. COURTS ⟸325—JURISDICTION—WAIVER OF OBJECTIONS.

In an action in the federal court, defendant, a foreign corporation, by answering to the merits and setting up a counterclaim, without raising by demurrer the question of the court's jurisdiction by virtue of service on defendant's agent, waived all objections, and cannot thereafter urge them.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 884; Dec. Dig. ⟸325.]

2. EVIDENCE ⟸487—ADMISSIBILITY—VALUE OF SERVICES—ATTORNEY AND CLIENT.

In an action to recover the value of personal services rendered by plaintiff in effecting a settlement, whereby a third person was induced to confess judgment in favor of defendant for infringement of defendant's filter patents, a witness familiar with the patent situation with respect to filters may testify as to the value of the services of plaintiff, in view of the surrounding circumstances.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2272; Dec. Dig. ⟸487.]

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

*Rehearing denied March 19, 1917.

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 J. L. Taugher against the Moore Filter Company, a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

J. R. Pringle and Clarence A. Shuey, both of San Francisco, Cal., for plaintiff in error.

John L. Taugher, of San Francisco, Cal., pro se.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error, a citizen of California, brought an action to recover the value of personal services alleged to have been rendered to the plaintiff in error, a corporation of the state of Maine. Service of the summons was had upon an agent of the plaintiff in error residing in San Francisco. From the allegations of the complaint, it was inferable that all the services therein mentioned were rendered elsewhere than in the state of California. A motion was made to quash the service of the summons. The motion is not found in the record, but from a memorandum opinion of the court below it appears that the ground of the motion was that the person who was served with the summons was not an agent upon whom service was authorized to be had. At the beginning of the answer to the complaint is the following:

"Now comes the defendant, the Moore Filter Company, and without waiver of its objections that this honorable court has acquired and can lawfully exercise no jurisdiction over it or over the subject-matter of this action, which said objections, and the several benefits thereof, are specifically reserved to it, and also specifically reserving all of its rights under motion to quash service of summons in this action heretofore made by it and denied by this court, said defendant makes answer and says."

Then followed denials of certain of the allegations of the complaint, and in conclusion the plaintiff in error set up a counterclaim for $7,500, which it was alleged arose out of the same transactions that were set forth in the complaint. There was no allegation in the answer that the services for which the defendant in error sought to recover were rendered without the state of California, or upon contracts made elsewhere than in that state, and nowhere in the pleadings did the plaintiff in error present such an objection to the jurisdiction. Upon the conclusion of the opening statement for the plaintiff in the action, the court on its own motion suggested its doubt of the jurisdiction, on the ground that the subject-matter of the action grew out of a transaction which did not have its origin in the state or in the district, and no part of which was performed in the state or district; but, after argument of counsel, the court concluded, in view of the nature of the pleadings and the interposition of the counterclaim, that the court had acquired jurisdiction, and so ruled. To that ruling the plaintiff in error reserved an exception, and again, at the conclusion of the plaintiff's case, moved to dismiss the action on the ground that the court could law-

fully exercise no jurisdiction over the defendant in the action or the subject-matter thereof.

[1] The plaintiff in error now presents to this court the question of the jurisdiction, and it contends that it did not waive the question by pleading a counterclaim, for the reason that, under the statute of California and the decisions of the courts of that state, it was compelled to plead the counterclaim or lose the right to assert the same in any subsequent action. We need not pause to consider whether a counterclaim thus pleaded under compulsion would take the case out of the rule of Merchants' Heat & L. Co. v. Clow & Sons, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488, in which case the defendant elected to sue upon a counterclaim, although under the law of Illinois which controlled the question there was no obligation to plead a cross-demand, and whether he should do so or not was left to his choice; for, in our opinion, the plaintiff in error here waived all right to object to the jurisdiction on the ground now urged, by answering upon the merits and setting up the counterclaim and going to trial upon both, without having presented by demurrer or answer that question of the jurisdiction to the court below.

[2] Error is assigned to the admission of a portion of the testimony given by one Oliver, a mining engineer engaged in manufacturing and selling filters for cyanide processes used for the same purpose as the Moore filter, who had testified that in the year 1913 he had a general idea of the patent situation in the United States relating to filters in use in mining operations similar to the Moore process, and was familiar with the claims made by the Moore Filter Company under its patent filter process, and was familiar with the litigation between that company and the Tonopah Belmont Mining Company, and had studied the matter very thoroughly, because he was having trouble with the Moore Filter Company, which claimed that he was infringing its patents, that he had obtained patents for filter apparatus and had given a great deal of consideration to the filter situation, both in the United States and abroad, and that he knew of the settlement the plaintiff in error made with the Golden Cycle Mining Company, by which the latter confessed judgment for $50,000, which was announced in the technical journals. He was asked:

"What value, in your judgment, was the confession of judgment to the Moore Filter Company, if the Moore Filter Company had made reasonable use of it in its negotiations and dealings with other mining companies that were infringers of its patents?"

Objection was interposed on the ground that the witness was not competent to pass on the value of a judgment of confession, and on the further ground that the testimony was incompetent. The court interposed by explaining to the witness that what counsel was asking him was whether, from his knowledge of the business, he would consider that a second adjudication of the validity of the patent, where the patent had given rise to litigation growing out of the infringements, would be of value to one owning the patent and making future settlements with parties who had infringed the patent. The answer of the witness was:

"It is a difficult matter to put in dollars and cents. It came at a psychological moment. The Moore Filter Company had won its suit against the Tonopah Belmont in another circuit; and this was the first settlement that was made, the first large settlement they had gotten from infringers. The Tonopah Belmont case was still in the courts awaiting a judgment—waiting for the accounting. They had won the case."

We are not convinced that the objection should have been sustained, or that it was reversible error to admit this testimony of a witness who, to some extent, was an expert and was qualified to testify as to the timeliness of the services rendered by the defendant in error, and the circumstances under which they were rendered. That was the sum and substance of his answer to the question, and, in the light of the meager portion of the evidence which the record contains, it does not appear that such testimony was beyond the scope of legitimate inquiry. We find no error.

The judgment is affirmed.

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KLEIN et al. v. BEACH et al.

(Circuit Court of Appeals, Second Circuit. January 16, 1917.)

No. 63.

1. COPYRIGHTS ⊜50—CONTRACT—"PRESENTATION ON STAGE."

A contract, entered into after motion pictures had become well known, the preamble of which recited that one of the parties had dramatic rights in a novel written by him, and which granted to another party the exclusive right to dramatize the novel for presentation on the stage, conveyed only the right to dramatize for performance by actors in person, not the rights to dramatize for motion picture performance, and did not invalidate a subsequent contract granting the motion picture rights.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 47, 49; Dec. Dig. ⊜50.]

2. COPYRIGHTS ⊜50—CONTRACTS—IMPLIED COVENANCE.

That contract, having been executed after motion picture presentations were known, there is no implied covenant against granting rights to dramatize for motion pictures to another, to the detriment of the rights granted by the contract.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 47, 49; Dec. Dig. ⊜50.]

3. COPYRIGHTS ⊜50—CONTRACTS—CONSTRUCTION—REVERSION.

A subsequent provision of the contract, which provided that the right therein granted to a producer, who produced the dramatized version on the stage, should revert to the author and dramatist on certain conditions, does not enlarge the rights of the dramatist.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 47, 49; Dec. Dig. ⊜50.]

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

Suit by Philip Klein, as executor, and Lilian Klein, as executrix, of the last will and testament of Charles Klein, deceased, against Rex Beach and the Selig Polyscope Company, Incorporated. From a decree

dismissing the complaint as against defendant Selig Polyscope Company, Incorporated (232 Fed. 240), complainants appeal. Affirmed.

The decree below dismissed the complaint as against the defendant Selig Polyscope Company, Incorporated, on motion. The plaintiff, who held rights from the defendant Beach under a contract set forth in the opinion below, asked to enjoin Beach and the defendant Selig Polyscope Company, Incorporated, from producing a motion picture play under a subsequent grant from Beach to the Selig Polyscope Company, Incorporated. The District Judge held that Beach's grant to Klein under the contract in question did not cover motion picture rights and that the subsequent grant therefore prevailed.

Ernst & Cane, of New York City (Bernard M. L. Ernst, Melville H. Cane, and Emil Breitenfeld, all of New York City, of counsel), for appellants.

David L. Podell, of New York City, for appellee.

Weadock & Miner, of New York City, for defendant Beach.

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

LEARNED HAND, District Judge (after stating the facts as above). [1] The turning point in this case is the scope of the grant, whether by its terms it conferred upon Klein dramatic rights in the larger sense, including presentation, not only by living actors, but also by motion pictures, or whether it was limited to "the stage" proper. The actual words of grant are these:

"The sole and exclusive right to dramatize the said book for presentation on the stage."

The plaintiff insists, in view of Kalem Co. v. Harper, 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285, and Frohman v. Fitch, 164 App. Div. 232, 149 N. Y. Supp. 633, that dramatic rights include motion picture rights. If used alone, that is doubtless true, especially if the contract antedate the commercial use of motion pictures.

[2] Yet Judge Hough, in Harper v. Klaw (D. C.) 232 Fed. 609, held on a contract dated in 1899 that the words, "the exclusive right of producing such dramatic version on the stage," did not give to the grantee any motion picture rights, although it is true he also held that such a grant raised by implication a negative covenant against destroying the effect of such a grant by motion pictures. That decision would avail the plaintiff here, if the date of this contract had been so early; it will hardly serve at the end of November, 1911, long after motion pictures had become common, and the distinction between them and the stage proper had for all purposes become well fixed. There is no basis for an implied negative covenant, because the situation has not changed since the contract was made, so as to create an unexpected situation, if the terms be strictly interpreted.

We start, therefore, with a grant prima facie of "stage" rights only. In the preamble of the contract the distinction is already indicated between "stage" rights and general dramatic rights; thus, Beach is recited as having "dramatic rights" in the novel, while Klein is only "to drama-

tize the said book for presentation on the stage," which is to result in a "play," the exclusive rights in which are to go to the Authors' Producing Company. The grant follows the scheme of the preamble. Beach's grant to Klein is what we have quoted; Beach and Klein's grant to the Authors' Producing Company is an exclusive license to produce this "play" on the stage. The word "play" is specifically defined as covering all the results of the exercise of Klein's dramatic rights, and as the Authors' Producing Company has sole license to produce the play on "the stage" (the very word used to limit Klein's rights), it follows that the Authors' Producing Company's license is as broad as Klein's right. Nobody asserts that the Authors' Producing Company got any license to produce motion pictures, if Klein had made such a scenario. The context puts that question beyond any doubt.

[3] Some point is made of the clauses securing the reversion of the Authors' Producing Company's rights to Klein and Beach, but it only serves to help the defendants. No rights in reversion from the Authors' Producing Company can give Klein any motion picture rights, if by hypothesis the Authors' Producing Company's rights are limited to "stage" production proper. On the contrary, such reversion was perhaps thought necessary to revest in Klein and Beach any rights of production whatever, because the grant to the Authors' Producing Company was as broad as any rights created by the contract. In any case the reversion enlarges nothing.

In general it is quite clear that this was the pervading purpose of the parties. Klein was to make a play out of the book, and the Authors' Producing Company was to produce it; if they failed, Klein and Beach might try it together. There is no intimation that Klein should have further rights to make, not a play, but a motion picture scenario. Such a scenario is hardly a "play" for "presentation on the stage." We have this language to construe at a time when the different requirements of "screen" and "stage" were well understood, and with them the need of writing two quite separate kinds of dramatization. We see no reason in the face of that situation to suppose that the language was used out of its natural meaning, or in disregard of a well-established convention which was applicable. Hence we confine the contract to the enterprise before the parties and to such subsequent ventures as the reversions might enable Klein and Beach to undertake.

Therefore we find that there was no implied covenant, and that the grant is limited. As Beach has not appealed, we do not wish to be understood as holding that the complaint states a cause of equity against him.

Decree affirmed, with costs.

## THE JOHN G. McCULLOUGH.

## THE BEGONIA.

(Circuit Court of Appeals, Fourth Circuit. December 12, 1916.)

No. 1463.

1. COLLISION ⊜74—MOVING AND ANCHORED VESSEL—INEFFICIENT LOOKOUT.
A finding by the trial court that a collision in Chesapeake Bay at night between an anchored and a moving vessel was due solely to the fault of the moving vessel for failing to keep a proper lookout *held* sustained by the evidence.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 104; Dec. Dig. ⊜74.]

2. COLLISION ⊜75—MOVING AND ANCHORED VESSEL—ANCHOR LIGHTS.
That the stern light of a vessel anchored at night was not more than 10 feet lower than the forward light, instead of 15 feet, as required by the Inland Rules (Act June 7, 1897, c. 4, § 1, art. 11, 30 Stat. 98 [Comp. St. 1913, § 7884]), is not sufficient to charge her with fault for a collision with a moving vessel, where the evidence showed that the lights were otherwise in proper position, were burning brightly, and could be seen for a long distance.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 105–121, 207; Dec. Dig. ⊜75.]

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

Suit in admiralty for collision by Joseph Robinson, master of the British steamship Begonia, against the American steamship John G. McCullough, Lars P. Nelson, master, with cross-libel against the Begonia. Decree against the McCullough, and her claimant appeals. Affirmed.

For opinion below, see 232 Fed. 637.

T. Catesby Jones, of New York City (Harrington, Bigham & Engler, of New York City, and J. W. Willcox, of Norfolk, Va., on the brief), for appellant.

Leon T. Seawell, of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

KNAPP, Circuit Judge. On December 3, 1915, about half past 3 in the morning, in the lower Chesapeake Bay, there was a collision between the British steamship Begonia, lying at anchor, and the American steamship John G. McCullough, bound for Hampton Roads. The master of each vessel claimed that the other was at fault, and both of them promptly filed libels for damages. The cases were tried together, and a decision rendered exonerating the Begonia and holding the McCullough solely responsible for the accident. From the decree which followed this appeal is taken.

[1] Two questions are presented. On behalf of the McCullough it is alleged that the Begonia was anchored in an unusual, if not unlawful, place, in the path of vessels coming in from the Capes, and that she did not display such lights or maintain such a watch as to give proper warning to other vessels which might approach her in the nighttime. On behalf of the Begonia these allegations are denied, and blame is charged upon the McCullough for neglecting to keep a proper lookout, and so failing to discover the Begonia in time to avoid a collision. This was the main issue litigated at the trial. Upon conflicting testimony the court below decided this issue in favor of the Begonia. Without reviewing the evidence, it is sufficient to say that the findings of the learned and experienced judge who heard the case are amply supported by testimony, and that no adequate reason appears for disagreeing with his conclusion.

The other ground for reversal is based upon article 11 of the Act of Congress of June 7, 1897, chapter 4, 30 Stat. at Large, 98 (Comp. St. 1913, § 7884), which provides that a vessel of 150 feet or upwards in length, as was the Begonia, "shall carry in the forward part of the vessel, at a height of not less than twenty and not exceeding forty feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than fifteen feet lower than the forward light, another such light." It is argued that the Begonia was not so lighted at the time of the accident, and therefore the appeal should be sustained.

There are two answers to this contention. In the first place, we are of opinion that the meager and indefinite testimony upon this point is not sufficient to overcome the presumption that the Begonia complied with the law by lights displayed and arranged according to the prescribed requirements. The difference in height of the Begonia's anchor lights was only incidentally alluded to by the witnesses who mentioned it at all, and it is evident that their statements in that regard had reference to the general appearance and position of the lights, and not to any distinct contention that one of them was less than 15 feet lower than the other. In other words, the precise question now raised was not in open dispute at the trial, and therefore takes on at this time the appearance of an afterthought. True, the appellant's libel alleges that "the anchor lights of the Begonia were not properly set," and this was, of course, enough to permit evidence of a violation of the statute; but it is plain from the averments as a whole, as well as from the range of testimony, that this was not the real ground upon which liability was predicated. If it was intended to rely upon a disregard of the statutory obligation in this respect, we think the appellant should have been prepared to give more positive proof upon an issue which, although formally embraced in the pleadings, was not actually the subject of controversy at any stage of the trial. That this specific default was not then brought forward is further shown by examination of the record, and by the fact that the matter is not referred to in the opinion of the court below. This being so, it seems clear to us that the incidental utterances of one or two witnesses, who appear to have testified without having the point in mind, and whose

statements at best are quite inconclusive, should not now be allowed to outweigh the presumption that the lights of the Begonia complied with the statute.

[2] In the second place, and on the assumption that the difference in height of the two lights was somewhat less than 15 feet, it is impossible to believe that this difference caused or contributed in any way to the accident which happened. It is virtually admitted by appellant that one of the lights in question was at least 10 feet higher than the other, and that both were otherwise in proper position. To say that the lookout of the McCullough failed to discover the presence of the Begonia for the sole reason that one of her lights was only about 10 feet above the other, and that he would have made the discovery if the difference had been 15 feet, is to advance a proposition which finds no support in any legitimate inference from the testimony, and which is discredited by all the circumstances of the case. The fact that two pilots, who brought in vessels about the same time, and who were near the scene of the collision when it occurred, testified that the lights of the Begonia were burning brightly, that they had no trouble in seeing them, one of them saying that they could be seen 5½ miles away, and that they also saw the lights of other craft in the immediate vicinity, which the lookout of the McCullough says he did not see, tends strongly, in our judgment, to support the conclusion that the accident in question is attributable to the failure of the McCullough to have a competent and efficient lookout, and that reasonable precaution on the part of those in charge of that vessel would have discovered the presence of the Begonia in ample time to avoid collision.

Affirmed.

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## In re BRAUN.

(Circuit Court of Appeals, Second Circuit. January 23, 1917.)

No. 115.

1. BANKRUPTCY ⟸414(1)—DISCHARGE—BURDEN OF PROOF.
In view of the presumption of honesty, creditors opposing a discharge on the ground that the bankrupt had been guilty of a fraudulent transfer of his property have the burden of proof.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 720; Dec. Dig. ⟸414(1).]

2. BANKRUPTCY ⟸468—DISCHARGE—EVIDENCE—SUFFICIENCY.
On appeal from an order denying a bankrupt's application for discharge on the ground that he had, within four months of the filing of the petition in bankruptcy, conveyed his property with intent to hinder and defraud his creditors, *held* that, under the evidence, the order should not be affirmed, but should be remanded for the purpose of taking further testimony.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 930; Dec. Dig. ⟸468.]

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

In the matter of the bankruptcy of Samuel Braun. From an order denying the discharge of the bankrupt, he appeals. Remanded, with directions.

H. & J. J. Lesser, of New York City (Jacob J. Lesser, of New York City, of counsel), for appellant.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The question involved in this appeal is the right to a discharge in bankruptcy. On the presentation of the petition of the bankrupt for his discharge, objection was made thereto by two of the creditors, and the matter was referred to a special master, who reported, recommending that the discharge be denied. The specifications of objections to the discharge made by the creditors were six in number. The master reported that in his opinion the charge made in specification No. 3 was established. That specification reads as follows:

"Upon information and belief that within four months immediately preceding the filing of the petition in bankruptcy herein, said bankrupt transferred to his brother, one Isidor Braun, certain property consisting of $300 in cash, with intent to hinder, delay, and defraud his creditors; that said transfer was accomplished ostensibly for the purpose of paying an alleged debt to the said Isidor Braun, whereas in truth and in fact said bankrupt was not indebted to the said Isidor Braun in any sum whatsoever; and that the said $300 in cash was paid to the said Braun with the intent and purpose of placing the same beyond the reach of creditors, and in order that the said sum might be held in secret trust for the benefit of said bankrupt."

The court below has confirmed the report of the special master and entered the order denying the discharge.

[1] The rule is well established, and is not questioned here, that the opposing creditors have the burden of proof on opposition to discharge. In re Gaylord (D. C.) 106 Fed. 833, affirmed in 112 Fed. 668, 50 C. C. A. 415. The presumption is that men are honest, and one who charges to the contrary must offer clear and convincing proof, if this presumption of the law is to be overcome. The contrary must be shown by a preponderance of testimony. In re Remmers, 173 Fed. 484, 97 C. C. A. 490; Remington on Bankruptcy (2d Ed.) § 2639, volume 3.

[2] The bankrupt was a dealer in flour, selling it by the barrel in small quantities to bakers. He resided in the city of New York and seems to have had no store or place of business. His deliveries were made direct to his customers from the dock, where the flour arrived on consignment. His purchases of flour amounted to about 9,000 or 10,000 barrels a month. He seems to have done business in a very loose way, and the wonder is that one who conducted business as he seems to have done could maintain it for any length of time. Such books as he kept were imperfect, and his wife made most of the entries. He had few, if any, cash customers. In reply to the question whether it was usual to leave entries out of the ledger, he replied:

"Well, it used to happen, maybe I was too busy; I used to be myself the bookkeeper and salesman, and I was everything."

He made entires a week, and sometimes two weeks, after transactions occurred. His brother acted as a salesman, and the cash book represented only his brother's collections. He never kept a cash book in which he entered his own collections. The testimony is that the bankrupt paid his brother $300 in cash a few weeks before the petition in bankruptcy was filed; that the brother asked the bankrupt for the money, and gave as his reason for making the request that he needed the money to go into a different kind of business. He also testified that he had five or six years before given the bankrupt $1,500, which he had saved. "I tell him," he testified, "he shall give me back money, and he tell me he cannot get so much money, and he give me $300." He said that the $1,500 had been saved out of his earnings as foreman in a ladies' waist shop, where he had been paid $30 a week for several years, and that he accumulated it between the ages of 15 and 20. He was unmarried, and lived with his married sister, and paid her $5 a week board.

While it is somewhat improbable, it is not impossible, that he had saved the sum he says he saved by the time he reached the age of 20 years. The bankrupt's testimony was to the same effect—that he had received $1,500 from his brother, and that he received it as a loan; that when he paid him the $300 he did not know that a petition in bankruptcy was to be filed against him; that his brother had ceased working for him seven or eight days before he was closed up by his creditors; that his books contained no reference to the loan of $1,500, and that he never had paid any interest on it, and had given no note; that the $300 was paid in cash, and not by a check; that when the $1,500 was originally paid to him—it was not paid all at one time, but in different sums on four or five different occasions—it, too, was paid in cash; that the reason he did not give his brother a check for $300 was that it would have cost the latter $2 or $3 to have the check cashed. There is no comprehensible explanation given of the reason why it would have cost his brother that amount to have obtained the money on the check. The bankrupt did not schedule his brother as a creditor, and in a statement given by him on November 13, 1911, for the purpose of obtaining credit, the bankrupt did not mention any indebtedness to his brother, in the sum of $1,500, or in any other amount.

The testimony is confusing and unsatisfactory, and in certain particulars is contradictory. The testimony of the brother Isidor as to the disposition he made of the $300 paid him by the bankrupt given on his first examination was that he used it to repay his own indebtedness to his poor relations. At his subsequent examination he stated that he used the money as a deposit with one Drillman, for whom he had gone to work. Both versions are not true, and they discredit his testimony that he had loaned $1,500 to the bankrupt. The liability of the prejudice to the bankrupt growing out of these contradictory statements may be avoided, if the bankrupt is granted the right to recall and re-examine the witness Isidor as to this feature of his testimony.

The bankrupt and his brother are ignorant persons, without much knowledge of business, and with an imperfect knowledge of the English

language. The bankrupt's business was carried on in a lax and primitive fashion. The impression which a reading of the testimony has made upon us is that there is some doubt whether the conduct of the bankrupt was in reality fraudulent. It seems to us, under the circumstances, that the safest disposition to make of the matter is to refer it back to the master to examine further concerning the irregularities in the testimony which are pointed out in his report. Further inquiry may serve to clear up what now appear to be irreconcilable statements. We have not had the benefit of seeing the witnesses on the stand, and for that reason are reluctant to disagree with the master and the District Judge, who reached the conclusion that the discharge should be refused. We should, however, be fully satisfied that we are right before branding as cheats and perjurers men who may be only ignorant and unused to the methods of modern business and who intended to commit no fraud. As the testimony now stands we are not satisfied that fraud is clearly shown. At least the discharge should not be denied until further testimony is taken with respect to certain irregularities which the master pointed out in his report.

The case is remanded, with directions to proceed in accordance with this opinion.

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## SENFT v. LEWIS et al.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 127.

1. BANKRUPTCY ⟸188(1)—CLAIMS—CHATTEL MORTGAGE—STATEMENT OF INTEREST.

Under the provision of the Bankruptcy Act, giving the trustee the rights of a creditor with an unsatisfied execution, and of Lien Law N. Y. (Consol. Laws, c. 33) § 235, making a chattel mortgage invalid against the creditors of the mortgagor after the expiration of one year, unless a statement of the interest of the mortgagee or his successor is filed, the rights of a chattel mortgagee against the trustee in bankruptcy are limited to the amount of his interest so stated, though that is less than the amount actually due under the mortgage.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286–289, 291, 293, 294; Dec. Dig. ⟸188(1).]

2. BANKRUPTCY ⟸303(1)—RECOVERY OF PROPERTY—FRAUDULENT CONVEYANCE—INSOLVENCY.

In an action by the trustee under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (Comp. St. 1913, § 9651), to recover property conveyed by the bankrupt in fraud of his creditors, proof of the insolvency of the bankrupt at the time of the conveyance is not necessary, if the fraudulent intent of the bankrupt and the lack of good faith of the transferee is sufficiently shown, though proof of such insolvency is usual, and often necessary, to establish fraud.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458, 459; Dec. Dig. ⟸303(1).]

3. BANKRUPTCY ⟸188(1)—CLAIMS—CHATTEL MORTGAGE—INTEREST.

Where a chattel mortgagee at the expiration of one year filed a statement that his interest in the mortgage was a certain amount, with inter-

est, and there was no proof that any interest had been paid, he is entitled to the interest on the amount of principal claimed from the date of the mortgage, as against the trustee in bankruptcy of the mortgagor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286–289, 291, 293, 294; Dec. Dig. ⊜188(1).]

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

Suit by David Senft, as trustee in bankruptcy of Joseph White, against Burt G. Lewis and another, to set aside a conveyance by the bankrupt to the defendants. Decree for plaintiff, and defendants appeal. Decree modified and affirmed.

Vincent P. Donihee, of New York City, Henry M. Cummings, of Coney Island, N. Y., and Robert E. Moffett, of Brooklyn, N. Y., for appellants.

L. & M. Blumberg, of Brooklyn, N. Y. (Leopold Blumberg, of Brooklyn, N. Y., of counsel), for appellee.

Before WARD, ROGERS and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. The questions presented by the assignments of error render unnecessary any full statement of the facts. White conducted a hotel at Coney Island, the premises being leased to him. Lewis held a chattel mortgage upon (apparently) the contents of the hotel, which he assigned to the Ulmer Brewery. The validity of this mortgage is not attacked; but when it became necessary to file a statement exhibiting the interest of the mortgagee or his assignee, in order to continue the lien, the Ulmer Brewery, as assignee, stated of record that the amount due was "$1,500 and interest."

After the assignment of mortgage to the Brewery, and within four months of petition in bankruptcy filed against White, he transferred to Lewis the hotel and its contents. Thereafter the Brewery foreclosed the mortgage, and $2,800 was realized at the foreclosure sale. Thereupon the trustee of White brought this suit, alleging that the transfer to Lewis by White was in fraud of creditors within section 67e of the Bankruptcy Act, and demanding from the Ulmer Brewery so much of the amount received at the foreclosure as exceeded $1,500. The lower court so decreed.

The record is barren of evidence tending to show that there was anything of value conveyed from White to Lewis, except the mortgaged chattels; we therefore have to deal with them alone and their proceeds.

[1] The errors insisted on are: (1) That the statement to continue mortgage above mentioned was erroneous; the amount really due on the mortgage was much more than $1,500; that as between the parties the original mortgage remained valid and enforceable; wherefore the erroneous statement for continuation may be disregarded, as the trustee in bankruptcy merely stands in White's shoes.

This argument overlooks both the language of the state statute and the Bankruptcy Act. By the Lien Law of this state (Laws 1909, c. 38 [Consol. Laws, c. 33] § 235) every chattel mortgage is invalid "as against creditors of the mortgagor" under the circumstances here ex-

isting, unless a statement "showing the interest" (e. g.) of the Ulmer Brewery therein is filed. Creditors are entitled to depend absolutely upon this recorded statement, with a possible exception of clerical errors obvious to any person of ordinary intelligence. No such exception is possible here; the Brewery would have no rights at all, were it not for the filed statement, and by that document, prepared by its own agents, its rights must be measured. The trustee does, to be sure, stand in the bankrupt's shoes; but, for the purposes of suits such as this, he has by the statute all the rights of a creditor with an unsatisfied execution. It follows that the mortgage was valid as against the creditors represented by the trustee for $1,500 only of principal.

[2] 2. It is urged for error that plaintiff did not show that White was insolvent when he conveyed to Lewis. It is true that the proof on this head is insufficient; but the action is to set aside a conveyance in fraud of creditors, made within four months of petition filed. The portion of section 67e conferring such right of action does not require proof of insolvency, as is the case with suits to recover voidable preferences, or to invalidate transfers held null by the laws of a state. We set forth the requirements of a suit such as this in Van Iderstine v. National Discount Co., 174 Fed. at page 521, 98 C. C. A. 300; proof of insolvency at time of transfer is not necessary; proof of fraudulent intent on the part of the bankrupt and lack of good faith in the transferee suffice. On these points the court below found against defendants, and we think on sufficient evidence.

It is usual and often necessary, to prove insolvency in order to establish fraudulent purpose; but when, as in this instance, such purpose can be proved otherwise, insolvency is not a prerequisite to suit. The gist of action is fraud. See Richardson v. Shaw, 209 U. S. at page 380, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981.

[3] 3. The Brewery complains that it was not allowed interest upon the admitted principal of its mortgage. We find no reason for this refusal. The statement filed declared $1,500 "and interest" to be secured. The evidence reveals no interest paid either by White or Lewis. The Brewery, as holder of the notes secured by mortgage, is entitled to interest at 6 per cent. on $1,500 from date of notes and mortgage; i. e., September 24, 1909, to date of foreclosure sale, March 29, 1911.

Let the decree below be modified, by the allowance of such interest, and, as modified, affirmed, without costs of this court.

## THE TICELINE.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 96.

COLLISION ⊂=102—TOW AND DREDGE—MUTUAL FAULTS.

A collision in Arthur Kill between a boat in a tow and a dredge at work *held* due to faults of both the towing tug and the dredge: The tug, which had a clear channel of 300 feet with a comparatively short tow not exceeding 75 feet in width, for not sooner changing her course which was necessary to pass the dredge; and the dredge, in not sooner swinging on its spud as was customary to give more room for passing vessels.

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

Suit in admiralty for collision by Mary A. Dempsey and Thomas Monahan against the Atlantic, Gulf & Pacific Company. The steam-tug Ticeline impleaded. Decree for libelant against respondent and the impleaded tug, and respondent appeals. Affirmed.

The following is the opinion of Hough, District Judge:

So far as this circuit is concerned, the line of cases of which The City of Birmingham, 138 Fed. 555, 71 C. C. A. 115, is the leading decision, seems to me to have added nothing to the rule long laid down that a vessel anchoring in a dangerous position shall take precautions commensurate with the perils assumed.

The Arthur Kill is pre-eminently a place where the peril of navigation is very great—not so much by reason of contingencies of weather or tidal movements, as because of the narrow channel there existing and the number and character of tows frequenting the waters.

There is here presented a collision between the end of a comparatively small tow and a dredge engaged in deepening the channel slightly to the northward of Buckwheat Island.

The dredge owners were operating under a contract with the United States. By the explicit language of their agreement, the whole burden of reasonably keeping out of the way of navigators was laid upon them.

It is evident that they endeavored to meet this burden, not only by shifting their dredge at times, but by swinging the dredge upon its spud so as to get (if not the whole dredge) at least the forward end of it out of the way of passing vessels. That respondent's dredge was thus equipped was well known to persons navigating the Kill generally and to those in charge of the Ticeline in particular.

The inquiries suggested by the evidence are: First, how much of a channel did the dredge give to the Ticeline and her tow; and, second, what measures, if any, were timely made by those in charge of the dredge to render that channel available, safe, and as easy as circumstances would permit.

On the first point, I am satisfied, by the quality rather than the quantity of the evidence, that the dredge gave a channel approximately 300 feet wide to the approaching tug, which upon a hawser of ordinary length had two tiers of boats aggregating perhaps 230 feet from the bow of the hawser boat to the stern of the rear one. The tow was not over 75 feet wide (with due allowance for fenders). It was made up in a somewhat unusual manner, i. e., without any breastlines or springlines between the rear starboard boat (which came into collision) and the next vessel alongside.

By the testimony from the Ticeline, that tug with her tow approached the dredge head on; that is, it was necessary (starting from a point, say, 500 or 600 feet from the dredge) for the Ticeline to change her course in order to avoid the dredge.

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

Yet the channel was straight, and she had nearly if not quite 300 feet of clear water within which to navigate.

No reason is seen why any tug could not take a tow 70 feet wide through such a channel if she had navigated with care.

As matter of fact, she never turned to avoid the dredge until so close thereto that it was necessary to make an S curve in order to "snap the end of the tow away from the dredge." The necessary, obvious, and proven effect of this maneuver was to make libelant's boat swing away from the boat alongside, and in my opinion considerably contributed to the collision—which would not have occurred had there been an additional clearance of 5 feet.

For not changing her course sooner, and for managing her tow in the manner hereinabove set forth, the Ticeline is at fault.

But the dredge cannot be wholly exonerated. I do not think that hers was the greater fault, but she had accustomed navigators to expect her to swing her forward end out of the way when tows were approaching; they had a right to rely upon this and to rely upon a timely swing.

The master of the dredge was not aboard, and the two men who were in charge, by their own testimony, did not begin to swing the dredge until the approaching tug and tow were within 200 feet of them. I think this delay is not to be excused, for it is believed that the Ticeline had signaled her approach twice, once when quite far down the Kill, and a second time within 500 or 600 feet of the dredge. No reason is seen why the dredge should not have swung at least at the second signal, and, if she had done so, I do not think there would have been a collision, for it is not believed that the swing of the dredge had been completed at the time the accident took place.

For these reasons the libelant may take a decree against both the original respondent and the party impleaded. The only costs will be those of the libelant.

Russell H. Robbins, of New York City, for respondent-appellant.

Herbert Green, of New York City, for libelants-appellees.

Park & Mattison, of New York City, for claimant-appellee.

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

PER CURIAM. Decree affirmed.

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NEW ENGLAND S. S. CO. v. R. G. PACKARD DREDGING CO.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 72.

NAVIGABLE WATERS ⊜26(3)—OBSTRUCTION BY ROCKS IN CHANNEL—SUIT FOR DAMAGES.

Evidence *held* insufficient to sustain the allegation of a libel that an injury to the bottom of libelant's steamer was caused by striking rocks thrown up by respondent dredging company in the course of its work.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 152–166.]

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

Suit in admiralty by the New England Steamship Company against the R. G. Packard Dredging Company. Decree for respondent, and libelant appeals. Affirmed.

Haight, Sandford & Smith, of New York City, for appellant.
Alexander & Ash, of New York City, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. September 15, 1913, at 6:30 a. m., libelant's steamer Providence, drawing 13 feet 1 forward and 13 feet aft, on a trip from Providence to New York, touched some submerged object or objects, sustaining considerable injury to her bottom.

The place of the accident was in the East River, somewhere between Sunken Meadows and the Long Island shore, where there is a long stretch of deep water running northeast and southwest over 1,000 feet wide, except for a reef called the Middle Ground, which runs lengthwise about 1,000 feet in the same compass direction and is at the widest 300 feet in a direction at right angles, southeast and northwest. The tide was dead low water; the tide gauge at Ward's Island showing .08 below mean low water. The government charts between September 13, 1912, and July 1, 1915, showed not less than 18 feet of water all over the reef at mean low water. The government has been increasing the depth of water at the Middle Ground for many years past, and at the time of this accident the respondent, the R. G. Packard Dredging Company, was engaged, under a contract with the War Department, in lowering the depth to 26 feet below mean low water.

The Providence is a side-wheel steel steamer, about 397 feet long, with a flat bottom and a plate keel, which does not project. When she reached her pier at New York a number of frames on her starboard side were found to be bent or broken, and 2 feet of water was found under the forward boiler, 20 inches under the after boiler, a little in the tank under the forward engine, and about an inch under the after engine. Water had evidently run in as a result of the injury and put the steamer further down by the head. The next day the steamer was put on the dry dock and a scoring was found, beginning at a point about 100 feet abaft the stem on the starboard side of the keel some 175 feet long, and a similar scoring on the port side for about half the distance. These scorings were parallel with the keel, and the distance between the extreme damage on the two sides was about 20 feet. The after part of the bottom was unmarked.

The respondent's plant had been temporarily withdrawn September 11, 1913, and a spar buoy left at the point where excavations had ceased. The government swept the work of the contractor between September 18 and 26, 1913, with a scow carrying on her port side an iron bar over the bottom parallel with the stream and found a spot with only 10.9 feet of water over it at low water on September 26th. September 28th and 29th the libelant sent a diver down at this point who found a rock some 7 feet high, wedge-shaped up to a sharp pinnacle point, and another, about 8 feet north of it, not so high. He measured the distance between the two rocks by spanning with his arms outstretched. These rocks were on the bottom, where the respondent had not excavated forming a ledge, next to a range which it had excavated and cleared to the required depth. It is upon these rocks that

the libelant claims the steamer struck, and unless it proves this the libel should be dismissed.

Judge Hough discussed a great many propositions about which we will express no opinion. His final conclusion was that the libelant had not sustained the burden of proof lying upon it to show that the steamer struck upon these rocks. We concur in this. Assuming that the rocks were thrown up by the Dredging Company, and that they should have been buoyed by it, we do not believe the steamer touched them, the scorings on her bottom show that when the accident happened the steamer must have been proceeding on a steady course because they ran parallel to the keel. It would not have been possible for two rocks within 8 feet of each other to make these scorings, which were at points 20 feet apart; nor could the bottom of a steamer drawing 13 feet strike a rock with only 11 feet of water over it, more especially at a point 100 feet abaft the stem. Finally, the highest of the two rocks found would have struck on the port side of the keel, whereas the serious damage was done on the starboard side.

It has been several times proved that a dangerous obstruction may exist for a long time in a much used waterway without appearing on the government charts. Such a case was that of the Pilgrim Rock in the East River off Twentieth street, so called because it was first discovered by the steamer Pilgrim striking on it. So there was the case of an unknown rock in Quick's Hole. The Nathan Hale, 99 Fed. 460, 39 C. C. A. 604, and also in Lehigh Valley Transportation Co. v. Knickerbocker Steam Towage Co., 212 Fed. 708, 129 C. C. A. 318. The steamer may have touched bottom at some point on or near the place where the respondent was working, but we are satisfied she did not touch the rocks in question.

The decree is affirmed, with costs.

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## In re GLAS-SHIPT DAIRY CO.

### KRAFT v. OTMAN.

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

No. 2407.

1. BANKRUPTCY ⇐257—SALE—WITHDRAWING BID.

A sale through bankruptcy proceedings is a judicial sale, subject to the same rules as an auction; so that a bid may be withdrawn before the hammer falls.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 356, 357; Dec. Dig. ⇐257.]

2. BANKRUPTCY ⇐260—SALE—ORDER.

An order in bankruptcy, that the referee is authorized and directed to sell property, and that he give notice that he will receive sealed bids, and that on receipt of them he shall report them to the court with his recommendations, is not strictly an order of sale, but a direction to advertise for bids, and to submit them to the court with recommendations.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 360; Dec. Dig. ⇐260.]

3. BANKRUPTCY ⊂=257—SALE—WITHDRAWING BID.

The trustee in bankruptcy, ordered to receive bids for property and to submit them to the court with recommendations, having recommended that the only bid received be accepted, if it be increased a certain amount, it could, before it was accepted, be withdrawn.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 356, 357; Dec. Dig. ⊂=257.]

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

In the matter of the Glas-Shipt Dairy Company, bankrupt. Petition of George Kraft against A. M. Otman, trustee in bankruptcy, was denied by the referee. From decree of the court affirming the order, petitioner appeals. Reversed, with directions.

Appeal from an order directing petitioner to pay the trustee in bankruptcy $29,500 and denying petitioner's petition to withdraw his bid on the real estate of the bankrupt. On May 11, 1916, the referee in bankruptcy, upon proper petition, ordered the trustee to receive bids on the sale of real estate situated in the city of Peoria. Material parts of the order were as follows: "It is therefore ordered, adjudged, and decreed by the court that the said A. M. Otman, trustee in bankruptcy as aforesaid, be and he is hereby authorized, directed, and permitted to sell and dispose of said property described as: * * * It is further ordered by the court that the said trustee give 10 days' notice in the Peoria Evening Star, and in such other way as said trustee may deem advisable, that he will receive sealed bids on the said real estate and personal property; that upon the receipt of such bids by the said trustee he shall report the same to the court, with his recommendations thereon."

Pursuant to the order a notice was given by the trustee, the material parts of which read as follows: "Public notice is hereby given that the undersigned will receive sealed bids for the real estate belonging to the Glas-Shipt Dairy Company * * * described as: * * * This property has been appraised at $40,000. * * * All bids must be filed with the * * * trustee not later than * * * May 23, 1916, * * * and will then be reported to the referee in bankruptcy for his action thereon," etc.

Kraft's bid, made May 22d, was the only one received. It was for $29,500. The trustee in bankruptcy thereupon made formal report to the court, the important part being as follows: "Your trustee further reports that he is required by the said order of sale to report such bids as he might receive on the said property to the said court, together with his recommendations thereon. Your trustee therefore recommends that if the said George Kraft will increase his said bid to the sum of thirty thousand dollars ($30,000) for the property mentioned in the said bid that the same be accepted, all of which is respectfully submitted."

The referee thereupon, on May 27th, made an order, the material portion of which is as follows: "And it further appearing to the court that the said trustee has recommended that if the said George Kraft will increase said bid for said property mentioned to the sum of thirty thousand dollars ($30,000) that the same be accepted by this court. It is therefore ordered by the court that all parties in interest be and they are hereby ordered and directed to show cause before the undersigned referee in his office * * * in the city of Peoria * * * on the 5th day of June, 1915, why the said bid should not be accepted, and said property sold to the said George Kraft."

On June 3d, two days before the hearing, petitioner filed a petition withdrawing his bid and asking the court to permit him to withdraw it from the files. The referee denied the application and directed the trustee to collect the $29,500 from the bidder. The District Court affirmed the order of the referee.

Clarence W. Heyl, of Peoria, Ill., for appellant.
Ira J. Covey, of Peoria, Ill., for respondent.

Before KOHLSAAT, MACK, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). [1] A sale through proceedings in bankruptcy is a judicial sale, subject to the same rules as an auction. The bidder may withdraw his bid at any time before the hammer falls. Hibernian Savings & Loan Society v. Behnke, 121 Cal. 339, 53 Pac. 812; Grotenkemper v. Achtermeyer, 11 Bush (Ky.) 222; Neb. T. & L. Co. v. Hamer, 40 Neb. 281, 58 N. W. 695; Blossom v. Railroad Co., 3 Wall. 196, 206, 18 L. Ed. 43.

[2, 3] Had the hammer fallen, so as to prevent the bidder from withdrawing his bid, on June 3d? The answer to the question turns upon the construction of the language of the order of sale and the action of the trustee thereunder. The so-called order of sale was somewhat inconsistent. Viewing it as a single order, it was a direction to advertise for sealed bids and to submit them to the court with recommendations. The trustee was the instrument by which the bids were to be received and transmitted to the court, which in turn stood in the place of the vendor. The notice of sale given pursuant to the order is consistent with this construction, and clearly indicates the trustee considered his duties restricted to receiving and reporting bids with recommendations. It was not, strictly speaking, an order of sale. The bidder's position was therefore not similar to a bidder at a public auction whose bid was accepted subject to the approval of the court.

Again the recommendation of the trustee was against the acceptance of the bid. If we are to draw any inference from the action of the trustee when the bid was received, it would be that the bid was rejected. Respondent relies upon In re Lane Lumber Co., 207 Fed. 762, 125 C. C. A. 300. The facts in the two cases are not alike. In the Lane Lumber Company Case the referee ordered the trustee to sell at private sale all of the real estate and personal property. The buyer made a written proposal containing among other things the following:

"As an evidence of my good faith in making this bid, I hand you herewith the sum of $1,000."

After the trustee petitioned the court to confirm the sale, but before hearing the same, the bidder asked to withdraw his bid, and his deposit. The trustee refused, and the action was brought to recover the money so deposited. The suit was dismissed.

Differing from the case at bar, the order was to sell the property. The sale was made subject to the approval of the court. Money was deposited and terms fixed by the bidder for its forfeiture. The bidder sought to recover the money so deposited contrary to the terms of the deposit fixed by himself. Petitioner's bid in the instant case had not been accepted, and nothing had occurred to prevent his withdrawing it. The court should have permitted him to do so.

The decree is reversed, with direction to enter an order permitting petitioner to withdraw his bid.

## FREDERICK v. METROPOLITAN LIFE INS. CO. OF NEW YORK.

(Circuit Court of Appeals, Third Circuit. December 28, 1916. Rehearing Denied February 9, 1917.)

No. 2148.

BANKRUPTCY ⊂=143(12)—RIGHTS OF TRUSTEE—PROCEEDS OF INSURANCE POLICY—PAYMENT WITHOUT NOTICE.

The trustee of a bankrupt, whose life was insured under a policy payable to his wife, but giving him the right to change the beneficiary, has no legal right to recover the amount of the policy, after the death of the bankrupt without changing the beneficiary, and the performance of its contract obligation by the insurance company by the payment of the amount to the beneficiary without notice of any adverse claim thereto.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 201; Dec. Dig. ⊂=143(12).]

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Action by Elliott Frederick, as trustee of John E. Schmidt, bankrupt, against the Metropolitan Life Insurance Company of New York. Judgment for defendant (235 Fed. 639), and plaintiff brings error. Affirmed.

Lowrie C. Barton, of Pittsburgh, Pa., for plaintiff in error.

William K. Jennings, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. This case concerns a life insurance policy for $5,000, issued July 10, 1909, by the Metropolitan Life Insurance Company to John E. Schmidt, who afterwards was adjudicated a bankrupt. By such policy the said sum was made payable to Anna M. Schmidt, his wife, on his death, but the right was reserved to the insured to change the beneficiary. Without having exercised such right, Schmidt died on April 4, 1913, leaving his wife to survive him. Mrs. Schmidt made due proof to the company of his death, and the company in due course paid her the full amount of the policy, which she surrendered to the company. As found by the trial judge, such payment was made "in good faith to the party designated in its contract as sole beneficiary therein without notice of any character as to any adverse claim thereto."

On May 11, 1915, the present suit was brought by the trustee in bankruptcy of said bankrupt, John E. Schmidt, a citizen of Pennsylvania, against the said insurance company, a corporate citizen of New York, to recover the full amount of this policy. Trial by jury being waived, the case was heard by the judge of the court below, who found a verdict in favor of the defendant. On entry of judgment on such verdict, the plaintiff sued out this writ of error.

The proceedings in bankruptcy against Schmidt were begun on December 19, 1912, he was adjudged bankrupt on January 8, 1913, and this suit was begun May 11, 1915. The statement alleged that the insurance company was—

"justly and legally indebted to Elliott Frederick, trustee in bankruptcy of the estate of John E. Schmidt. * * * In said policy said John E. Schmidt was named as the insured, and Annie M. Schmidt, his wife, the beneficiary, with right of revocation as by provision in said policy as follows."

The statement then avers:

"That the said John E. Schmidt died on the 4th day of April, 1915, and thereupon the proceeds of the said policy became payable to plaintiff, as trustee aforesaid; the title to said policy having passed to plaintiff as trustee in bankruptcy of the estate of said John E. Schmidt by reason of the said proceedings in bankruptcy heretofore set forth."

It is thus seen that we are here concerned with a suit, based on diversity of citizenship, by Frederick, a trustee in bankruptcy, against the insurance company, to recover the whole amount of a policy which, as found by the court below, had once been paid in good faith by the insurance company to the unrevoked beneficiary named in the policy. We are not here concerned with the duty, or the failure, or the omission, of the bankrupt in regard to this policy, or what might have been the right of the trustee to participate in the policy, had timely notice been given, and steps taken by him to secure the cash surrender value of the policy, before the same had been unwittingly paid by the company to the beneficiary. Nor are we concerned with any right of action of the trustee against the beneficiary, who received the money. The sole question before us is as to the liability of the insurance company, and whether, after the money has once been paid in good faith to the designated and unrevoked beneficiary of the policy, any legal right is now vested in the plaintiff in this case to compel the present defendant to pay the money a second time.

There certainly is no contract obligation on the insurance company to pay a second time. By that contract the company contracted with the insured to pay the amount of the policy to a certain beneficiary. On the death of the insured, without revocation or change of beneficiary, there arose a contractual legal liability of the company to pay the amount of the policy to that beneficiary. As a sequence to such contractual legal liability, the right to sue on the policy was vested in the beneficiary, and the contract provided for no other rights and obligations than those of the beneficiary and the company. When, therefore, the insured had died, and the beneficiary had furnished due proof and made timely demand for the contracted sum, the company, "without notice of any character as to any adverse claim thereto," was not only justified, but contractually bound, to pay the money to Mrs. Schmidt. Having done so, having fulfilled its promises, it was entitled to a surrender of the contract it had fully and in good faith fulfilled. Such being the case, it is manifest that the trustee has shown no legal right to again collect the whole amount of this policy from the company, and such alleged legal right to collect the whole policy is the demand, and the sole demand, on which he has declared.

Under these proofs and facts, the court below committed no error in holding the trustee was not entitled to recover against the company in this suit.

The judgment below is affirmed.

O'BRIEN, County Treasurer, v. ROCKEFELLER.

(Circuit Court of Appeals, Sixth Circuit. February 6, 1917.)

No. 2879.

1. TAXATION ⊜95(1)—SITUS OF PERSONAL PROPERTY—NONRESIDENT OWNER—STATUTE.

Under Gen. Code Ohio, §§ 5373, 5374, providing that a person who has had his actual or habitual place of abode in the state for the larger portion of the 12 months next preceding the annual tax listing day shall, for the purposes of taxation, be deemed a resident of the state, unless he shall before said day have changed his place of abode to a place without the state, with the bona fide intention of continuing actually to abide permanently without the state; that, if a person so removing from the state returns to it to reside within 6 months thereafter, it shall be prima facie evidence that he did not intend to permanently change; that the fact that a person so residing within the state does not exercise the right to vote shall not of itself constitute him a nonresident; and that no provision of the act shall be construed to repeal any statute previously in force as to the taxation of personal property—a bona fide citizen and resident of another state, who came to Ohio for a purely temporary object, with intent to return to his former abode, but notwithstanding the continuance of that intent was prevented by fortuitous circumstances from returning, until after the tax list day, is not subject to taxation on corporate stock, bonds, annuities, etc., owned by him and kept in the state of his residence, though he had been a resident and citizen of Ohio more than 25 years ago, since it is clear that the statute was aimed at persons really domiciled in Ohio who pretend to be domiciled out of the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 190; Dec. Dig. ⊜95(1).]

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

Suit by John D. Rockefeller against P. C. O'Brien, County Treasurer of Cuyahoga County, Ohio, to restrain the collection of taxes. Decree for the complainant (224 Fed. 541), and defendant appeals. Affirmed.

Frederick W. Green, Asst. Pros. Atty., of Cleveland, Ohio, for appellant.

A. E. Clevenger, and W. B. Sanders, both of Cleveland, Ohio, for appellee.

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

PER CURIAM. The single question presented upon this appeal is whether, under a particular statute of Ohio (94 O. L. 162; 3 Gen. Code Ohio, §§ 5373, 5374), taxes could rightfully be exacted of appellee for "moneys invested in bonds, stocks, joint-stock companies, annuities, or otherwise." The securities themselves, in respect of which it is sought to exact the taxes, were in New York, not in Ohio, throughout the time in question. The facts upon which the case depends are stated by the District Judge, now Mr. Justice Clarke, in

his opinion reported in 224 Fed. 541. In view of the learned judge's treatment of the case, both upon the pertinent facts and the law, an extended opinion here could serve no useful purpose. Upon careful consideration of the evidence and arguments, we are convinced that the trial judge's analysis of the statute and his conclusion are sound; and, as expressive of our view of the controlling facts and of some of the reasons why the statute is not applicable to such a situation, we may state:

Indisputably, when appellee came into Ohio, in June, 1913, he was a bona fide citizen and resident of the state of New York, and in every sense a nonresident of Ohio; he came into Ohio for a purely temporary object and with intent to return to his permanent place of abode, his domicile, in New York, not later than the early part of the following October; the object of his coming and the intent to return to his domicile continued, not only to the time so fixed, but throughout his stay in Ohio; and wholly fortuitous circumstances prevented the execution of his abiding intent until shortly after February 3, 1914, the tax-listing day in Ohio.

On its face the statute was not designed to apply to such a case. The statute certainly is not in terms directed against a bona fide nonresident, who never was a resident of Ohio, and who, having a fixed domicile elsewhere, may happen to be in the state for the time and under the conditions here shown; interpreted as an entirety, and in the light of the well-known conditions which gave rise to the statute, as pointed out by Judge Clarke (224 Fed. 553), it is clear that the statute is aimed against citizens of Ohio who, while really domiciled in Ohio, pretend to be domiciled outside of the state; and the circumstance that the appellee, more than a quarter of a century before his sojourn in Ohio for the time here in question, was a citizen and resident of that state, cannot in principle differentiate his situation from what it would be, had he always been a nonresident.

It results that the decree must be affirmed; and, since the appellee has acquiesced in the portion of the decree denying to him relief in respect of his tangible property (i. e., the automobiles), he will recover costs in this court.

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In re WOULFE & CO.

WILLIAM CAMERON & CO., Inc., v. GOODWIN et al.

(Circuit Court of Appeals, Fifth Circuit. December 18, 1916. On Petition for Rehearing, January 19, 1917.)

No. 2925.

BANKRUPTCY ⊜348—PRIORITY BETWEEN PREFERENTIAL CLAIMS—TEXAS STATUTES.

Rev. St. Tex. 1911, art. 5490, gives landlords a preference lien for rent due and to become due within the current year on all property of the tenant on the premises. Article 5644 gives to clerks, accountants, laborers, etc., a first lien on the property created by or connected with their services "provided that the lien herein given to a farm hand shall be subordi-

nate to the landlord's lien now provided by law." *Held* that, on the bankruptcy of a mercantile partnership, the claims of its clerks for wages were properly given preference over the claim of its landlord for rent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. ⊂⊃348.]

Petition to Superintend and Revise Order of the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge.

In the matter of Woulfe & Co., bankrupt. Petition of William Cameron & Co., Incorporated, against W. Goodwin and others to superintend and revise an order of the District Court. Petition denied.

The following is the order of Maxey, District Judge:

Whereas, on July 9, 1915, before T. F. Bryan, referee in bankruptcy for the Waco division of said court, there was a hearing to establish the allowance of claims entitled to priority of payment out of said estate. And whereas, at said hearing it was ordered by the said referee that the claims entitled to priority be allowed and ordered paid by the trustee in the following order to the extent of the funds now in the said trustee's hands, to wit: (1) All taxes due; (2) cost of preserving estate subsequent to the filing of petition; (3) all costs of administration; (4) wages due clerks for three months immediately prior to the filing of petition; (5) to the landlord for all rents accrued prior to filing of petition and all rents to accrue up to the 1st of November, 1915, the end of the current rental year at a rental of $350 per month; and (6) to the secured creditor proceeds of the furniture and fixtures of bankrupt. And whereas, on the 15th day of July, 1915, William Cameron & Company, Incorporated, being the landlord creditor in said proceedings, being dissatisfied with the said order of the referee, filed a petition for review, which petition was granted and filed in this court together with said referee's certificate of review on the 16th day of August, 1915. And whereas, on the 16th day of November, A. D. 1915, in the United States District Court for the Western District of Texas, came on to be heard the said petition filed by Wm. Cameron & Co., Incorporated, attorneys appearing respectively in behalf of said wage-earners and in behalf of the said landlord; and the court after hearing the argument of counsel, being of the opinion that the said order of the referee made on July 9, 1915, should be in all things affirmed.

It is therefore ordered by this court that said order of referee entered on July 9, 1915, be and the same is hereby in all things affirmed, and that the order of the payment of said claims entitled to priority stand and be paid by the trustee as follows: (1) All taxes due; (2) costs of preserving estate subsequent to the filing of petition; (3) all costs of administration; (4) wages due clerks for three months immediately prior to the filing of petition; (5) to the landlord for all rents accrued prior to filing of the petition and all rents to accrue up to the 1st of November, 1915, the end of the current rental year at a rental of $350 per month; and (6) to the secured creditor proceeds of the furniture and fixtures of bankrupt.

W. M. Sleeper and Chas. A. Boynton, both of Waco, Tex., for petitioners.

Albert Boggess, of Waco, Tex., opposed.

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

PER CURIAM. Considering that under the laws of Texas the owners of rented buildings have a so-called "preferential" lien (see Rev. Civ. Stat. Tex. 1911, Art. 5490), and that clerks, accountants, and laborers have a first lien only subordinate to the landlord's lien in the case of farm hands (Id., § 5644) we find that the priority in payment

accorded in the District Court under section 64d, Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 563 [Comp. St. 1913, § 9648]), was not erroneous.

The petition to superintend is denied.

On Petition for Rehearing.

The bankruptcy having intervened, and the clerks claiming liens having presented and established their liens in the bankruptcy court, it was wholly unnecessary to record the liens elsewhere.

The petition for rehearing is denied.

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## NEW YORK CENT. & H. R. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 105.

1. ALIENS ⟸56—IMMIGRATION—CONTRACT LABORERS.

Act Feb. 20, 1907, c. 1134, § 4, 34 Stat. 900 (Comp. St. 1913, § 4248), makes it a misdemeanor for any person, etc., to prepay the transportation, or assist or encourage the importation or migration, of any contract laborer or laborers into the United States, unless such contract laborer is exempted; while section 5 (Comp. St. 1913, § 4250) provides that for every violation of any of the provisions of section 4 the persons, partnership, company, or corporation violating the same by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer shall forfeit the sum of $1,000, etc. A railroad company sent its duly authorized agent into Canada to employ men to work on its section in the United States, furnishing the agent with transportation for the men he should employ. *Held* that, though the contract laborers solicited did not enter the United States, defendant was guilty of a violation of the act, and liable to fine.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 113–116; Dec. Dig. ⟸56.]

2. CRIMINAL LAW ⟸32—IMMIGRATION—CONTRACT LABOR—IGNORANCE OF LAW.

In such cases, the fact that the agent of the defendant railroad company did not know he was violating the act, being ignorant of its existence, is no defense to a proceeding against the railroad company.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 37; Dec. Dig. ⟸32.]

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

Action by the United States against the New York Central & Hudson River Railroad Company. There was a judgment for plaintiff (232 Fed. 179), and defendant brings error. Affirmed.

Allen & McClary, of Malone, N. Y., for plaintiff in error.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y., for defendant in error.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

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

COXE, Circuit Judge. This action was brought to recover five penalties, of $1,000 each, under the immigration laws, for assisting and inducing five aliens to enter the United States from Canada to work as laborers on the defendant's railroad. The aliens in question did not enter the United States but it is asserted by the defendant in error that there was a violation of the statute by the railroad company's agents in encouraging and assisting the aliens to enter, although they never did enter the United States. The court rendered judgment for one penalty only, of $1,000.

[1] The act of February 20, 1907, provides as follows:

"Sec. 4. 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 migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this act."

Section 5 of the act provides for the punishment of any one violating the law by assisting, encouraging or soliciting the migration or importation of any contract laborer into the United States. It is clear that any one who does this has violated the law. The solicitation must necessarily be attempted while the laborer is outside the United States. No one can solicit a laborer already in the United States to enter the same. It is argued that in order to constitute a crime it is necessary that the soliciting should be successful, that is, the laborer must actually come to his country by reason thereof. We think, however, that under the phraseology of the statute, the soliciting is sufficient.

[2] The action of the defendant in appearing, through its agents, before the board of special inquiry and submitting the question to that board is persuasive evidence that Vincent and Canale, the defendant's agents, were ignorant of the law in question and had no intention of violating it. This, however, is a defense which is not available to the defendant. The railroad company is the party here charged with violation of the law and we think it is apparent that the court was justified in finding that it assisted or encouraged the importation of the laborers in question.

Judgment affirmed.

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## WORDEN v. KENNY.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 128.

APPEAL AND ERROR ⊂=1004(1)—REVIEW—VERDICT—EVIDENCE.

In an action, where plaintiff claimed to be a partner of defendant in the construction of a building, and entitled to one-half the amounts received by defendant less certain deductions, while defendant claimed that he had merely employed plaintiff at a fixed salary and thereafter discharged him, a verdict for plaintiff for much less than half the amount received by defendant, rendered after the jury had inquired whether they could bring in a verdict for plaintiff on any other basis than an equal partnership, which was answered in the negative, will not be set aside, as

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

not based on the account of either party, and therefore rendered through sympathy only, where there was evidence as to the deductions to be made from the gross amount received by defendant sufficient to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3944; Dec. Dig. ⊂⊃1004(1).]

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

Action by John M. Kenny against Edward C. Worden. Judgment for plaintiff, and defendant brings error. Affirmed.

Henry Escher, Jr., of Brooklyn, N. Y., for plaintiff in error.

Charles Oakes, of New York City, for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is a writ of error taken by the defendant to a judgment entered on the verdict of a jury in favor of the plaintiff.

The complaint contained two causes of action: First, that the defendant agreed to associate the plaintiff with him as a partner in the profits of a contract which the defendant had to supervise the construction of a powder plant for the Western Cartridge Company, the terms being that out of $1,000 payable by the company monthly to the defendant $500 were to be set aside for expenses and $500 divided between the plaintiff and the defendant: 'Five per cent. on the cost of construction, which the defendant was to receive from the Cartridge Company was to be divided between the plaintiff and the defendant after 1 per cent. had been deducted payable to one Deveen, and not over $500 payable to one Moos; that the defendant having accounted to the plaintiff for $250 for the first month refused to recognize him further in the transaction. Second, for $356.25 expended by the plaintiff in the employment of assistants and the purchase of supplies.

As to the first cause of action the defendant denied any contract for a joint adventure, alleging that he had employed plaintiff at a salary of $250 a month; that he paid him the first month and discharged him at the end of it because his services were unsatisfactory. The defendant admitted the second cause of action to the extent of $110.75. The defendant completed the contract with the Cartridge Company in five months and received $7,500; that is, 5 per cent. on the cost of construction, $150,000.

It is quite plain that the jury thoroughly appreciated the nature of the dispute between the parties as to the first cause of action because after having retired they sent the following communication to the court:

"The jury desires further instructions as to whether on the first cause of action the jury is permitted to bring in a verdict for the plaintiff on a basis other than an equal partnership?"

To which the court replied:

"After allowing the proper deductions, the jury could bring in a verdict for the plaintiff only on a basis of an equal partnership, so far as the first cause of action is concerned."

The jury found a verdict in favor of the plaintiff for the sum of $1,250 on the first cause of action and for $110.75 on the second cause of action.

The defendant contends that it is impossible to reconcile the verdict on the first cause of action with the account of either party, that is to say, with the employment of the plaintiff at $250 a month, or with participation by him in the defendant's contract with the Cartridge Company, and therefore it must have rested upon sympathy merely, and should be reversed. This is so, if true. Obviously the jury did not adopt the defendant's testimony that the contract with the plaintiff was one of employment only, because if they had done so they could not have rendered any verdict on the first cause of action in favor of the plaintiff. We are therefore compelled to assume that they found that the parties did enter into a joint adventure, as the plaintiff testified. How much his share would be would depend on the deductions to be made from the gross profits. There was testimony to support the verdict, and we are not concerned with the exact method the jury pursued, and have no right to pass upon the weight of evidence.

The judgment is affirmed.

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## SMITH v. GOVERNMENT OF CANAL ZONE ex rel. MacINTYRE.

(Circuit Court of Appeals, Fifth Circuit. February 5, 1917.)

No. 2911.

1. COURTS ⟸405(4)—JURISDICTION OF APPELLATE COURT.

Act Aug. 24, 1912, c. 390, § 9, 37 Stat. 565 (Comp. St. 1913, § 10045), gives jurisdiction to the Circuit Court of Appeals of the Fifth Circuit to review, revise, modify, reverse, or affirm judgments or decrees of the District Court of the Canal Zone, only where the Constitution or any statute or treaty, etc., of the United States is involved, and a right thereunder denied, or in cases where the value in controversy exceeds $1,000, or in criminal cases, where the offense charged is punishable as a felony. Defendant was convicted of contempt in the District Court of the Canal Zone and fined $25. *Held*, that as he was not, under the Constitution of the United States, entitled to a jury trial, the Circuit Court of Appeals had no jurisdiction to review the conviction; the fine amounting to less than $1,000, and the offense not beng punishable as a felony.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1098; Dec. Dig. ⟸405(4).]

2. JURY ⟸21(4)—CONTEMPT—RIGHT TO JURY TRIAL.

In a proceeding in a federal court to punish for contempt, defendant is not entitled to a jury trial under the federal Constitution.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 139; Dec. Dig. ⟸21(4).]

In Error to and Appeal from the District Court of the Canal Zone; William H. Jackson, Judge.

Proceeding by the Government of the Canal Zone, on the relation of William C. MacIntyre, against H. A. A. Smith, for contempt of

court. Defendant was convicted of contempt, and he appeals and brings error. Appeal and writ of error dismissed.

Frank Feuille, of Ancon, Canal Zone, for plaintiff in error and appellant.

Walter Guion, U. S. Atty., of New Orleans, La., and William C. MacIntyre, of Cristobal, Canal Zone, for defendant in error and appellee.

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

PER CURIAM. The record shows petitioner and appellant was tried and convicted in the District Court of the Canal Zone for contempt of court and sentenced to the payment of a fine of $25. He first sued out an appeal to this court, giving bond, but filing no assignments of error. At a later day he sued out a writ of error, principally assigning as errors the denial of the right of a trial by jury, and that under the proceedings he was deprived of due process of law, in violation of the Constitution of the United States. The defendant in error and appellee moves to dismiss, on the ground that this court is without jurisdiction to review the proceedings complained of.

[1] It is conceded that the case sought to be reviewed is a criminal cause. Our jurisdiction to review cases from the District Court of the Canal Zone is to be found in an "Act to provide for the opening, maintenance and protection and operation of the Panama Canal, and the sanitation and government of the Canal Zone, approved August 24, 1912." 37 Stat. 560. By the ninth section of that act jurisdiction is given to this court to review, revise, modify, reverse, or affirm final judgments or decrees of the District Court of the Canal Zone, and to render such judgment as in the opinion of the court should have been rendered by the trial court, only where (a) the Constitution, or any statute, treaty, title, right, or privilege of the United States is involved, and a right thereunder is denied; or (b) in cases in which the value in controversy exceeds $1,000; or (c) in criminal cases wherein the offense charged is punishable as a felony. Certainly, this is not a case in which the value in controversy exceeds $1,000, nor is it a criminal case wherein the offense charged is punishable as a felony.

[2] The plaintiff in error and appellant here contends that, as he was denied in the course of the trial the right to a trial by jury, thereby he was deprived of a right guaranteed to him by the Constitution of the United States. This claim, we think, is without foundation. See Eilenbecker v. Plymouth County, 134 U. S. 36, 10 Sup. Ct. 424, 33 L. Ed. 801; Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; Watson v. Williams, 36 Miss. 331–341.

The motion to dismiss is granted, and the appeal and writ of error are dismissed.

GRUBB, District Judge, concurs.

## ATLAS FLOOR CO. v. ROBBINS MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. December 7, 1916. Rehearing Denied January 24, 1917.)

No. 2359.

1. PATENTS ⊜328—CONSTRUCTION—INFRINGEMENT.
Complainant's patent, No. 825,952, for an improvement on metal frame window screens, construed, and *held* infringed by those frames of defendant showing a pivotal connection between the two parts of the frame between which the screen cloth is held gripped, but not to be infringed by defendant's latest device, which performs the same function in a different manner.

2. PATENTS ⊜317, 318(1)—INFRINGEMENT—INJUNCTION—ACCOUNTING.
Where defendant, after notice, sold devices infringing complainant's patent, a decree for an injunction and accounting is proper.

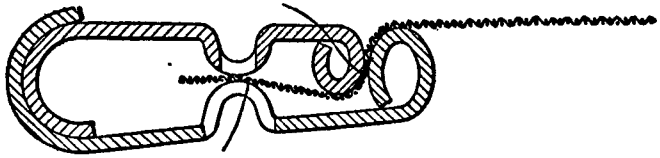
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 559-568; Dec. Dig. ⊜317, 318(1).]

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

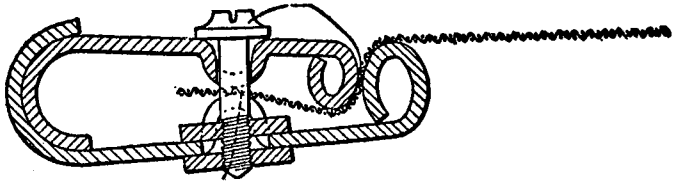
Bill by the Robbins Manufacturing Company against the Atlas Floor Company. From a decree for complainant, defendant appeals. Affirmed.

The action was in equity for infringement of patent No. 825,952 issued July 17, 1906, for an improvement on metal frame window screens. The District Court sustained the patent and found it infringed. Validity is substantially conceded, but it is urged that defendant omits one if not two elements of the claims sued on, and so does not infringe. The accompanying cuts will serve to show the respective frames in cross-section:

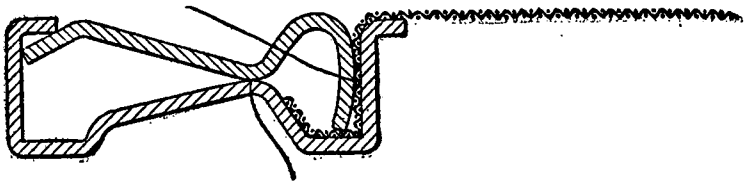
Plaintiff's Device under Claims 5, 6 and 12.



Plaintiff's Device under Claims 1, 2 and 11.



Defendant's Device.



Francis W. Parker, of Chicago, Ill., for appellant.

Henry M. Huxley and Edward S. Rogers, both of Chicago, Ill., for appellee.

Before MACK and EVANS, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge (after stating the facts as above). [1] By observing the cuts it will be seen that the patent device has a pivotal connection at the outside or left edge of the window frame. The two frame members are separate. The lower one is called the frame member, the upper one the clamping member, the channels in the middle portion being known as ribs, and the right hand edges as "inner edges," "wire-engaging edges," or "stretching edges."

In the claims as a whole there are four elements: (1) The pivotal connection shown at the left, (2) the co-operation of the inner edges at the right, (3) the ribs, and (4) the screws to hold the members together. No single claim covers all of these elements. Thus, claim 1 includes (1) the pivotal connection between the two members on the left, (2) clamping means at the right or inner edges, and (4) means for holding the members in clamping position. The fourth element comprises screws for holding the members rigidly together. Claim 6 includes (1) the same pivotal connection, (2) the same clamping means between the inner edges, and (3) clamping means between the two members to contact with the screen cloth and hold it in the position to which it was drawn by the inner edges of the members. It is evident that the last element in these two claims is entirely different. Claim 12 covers substantially the same elements as claim 6, in different language.

Clearly it is not necessary to read anything into any of the claims. One group depends for holding power on the frictional contact of the clamping members, and the other one the screws. Either form is plainly operative, though one is better than the other.

As to infringement, a reference to the defendant's frame of the latest type manufactured at the time of trial shows no pivotal connection, an element of all the claims in suit. The record shows, however, that defendant has put out two types. Some of the first type, made by a predecessor in interest and sold by defendant, has the holding screws; others do not have them. The second type has no screws; but those made up to the time of trial had a groove which defendant claims was accidental. Nevertheless it was there and gave the pivotal connection. Defendant, by making the upper or clamping member long enough to exert a spring action against the woven wire and the frame member, makes other binding means, such as screws, unnecessary. While defendant further claims that gripping the wire, which occurs in about 5 per cent. of its screens, is accidental and a detriment, we are nevertheless of the opinion that when this occurs the element of clamping means specified in claim 6 is present.

Speaking more generally, defendant has substituted for both the screws and the pivotal connection a longer clamping member, thus by clamping frictional means dispensing with the necessity of screws and

the friction due to the pivotal relation of the members as to each other as well as to the wire mesh between them. Thus in its latest device the defendant employs different means, and a distinct mode of operation, producing a similar result, and permitting the frame to be taken apart and put together without the necessity of removing or putting back any screws.

[2] This suit was based upon the earlier device. Inasmuch as some of these were sold after notice, the decree for injunction and accounting was proper. The injunction and accounting, however, must be understood as limited to such of defendant's devices as have the groove in the outer portion of the frame member or some other pivotal connection, and in which either the screws are used as the means for holding the members in clamping position, or in which the screen cloth is held gripped between the ribs.

Decree affirmed.

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JOHNSTON v. STEWART.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 100.

PATENTS ⊂=328—INFRINGEMENT—BUILDING MATERIAL.

The Cottom patent, No. 650,824, for a building material consisting of concrete blocks, to be laid in the wall in such manner as to be anchored together by cement bars, construed, and *held* not infringed.

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

Suit in equity by Walter D. Johnston against Clarence W. Stewart for infringement of letters patent No. 650,824 for building material, granted June 5, 1900, to J. B. Cottom. Decree for defendant, and complainant appeals. Affirmed.

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

I think the meaning of this patent is not primarily to make a ventilated wall at all, although the claims do contain that element. A ventilated wall is provided for; that is undoubtedly true, but there is no mention of ventilation until we get to line 101, after the patent itself has been very carefully described in full. Then provision is made for ventilation by a tube which is afterwards to be withdrawn. It seems to me it is quite clear that what the patentee chiefly intended was to get a series of concrete blocks, which he could anchor together by solid concrete bars going from the top to the bottom of the wall. I refer particularly to the passage on the first page, which begins at 86: "When the blocks are thus laid in the construction of a wall, it will be observed that each block does not depend for its security on the mortar or cement as usually applied between the faces of bricks, but, on the contrary, have 'cement bars,' so to speak, which extend through them at two points in the body of each block and which also securely unite the ends of said blocks to form continuous horizontal row of blocks." That last clause probably refers to the dwelling; but it is quite clear, when one looks at the figures, that he had in mind something quite different from what has been called here by one of the witnesses a doughnut or mortise of cement squeezed out by the weight of the blocks, which is all that Stewart uses.

This conclusion is re-enforced by the fact that all of the figures on the first

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

page—that is, Figs. 1, 2, and 3—show the cement bar, but do not show the ventilation. The ventilation is shown only in Figs. 5 and 6, and these are apparently alternative features, as appears in line 101. Coming to the claims, it is quite true that the ventilation is made an element, and so we must accept it; but we have on that account no right to disregard the "cement bars," which the claims also incorporate, and which have been clearly shown in all the drawings. The language of the claim in this respect is as follows: "By means of which a continuous body of cement may be placed to rigidly secure said blocks from top to bottom of a wall."

Furthermore, the description of the process on the second column of page 1 is illustrative. It is quite clear that the semi-liquid cement is to be poured in until it fills the whole column made by the holes in the blocks when superposed on one another. This filling or cement accounts in part for the singular shape of the funnels themselves, each one being double. I think the patentee's theory was that, by securing a break in the line of each block, he could get a stronger bond than if he had a straight cylindrical column going all of the way through. I do not therefore think, taking the patent alone as it stands, we should call Stewart's blocks when laid an infringement, because there was no column of concrete running through, no "continuous body."

If we were so to interpret the claim, I should, moreover, have great doubt of its validity in the face of Smithmeyer. It is true that Smithmeyer did not disclose the bond between brick and brick as part of what he wanted to accomplish, but he did have it in mind, whether he desired it or not, in the language of lines 51 to 54: "The cup-shape depressions forming receptacles for any excess of mortar without infringing upon the ventilating capacity."

Of course Smithmeyer was laying bricks, and bricks are shallow for their length and width. They do not need anything but a surface bond. It was natural that Smithmeyer should not have spoken of that bond as one of the advantages secured by his patent, but he provided for it, nevertheless, and I cannot agree that it was a mere casual or accidental result of his invention. It was an inevitable and necessary result of his invention that there should be an anchor of cement at each orifice, caused by the extrusion of cement. I am justified in making that assertion without any express evidence, because the laying of bricks and the mortar is a commonplace thing in everyone's experience; I think I can take notice of the fact that mortar is a plastic bonding material, and that bricks, when they are laid, are laid with a little pressure or tapping. We know that the brick itself, when laid on the mortar, will squeeze a little of the mortar out. It is a very familiar recollection of every person who has lived where building has been going on to see mortar scraped off the face where solid bricks are laid. Since Smithmeyer's bricks had holes in them, the necessary squeezing and tapping would cause some of this mortar to go into this space B. The patentee was aware of that and provided for it, although he did not suppose it to be of advantage. Mr. Kenyon says that very little will be squeezed through. I cannot say how that would be, and I do not think it is of any consequence. The action is there; the degree of the action depended upon what the consistency of the mortar was, but the action was there. In this connection it must be noted that Smithmeyer does not confine himself to bricks; he speaks of blocks as well, and specifically says that he does not wish to limit himself in any manner as to material used, but may employ any of the well-known materials which may be desired. That was in June, 1883, when working in concrete was well known. Therefore, if it were proper so to interpret claim 1 as to cover Stewart's construction, I should have a very grave doubt as to whether it was valid in the face of Smithmeyer.

I do not think, however, that it is essential that I should make a finding upon that question, in view of the construction I have put upon the claim.

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

A. Parker Smith, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed.

## DE LASKI & THROPP CIRCULAR WOVEN TIRE CO. v. EMPIRE RUBBER & TIRE CO.

(District Court, D. New Jersey. December 12, 1916.)

1. COMPROMISE AND SETTLEMENT ⊜16(1)—INFRINGEMENT SUIT—EFFECT OF SETTLEMENT WITH MANUFACTURER.

In a suit for infringement by the manufacture and sale of infringing machines, an interlocutory decree was entered in favor of complainant, but limiting the accounting and the extent of complainant's recovery to the profits which defendant had derived from the infringement. On affirmance of such decree the parties made a settlement, and entered into a stipulation that the amount paid by defendant was accepted by complainant "in full payment of all claims and demands which it may have against the defendant by reason of the defendant's infringement." *Held*, that the settlement covered only infringements of the character charged in the bill, and such damages and profits as could have been recovered under the issues in the cause, and that it did not bar a subsequent suit by complainant against a user of machines sold by the defendant, although bought before it was made.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 54–58, 62–65; Dec. Dig. ⊜16(1).]

2. PATENTS ⊜327—INFRINGEMENT SUIT AGAINST USER—EFFECT OF RECOVERY FROM MANUFACTURER.

The recovery by a patentee of full compensation for the making and selling of infringing articles does not entitle a purchaser to continue the use of the infringing article thereafter, and the patentee may maintain a suit against him to enjoin such further use and for an accounting at least for the profits made by such use.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620–625; Dec. Dig. ⊜327.]

3. PATENTS ⊜319(1)—INFRINGEMENT—MEASURE OF DAMAGES.

The measure of damages recoverable by a patentee from an infringer, except where increased by the court under the statute, is compensation for the pecuniary loss which he has suffered from the infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 578; Dec. Dig. ⊜319(1).]

4. PATENTS ⊜327—SUIT FOR INFRINGEMENT AGAINST USER—RIGHT TO DAMAGES.

Where a patentee makes his profit by licensing the use of patented machines made by him for a royalty, he may recover from the maker and seller of infringing machines the amount of royalties of which he has been deprived by the sale of the infringing machines, provided he can show that the purchasers would otherwise have taken licenses to use the patented machines; but in the absence of such proof the decree does not cover damages for the use of the infringing machines, and in a subsequent suit against the users he may recover such damages as he may be able to prove.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620–625; Dec. Dig. ⊜327.]

In Equity. Suit by the De Laski & Thropp Circular Woven Tire Company against the Empire Rubber & Tire Company. On final hearing. Decree for complainant.

E. Clarkson Seward, of New York City, for plaintiff.

Francis C. Lowthorp, of Trenton, N. J., for defendant.

HAIGHT, District Judge. The validity of the patent in suit was established by this court (De Laski & Thropp Circular Woven Tire Co. v. William R. Thropp & Sons Co. [D. C.] 218 Fed. 458) and the Circuit Court of Appeals of this circuit (226 Fed. 941, — C. C. A. —), in a suit instituted by the present plaintiff against William R. Thropp & Sons' Company (hereinafter referred to as the "Thropp Company"). The infringement now complained of is the defendant's use of two machines manufactured by the Thropp Company, and which were held in that case to infringe plaintiff's patent. In order that the questions to be decided and the conclusions which I have reached may be understood, it is necessary that the facts, as I find them, be recited in some detail.

In the early fall of 1911 the defendant purchased of the Thropp Company a tire-wrapping machine of substantially the same construction as that covered by the subsequently issued patent in suit. Shortly after the patent was granted, the defendant, upon being advised by its attorney that the machine infringed it, caused the superstructure of the machine, to which was attached upper pressure rollers which were not positively driven, and which was the infringing feature, to be removed. The machine was used in that condition for several months. On July 2, 1912, a patent was issued to Joseph W. Thropp (one of the officers of the Thropp Company) for a machine in which the upper rollers were positively driven. As set forth in the opinions in the before-mentioned case, it was claimed that these rollers did not perform the function of the pressure rollers of the machine of the patent, but merely aided the lower rollers in rotating the tire to be wrapped, and hence that the machine did not infringe. About the time that this latter patent was granted, the defendant, at the request of Joseph W. Thropp, replaced the superstructure, to which positively driven upper rollers had since been attached, on the machine which it had theretofore purchased. The defendant paid nothing for the change, it having been made, apparently, for experimental purposes. The machine thus equipped would not work properly, because the gears, which operated the upper rollers, frequently became broken. About the same time the defendant purchased another tire-wrapping machine from Thropp & Co. This, however, had no superstructure or upper rollers. Although an attempt was made to induce the defendant to purchase a machine equipped with them, it declined to do so, because it considered that the extra cost was not warranted, as its process of manufacturing tires did not require any pressure to be exerted on the tire and pressure rings during the wrapping process. The superstructure and rollers were not again removed from the first machine until after this suit was started, although the evidence is that the upper rollers were very infrequently used.

A week or so prior to the trial of the action against the Thropp Company, a superstructure with positively driven rollers was attached to the second machine, at the request of Joseph W. Thropp, for the purpose of demonstrating to the court how the machine worked and the features which distinguished it from the machine of the patent. Nothing was paid by the defendant for the addition. However, the

superstructure and rollers were not removed until after this suit was begun. The reason given by the defendant as to why they were retained is that Joseph W. Thropp told the defendant's representative to leave them on as there was "no doubt about the outcome" of that suit. The opinion of the Circuit Court of Appeals, affirming the judgment of this court, was handed down on August 9, 1915, and on September 14, 1915, this suit was begun. The very day that the subpœna was served the defendant consulted counsel, and the superstructure and upper rollers of both machines were at once removed, and have not since been used. The interlocutory decree in that case (which was prepared by plaintiff's counsel) limited the accounting and the extent of plaintiff's recovery to the profits which the defendant had derived from the infringement. No accounting, however, was ever taken; but, by a stipulation entered into on August 9, 1916, and filed in the case, the parties agreed that a judgment might be entered in favor of the plaintiff for the sum of $750, "covering profits, damages, and costs in the foregoing cause"; that an accounting should be waived, and that the plaintiff should accept such sum "in full payment of all claims and demands which it may have against the defendant by reason of the defendant's infringement." It also acknowledged receipt of the money, and directed the clerk to enter in his docket the following:

"Judgment for the plaintiff for costs, profits, and damages, seven hundred and fifty ($750) dollars. Judgment satisfied."

It is claimed that the stipulation and the payment of the money therein provided for precludes the plaintiff from any relief in this action.

[1] 1. It is contended, primarily, that the use of the two machines with the infringing features thereon, was, under the circumstances before detailed, the joint infringement of the defendant and the Thropp Company; that by virtue of the payment of the money provided for in the stipulation the plaintiff received satisfaction for all injuries sustained by it through the Thropp Company's infringements of the patent, of every character and kind; and that consequently, as the defendant and that company were joint tort-feasors in respect to the infringement now complained of (which took place before the stipulation was entered into), the plaintiff cannot, under well-settled principles, recover any damages or profits from the defendant, the other joint tort-feasor. Even if it be assumed that the use by the defendant of the machines with the infringing features was a joint infringement of the defendant and the Thropp Company (and I do not attempt to decide whether it was or not), I do not think that the stipulation and the payment of the money therein provided for bars the plaintiff from recovering profits and damages in this action. Although the interlocutory decree in the former suit limited the plaintiff's recovery to profits, as distinguished from damages, the parties undoubtedly could and did, by the stipulation, provide that the plaintiff should have both profits and damages.

The question then is: What damages and profits did the stipulation cover, or for what injury or injuries was the plaintiff compensated?

The answer, I think, must be primarily found by ascertaining whether the amount paid was to cover all kinds of infringements of which the defendant had, up to that time, been guilty. The only guide for determining this is the stipulation itself. It provides that the plaintiff shall accept the sum therein named "in full payment of all claims and demands which it may have against the defendant by reason of the defendant's infringement." It will be noted that "infringement" is used, not "infringements." Nor does it attempt to specify the kind or character of the infringement. I think it admits of no doubt that the parties intended that the stipulation was to cover only infringements of the character charged in the bill of complaint and in issue in that cause. If they had intended anything else, the natural presumption is that they would have in some way so indicated. The infringement charged in the bill was the making and selling of infringing machines; no mention was made of their use. Hence the money paid by virtue of the stipulation was not in satisfaction of the injury here complained of (the use), and therefore the rule respecting the effect of a satisfaction by one of two or more joint tort-feasors, invoked by the defendant, is not applicable.

Furthermore, and for the same reasons, I think it clear that they intended to and did settle only such damages and profits as the plaintiff would have been entitled to recover in that action upon the pleadings as they then were. The plaintiff would have been entitled to recover only such damages as it suffered and such profits as the defendant realized from infringements of the character and kind which were within the issues. I know of no rule, and my attention has not been called to any, which would permit the plaintiff to recover damages for an infringement of an entirely different character than that in issue or mentioned in the proofs before the court, by simply proving such infringement before a master to whom it had been referred to take an account of damages and profits. Any such practice would violate settled rules of judicial procedure. To adopt it in this case would be to hold that, although the only infringement relied upon in the first case, either in the pleadings or in the proofs before the court, was the making and selling of infringing machines, yet a master, on an accounting, could have determined whether or not the use by the defendant in this case of the infringing machine was the result of such actions upon the part of the defendant in the first case as to constitute the latter a joint infringer with the former. To state such a proposition seems to me to refute its soundness. For the same reasons, if for no other, the plaintiff is not precluded from recovering of this defendant the profits to which it would otherwise be entitled, simply because the defendant, in its use of the infringing machine, was a joint tort-feasor with the Thropp Company.

[2] 2. But, irrespective of the question just discussed, and assuming that, as respects the infringement now complained of, the Thropp Company was not a joint tort-feasor, the question arises whether, since the plaintiff has received all the damages and profits which it could have recovered in the first suit against the Thropp Company by reason of the latter's manufacture and sale of the infringing machines

(as it must be held that it has), it is entitled to any relief against the defendant, who has merely used one of the machines manufactured by the Thropp Company. It has been held in several cases that where, in a suit against one who has made and sold infringing articles, a patentee has already received full compensation in the same manner and to the same extent as if he had sold the patented articles himself, that the infringing articles so sold may be used by the vendees thereof free from any further claim of the patentee, or, in other words, that the vendees under such circumstances acquire an implied license to use them. Gilbert v. Bussing, 12 Blatchf. 426, 10 Fed. Cas. 348 (C. C., S. D. N. Y.); Spaulding v. Page, 1 Sawy. 702, 22 Fed. Cas. 892 (C. C., Cal.); Allis v. Stowell, 16 Fed. 783 (C. C., E. D. Wis.); Stutz v. Armstrong, 25 Fed. 147 (C. C., W. D. Pa.); Stebler v. Riverside Heights Orange Growers' Ass'n, 214 Fed. 550, 131 C. C. A. 96, L. R. A. 1915F, 1101 (C. C. A., 9th Cir.). All of these cases, except the last two, were decided prior to the decision of the Supreme Court in Birdsell v. Shaliol, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. Ed. 768. But, so far as I have been able to ascertain, since the decision in that case, with those two exceptions, it has been uniformly held that recovery of such compensation from one does not entitle another, whether a purchaser or licensee, to thereafter use the infringing article without the consent of the patentee. Tuttle v. Matthews, 28 Fed. 98 (C. C., N. D. N. Y.); Kelley v. Ypsilanti, etc., Co., 44 Fed. 19, 10 L. R. A. 686 (C. C., E. D. Mich.); New York Filter Co. v. Schwarzwalder, 58 Fed. 577 (C. C., S. D. N. Y.); Philadelphia Trust, etc., Co. v. Edison Electric Light Co., 65 Fed. 551, 13 C. C. A. 40 (C. C. A., 3d Cir.). And such seems to be the proper rule to be deduced from Birdsell v. Shaliol.

It is true that it was considered otherwise in Stebler v. Riverside Heights, etc., Ass'n, supra. But it does not seem that the extract from the opinion in Birdsell v. Shaliol, which is quoted in the Stebler Case, warrants the construction there placed upon it. Mr. Justice Gray did not say, "If one person is in any case exempt from being sued * * * for using the same machine," etc., as seems to have been thought in the Stebler Case; but he said, "If one person is in any case exempt from being sued for damages for using the same machine," etc. Manifestly there is a distinction between the liability of a user being sued for damages, when all damages which the patentee has sustained have already been paid by another, and the liability of being enjoined from further use and made to respond for profits, because the former liability would permit a patentee to receive double compensation, while the latter would merely protect fully a right which the patent gives him, namely, to prevent others using the patented article without his consent, and compel an infringer to relinquish the profits which he has realized and which, in equity, belong to the patentee.

Nor do I think that the decision in Kelley v. Ypsilanti is susceptible of the construction apparently given it in the Stebler Case. The extract from it which is quoted in the latter case contains the limiting words "until the validity of plaintiff's patent and the infringement of the defendant have been judicially ascertained in one of the principal

suits." On that phase of the case it was merely said that, where a suit has been brought against a manufacturer and other suits have been instituted against purchasers from such manufacturer, it would be quite proper to stay the latter suits until the validity of the patent and the question of infringement could be determined in the former. But this is far from holding that a suit for injunctive relief could not, after the validity and infringement had been determined, be prosecuted against a purchaser simply because, in the suit against the manufacturer, the patentee had been fully compensated for the injury he had suffered. Indeed, the decision is clear to the effect that such a suit can be maintained.

I must conclude, therefore, that even if the plaintiff has received full compensation from the Thropp Company for the damages which it sustained as a result of the latter's infringement, to the same extent as if it, rather than the Thropp Company, had manufactured and supplied the defendant with the machines which it has used, that this fact will not bar the plaintiff from some relief in this action. The remaining questions are as to the extent and nature of the relief.

3. May the plaintiff recover damages, as distinguished from profits? If it has already received full compensation from the Thropp Company in the sense before mentioned, I do not think it can recover any damages from this defendant. Birdsell v. Shaliol, supra, 112 U. S. 489, 5 Sup. Ct. 244, 28 L. Ed. 768. If it has not received such satisfaction, then clearly it is entitled to recover from the defendant any damages which it has suffered by reason of the latter's use of the infringing machines. As before stated, the stipulation must be construed to mean that the Thropp Company paid and the plaintiff received the money therein provided for in satisfaction of all damages which the latter could have recovered against the former in that suit. The plaintiff has always derived its pecuniary benefit from the patent by making machines and licensing others to use them upon the payment of a royalty, based upon the number and size of the tires wrapped on each machine. Hence the measure of the plaintiff's damages against this defendant, if the other requisites essential to the recovery thereof were proven, would be the license fees or royalties which it would have received from the defendant, had the latter used the patented machines manufactured by the plaintiff rather than the infringing machines. Seymour v. McCormick, 16 How. 480, 14 L. Ed. 1024; New York v. Ransom, 23 How. 487, 16 L. Ed. 515; Packet Co. v. Sickles, 19 Wall. 611, 22 L. Ed. 203; Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 694. Therefore, in order to find that the plaintiff has already received full compensation from the Thropp Company, it must appear that he could have recovered those royalties in the first suit. I do not mean to hold, of course, that the plaintiff will necessarily be entitled to recover these royalties in this action, because it may be that it will be unable to prove one or more of the other essentials. But, under the construction which I have given the stipulation, the plaintiff surely cannot be held to have received full compensation, unless it would have been entitled to recover from the defendant in the

first suit all that it could presumably recover by way of damages from the defendant in this suit. If, for any reason, it should eventually develop that it cannot recover the royalties in this suit, no harm will result from permitting it to endeavor to do so.

[3, 4] It is necessary, therefore, to ascertain whether the plaintiff could have recovered these royalties in the suit against the Thropp Company. The measure of damages which a patentee is entitled to recover from an infringer (except where they are increased by the court under the statute) is compensation for the pecuniary loss which he has suffered from the infringement. Coupe v. Royer, 155 U. S. 565, 582, 15 Sup. Ct. 199, 39 L. Ed. 263; Yale Lock Co. v. Sargent, 117 U. S. 536, 552, 6 Sup. Ct. 934, 29 L. Ed. 954; Philp v. Nock, 17 Wall. 460, 462, 21 L. Ed. 679; Seymour v. McCormick, supra. As the plaintiff utilizes its patent only by licensing others to use machines manufactured by it, it is clear that the pecuniary loss, if any, which it suffered as a result of the Thropp Company's infringement, was the deprivation of an opportunity to furnish the defendant with the patented machines and to collect royalties for their use. Although it was said in Colgate v. Western Electric Mfg. Co. (C. C.) 28 Fed. 146, 147, that "royalty paid by licensees for the right to use the invention is not evidence of damages sustained by the patentee by the sale of the patented article sufficient to authorize a recovery," it does not follow that, if by a sale the patentee has been deprived of royalties which he would otherwise have received from a user, they are not the proper measure of damages against the first infringer. If the manufacture and sale or other disposition of an infringing article is the proximate cause of the loss by a patentee of royalties which he would otherwise have received from the user of a patented article, it would certainly seem to follow that he can recover such royalties from the one who manufactured and sold or otherwise disposed of the infringing article, because he would not otherwise be compensated by that infringer for the loss which he sustained as a result of the infringement.

It is no answer to say that such an infringer has invaded only one or two of the patentee's rights, namely, to make or sell; for the important question is, What damage has the patentee suffered as a result of the invasion complained of? not what right was invaded? If such damage is the deprivation of an opportunity to license another to use the patented article, and the pecuniary loss resulting therefrom, it must follow that an infringer is responsible for that damage. But merely because (and this is what I think was intended by the above-quoted expression in Colgate v. Western Electric Mfg. Co., supra) one has used an infringing article, and a patentee receives a certain royalty from those using the patented article, would not, standing alone, permit the patentee to recover from the person who made and sold the infringing article the royalty which the patentee would have received, had the patented rather than the infringing article been so used. This necessarily results from the rule that damages must be proven, and, consequently, that it is necessary, in a suit against the manufacturer and seller, or distributor, at least to show that the user would have purchased or taken a license to use the patented article

had he not purchased, or otherwise acquired, the infringing article, as also that the patentee would have been able to have furnished the patented article to him. Dobson v. Dornan, 118 U. S. 10, 17, 6 Sup. Ct. 946, 30 L. Ed. 63; Brookfield v. Novelty Glass Co., 170 Fed. 960, 96 C. C. A. 127 (C. C. A., 3d Cir.); Rose v. Hirsh, 94 Fed. 177, 179, 36 C. C. A. 132, 51 L. R. A. 801 (C. C. A., 3d Cir.); Tatum v. Gregory, 51 Fed. 446, 447 (C. C., N. D. Cal.); Bell v. U. S. Stamping Co., 32 Fed. 549, 551 (C. C., S. D. N. Y.); Roemer v. Simon, 31 Fed. 41 (C. C., S. D. N. Y.); Hall v. Stern, 20 Fed. 788 (C. C., S. D. N. Y.); Zane v. Peck, 13 Fed. 475, 476 (C. C., Conn.).

The evidence in this case quite conclusively shows that the defendant would not have used the patented machines, even if it had not acquired the infringing machines. Therefore the plaintiff could not have recovered the royalties on the two machines used by the defendant from the Thropp Company. If they can be recovered in this suit, then the plaintiff did not receive, through the settlement, full compensation for the loss which it may have suffered from the making and distributing of the infringing machines. It is therefore entitled to recover in this action such damages as it may be able to prove that it has suffered as a result of the defendant's use of the infringing machines.

4. Plaintiff is undoubtedly entitled to recover whatever profits the defendant realized from the use of the infringing machines, if it elects so to do, irrespective of the recovery of damages from the Thropp Company. It was so held by the Circuit Court of Appeals of this circuit in Philadelphia Trust, etc., Co. v. Edison Electric Light Co., 65 Fed. 551, 554, 13 C. C. A. 40.

5. As before shown, plaintiff is entitled, under any aspect of the case, to an injunction against the further use of the infringing machines by the defendant, unless the fact that defendant has ceased to use them is a sufficient reason for withholding it. This latter fact has not been generally considered such a reason, and I fail to see anything in this case which would take it out of the general rule. If the defendant does not intend to use the infringing features on the machines which it has, no harm will come to it from a decree specifically forbidding it from doing so.

Plaintiff will therefore be awarded the usual decree for an injunction and an accounting for profits and damages. The decree will carry costs.

## THOMSON ELECTRIC WELDING CO. v. BARNEY & BERRY, Inc.

(District Court, D. Massachusetts. July 11, 1916.)

No. 701.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—PROCESS OF ELECTRIC WELDING.

The Harmatta patent, No. 1,046,066, for a process of electric welding and its product, *held* valid and infringed.

In Equity. Suit by the Thomson Electric Welding Company against Barney & Berry, Incorporated. On entry of decree on mandate.

F. P. Fish and Fish, Richardson, Herrick & Neave, all of Boston, Mass., for plaintiff.

Edwards, Sager & Wooster and Clinton V. Edwards, all of New York City, and Browne & Woodworth, of Boston, Mass., for defendant.

DODGE, Circuit Judge. The opinion of the Court of Appeals dated October 5, 1915 (227 Fed. 428, 142 C. C. A. 124), reversing the decree of this court which held the patent in suit invalid, was followed by hearings in this court in December, 1915, and January, 1916, upon draft decrees submitted by the respective parties for entry in pursuance of the directions given in said opinion. The defendant thereafter applied to the Court of Appeals for leave to amend its answer by setting up, as an anticipation of the patent in suit, a French patent to Bouchayer, which application was denied June 14, 1916. 236 Fed. 1022, — C. C. A. —.

The further proceedings in this court in pursuance of the Court of Appeals' decision on October 5, 1915, have been in substance as follows:

The plaintiff, submitting a draft decree adjudging the patent valid and providing in the usual terms for an injunction and accounting, stated that it had no further proof to offer and submitted that the facts of the infringement whereof it complained were shown by the record before the appellate court.

The defendant submitted two draft decrees, one dismissing the bill, the other, in the alternative, containing a proviso excepting from the operation of the injunction any machines, processes, and products made or used before the amendment of the patentee's application before the issue of the patent made March 31, 1910.

The defendant thereupon offered to prove, and the plaintiff conceded, though objecting that the facts conceded were immaterial, that the witnesses produced by the Toledo Company, whose testimony appears in the record, testified as to certain machines used for spot welding in 1908 and 1909 and prior to March, 1910; that said machines were in fact used for spot welding; and that when so used they practiced the Harmatta method with the Harmatta result, under any construction as to them, of the claims in suit.

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

The defendant then offered in evidence the French patent to Bouchayer, since brought by it before the Court of Appeals in its application denied June 14, 1916, as above stated. This was excluded, as was also a translation of the patent into English, objected to by the plaintiff, as incorrect; and evidence offered by the defendant to prove that the translation was correct.

The defendant offered expert evidence to explain the operation of the machine described in the patent in suit and its process. This was also excluded.

The defendant then moved for leave to amend its answer so as to set up said Bouchayer patent as an anticipation of the patent in suit, which motion was denied; this court not regarding the opinion of the Court of Appeals as permitting such an amendment at that stage of the proceedings.

The defendant then called Mr. Cutler, a witness who testified on its behalf at the original hearing, and he was permitted to testify, against the plaintiff's objection, that, in heating the skates referred to in his former testimony, the operator held in his hand the bottom portion thereof, intended to lie against the sole of the wearer's shoe; that during the heating operation the portion so held did not become too hot to be held without burning; and that the skates were white nickel plated before welding, whereby the welding operation was materially facilitated.

The defendant then offered in evidence three United States patents to L. S. Lachman, Nos. 896,218, 904,881, and 904,882, for the purpose of establishing the entry of other processes into the field prior to Harmatta's amendment of his application on March 31, 1910. These were excluded, the Court of Appeals opinion not being understood as permitting their introduction at that stage of the proceeding.

Nothing further was offered by either party.

The Court of Appeals opinion is understood to have settled the following matters for the purposes of the further proceedings therein ordered:

(1) The process and product described in the patent in suit involve patentable invention.

(2) They were not anticipated by anything in the prior art disclosed by the evidence.

(3) Nor is the patent invalid by reason of any changes made before its issue in the original application for it.

(4) Upon the evidence in the record, there has been at least some infringement by the defendant of the claims in suit. If, in the view of the appellate court, the briefs had failed to show any infringement, its opinion could not have declared, as it does, that the bill "must, of course, be sustained." Whether infringement had been proved or not, supposing the patent valid, was a question fully argued on the appeal upon such evidence as both parties had seen fit to introduce, as the record and briefs show; and, as to a principal part of the alleged infringing manufacture, the opinion of this court that it had not infringed the patent, even if valid, had been stated.

Dismissal of the bill on the ground, now asserted by the defend-

ant, that no infringement has been proved, would therefore be a proceeding inconsistent with the Court of Appeals opinion, under which the further inquiry directed by this court is to determine two questions only: (1) Whether or not the decree should be limited so as to exclude from the profits recoverable under it profits "for anything done prior to the amendment" of the patentee's application in 1910; (2) whether from the injunction it is to contain there should be any exemption with respect to "machines constructed before the amendment was made," and what, if any.

The patent in suit was issued December 3, 1912. This bill was filed March 13, 1913. The patent is not for a machine, but for the described process of spot welding, and for the product thereby obtained.

Between the two above dates the defendant made articles like loom parts, marked Exhibits 8 and 9, and the skates, marked Exhibits 27, 28, and 32. In making such articles it used a machine which it had installed in May, 1911, and used ever since. This machine it bought of the Toledo Electric Welder Company, which, though not a nominal party, is defending this suit. All these facts seem to me established by the answers to the plaintiff's interrogatories in connection with the evidence in the record. There was no dispute as to any of them at the trial. The Court of Appeals opinion is not understood as deciding anything to the contrary.

No injunction is sought against the manufacture and sale of any machine, nor against the use of any, except to the extent that it may be used in following the patented process or in producing articles spot welded according to that process. The infringement alleged in the bill is "using a method of electric welding and making and selling metal work, plates and articles embodying the invention claimed in said letters patent." Against such infringement only is any injunction sought; in other words, against using the patented method or making the patented product, whether with the above or with any other machine.

The validity of the patent being now established, I am unable to doubt that loom parts like Exhibits 8 and 9 infringe the product claims in suit, or that in making them the defendant infringed the process claims in suit. Except as below stated, the defendant is not understood to deny that said claims have been infringed by the manufacture of said loom parts.

As to the skates, Exhibits 27, 28, and 32, the defendant contends that in making them there was no infringement either of the process or of the product claims, because the spot welds uniting their parts are not surrounded by unwelded areas, but are, on the contrary, continuous and overlapping so as to form practically continuous lines; and because they were made by the operator one after the other, each before its predecessor had time to cool, so as to form what is in effect a "line" as distinguished from a "spot" weld.

While the above may apply to a considerable proportion of the spot welds in these skates, it is not true of all; there are enough isolated spot welds to prevent the conclusion that the skates do not infringe, even if the above contention could otherwise prevail. And, taking the facts as to the making of those spot welds in the skates which are not

so isolated from each other to be as the defendant claims, some at least of the claims in suit, such as claims 3, 8, 9, 11, and 12, seem to me incapable of a construction according to which spot welding so performed would not infringe them, consistently with the Court of Appeals opinion. I am obliged to agree with the plaintiff that the "line welding," referred to in that opinion, all claims for which are therein said to have been stricken out of Harmatta's application in 1910, is line welding of the kind effected by the beveled roller electrodes described in Harmatta's original application, and is not that effected by making a line of overlapping, single spot welds.

The terms of the plaintiff's proposed decree, in connection with the pleadings, sufficiently show that no recovery of profits arising from any use of the patented process before the patent issued on December 3, 1912, nor from any articles produced before that date by said process is to be had. That no such recovery is sought has been expressly stated on the plaintiff's behalf. A recovery of profits "for anything done prior to the amendment" of 1910, as suggested by the Court of Appeals in its question 1 above, is thus not to be apprehended from the entry of said decree.

As to the other question which the opinion directs to be considered, "whether or not an injunction can go against machines constructed before the amendment was made," the defendant has contended that the result of such consideration must be to prevent any injunction against its use of the Toledo machine above mentioned, or of any similar machine constructed before said amendment; and this has been urged by it as requiring dismissal of the bill. With this contention, as has been stated, I am unable to agree.

There being no alleged infringing machines, strictly speaking, in the case, the Court of Appeals must be understood to mean, by its use of those words, machines like the defendant's, capable of infringing use in performing the patented process. The inquiry directed is therefore understood to be whether there is evidence requiring the specific exemption from the terms of any injunction against the defendant of the use of any particular machine or machines. The only machine with whose use the proposed injunction will interfere, so far as now shown, is the defendant's machine installed, as stated, in May, 1911, and I do not find evidence in the record sufficient to prove that this machine was constructed before March 31, 1910, the date of the amendment referred to. I do not understand the opinion as suggesting that the defendant may be left free to produce the patented product by the patented process upon other machines, in fact built before that date, if it can find them.

The draft decree submitted by the plaintiff is approved and may be entered upon motion to that effect.

## McCARTY v. NEILSON.

(District Court, E. D. Pennsylvania. January 29, 1917.)

No. 3900.

1. USURY ⟸111(3)—ACTION TO RECOVER—STATEMENT OF CLAIM.
The cause of action, set forth in a statement of claim, being that plaintiff borrowed money from defendant, and in discharge of the obligation defendant received a sum in excess of that loaned and legal interest, and plaintiff has demanded return of the usurious interest thus exacted, making his demand and bringing his action within the statutory period, the statement of claim alleging, as the means through which defendant received the money, the distribution to defendant of plaintiff's share in an estate, is not defective in not setting forth the full record of the proceedings in the matter of the estate.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 297; Dec. Dig. ⟸ 111(3).]

2. PLEADING ⟸155—AFFIDAVIT OF DEFENSE—ADDING TO STATEMENT OF CLAIM.
Practice Act (Act Pa. May 14, 1915 [P. L. 483]) § 20, allowing defendant in his affidavit of defense to raise any question of law, without answering the averments of fact in the statement of claim, which question may be set down for hearing and disposed of in limine, does not allow defendant by his affidavit of defense to practically incorporate into the statement of claim matter unnecessary therefor, but constituting a defense, and thereon raise a question of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 309–311, 313, 314; Dec. Dig. ⟸155.]

At Law. Action by John C. McCarty against William D. Neilson. Sur rule for judgment upon affidavit of defense in law. Rule discharged.

Jere J. Crowley, of Philadelphia, Pa., and Wilton Snowden, Jr., of Baltimore, Md., for plaintiff.

John Douglass Brown, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The statement of claim avers a cause of action arising out of the fact that the plaintiff, who had barely reached his majority, was a distributee of the estate of Marie E. McCarty, and being in need of money applied for and ultimately secured from the defendant the loan of a sum of money, for which his interest in said estate was pledged as security, the pledge taking the form of an absolute assignment of his interest. There are other averments to the effect that the substantial sum advanced was $1,000, and that the defendant received as the fruit of the pledge the sum of $8,500 in the distribution of the estate in which the plaintiff had a share. The plaintiff admits the right of the defendant to retain out of his distributive share of said estate the advances made by the defendant by way of loan, together with interest thereon, but claims the balance of the sum received by the defendant, to wit, $5,424.31.

The statement of claim, in paragraph 8 thereof, sets forth as a fact an adjudication in the estate of the decedent, and following this a de-

cree of distribution fixing the share and interest of the plaintiff in the estate, and awarding it to the defendant as his assignee, and attaches what purports to be a copy of the decree of distribution. The affidavit of defense avers this record of the proceedings in the orphans' court to be incomplete, and sets forth what is further averred to be a true copy of the distribution. This brings into the decree the added thought of the consent of the plaintiff to the distribution as made, and lays ground for the defense set up that the ownership of this share had been determined by the orphans' court, and that the claim presented in the present case had thereby been adjudicated and determined, and the plaintiff, in consequence, precluded from again asserting title to the property, the ownership of which is claimed in this action.

[1, 2] The affidavit of defense is filed under section 20 of the Ralston Act. It seeks to raise a substantial defense to the action by invoking the res adjudicata doctrine. It also incorporates exceptions going to formal defects in the statement of claim. One of the latter, and the only one urged at the argument, is that the statement of claim is defective, in that it does not exhibit the full record of the orphans' court relating to the distribution of the decedent's estate. A disposition of the question of the sufficiency of the statement in this respect will dispose of all the questions upon which we now feel required to pass.

The cause of action set forth in the statement of claim is essentially this: The plaintiff borrowed from the defendant a sum of money, and in discharge of the obligation the defendant received a sum of money in excess of the sum loaned and legal interest thereon, and the plaintiff has demanded the return of the usurious interest thus exacted, and has both made his demand and brought his action within the period limited by the act of assembly. The only relation which the distribution of the estate of the decedent has to this transaction is that it was the means through and by which the defendant received the moneys, the return of a part of which is now demanded. If it be a fact in the case that it had been determined by a court of competent jurisdiction that the transaction upon which the plaintiff bases his claim was not a loan transaction, but the sale of property, this would be a defense which the defendant might set up, but would not be a matter of defense which the plaintiff was obliged to disclose. The defendant concedes that the plaintiff has not disclosed it, but seeks to bring it upon the record by presenting it through an affidavit under section 20 of the act of assembly to which reference has been made.

We are of opinion that the defendant cannot in this way secure a right to the judgment for which section 20 provides. The defendant may, of course, present the defense indicated through and by an affidavit of defense, but when so presented it is presented primarily as a fact, and the fact must in some way be found before the court can pronounce its judgment upon the law. Such an affidavit is not that to which section 20 applies, but is the affidavit of the facts, the disposition of which is provided for in other sections of the act. When such an affidavit of defense, upon the facts averred therein, is presented,

the plaintiff, if he so elects, may test its sufficiency by a rule for judgment; but the defendant cannot, and must await some method of having the fact determined before he is entitled to a judgment in his favor. A plaintiff would have the right (although not bound to do so) to bring on a test of the sufficiency of such an anticipated defense by averring and thereby admitting the facts upon which the defense rested. Defendant might then file an affidavit of the legal defense which would then arise out of the statement of claim. This would raise a question of practice under the Ralston Act.

If the fact of the defense thus incorporated in the statement of claim was the sole defense upon which the defendant relied, and a stipulation to this effect were made, the court could proceed to enter a final judgment. Where, however, the defendant wished to urge other defense, then the court would not be in a position to render a judgment, which would surely be a final disposition of the case, although it might be technically a final judgment. Being such a final judgment, if rendered in favor of the defendant, the plaintiff would have his right of appeal, and we would in consequence have introduced the evils of the system of appeals from interlocutory judgments. Because of this, as observed in other cases, the better practice, to which this court, until the practice is otherwise authoritatively settled, will adhere, is, where the question of law raised under section 20 is one which will inhere until trial and thereby become a trial question, it will be disposed of as such, and the power to rule it in limine, conferred by section 20 of the Ralston Act, will not ordinarily be exercised.

The rule of the defendant for judgment in his favor upon the affidavit of defense filed is discharged.

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## UNITED STATES v. GRAND RAPIDS & I. RY. CO.

(District Court, W. D. Michigan, S. D. February 25, 1915.)

1. INTERNAL REVENUE ⊜28—EXCISE TAXES—LIMITATION.
   The three-year clause in the Excise Law of 1909 (Act Aug. 5, 1909, c. 6, § 38, subd. 5, 36 Stat. 112 [Comp. St. 1913, § 6304]), imposing a special tax on corporations, is not a limitation on the right of the government to sue for unpaid taxes, but at most is a limitation on the collecting officers to make an assessment to enforce payment by summary proceedings.
   [Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 76–81; Dec. Dig. ⊜28.]

2. INTERNAL REVENUE ⊜28—CORPORATIONS—LIABILITY FOR TAXES.
   In the collection of taxes imposed on corporations by the Excise Law of 1909, the government is not confined to the summary proceedings therein, but may resort to a plenary suit.
   [Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 76–81; Dec. Dig. ⊜28.]

3. INTERNAL REVENUE ⊜28—CORPORATIONS—COLLECTION OF TAXES.
   Where a tax of a fixed percentage like the one imposed by Excise Law of 1909 on corporations is so definitely described in the statute that its

amount or value can be ascertained and determined on evidence by a court, a suit therefor will lie without assessment.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 76–81; Dec. Dig. ⊜28.]

At Law. Action by the United States against the Grand Rapids & Indiana Railway Company. Demurrer to declaration overruled.

Myron H. Walker, U. S. Dist. Atty., of Grand Rapids, Mich.

James H. Campbell, of Grand Rapids, Mich., for defendant.

SESSIONS, District Judge. A careful study and analysis of the statute here involved and an examination and consideration of the applicable and controlling authorities lead to the following conclusions:

[1] 1. The three-year clause of the fifth subdivision of section 38 of the 1909 Excise Law is not a limitation upon the right of the government to sue for unpaid taxes, but, at most, is a limitation upon the right of the collecting officers to make assessment and to enforce payment by the summary statutory proceedings.

[2] 2. In the collection of the taxes imposed by the statute, the government is not confined to the summary proceedings therein provided, but may resort to a plenary suit.

[3] 3. "Where a tax of a fixed percentage (like the one here sought to be recovered) is imposed by the statute on a subject or object which is so definitely described in the statute that its amount or value, on which the fixed per centum is to be calculated, can be ascertained and determined, on evidence, by a court, a suit for the tax will lie, without an assessment." United States v. Tilden, 28 Fed. Cas. 161, No. 16,519; United States v. Hazard, 26 Fed. Cas. 251, No. 15,337; Dollar Savings Bank v. United States, 19 Wall. 227, 22 L. Ed. 80; United States v. Chamberlin, 219 U. S. 250–264, 31 Sup. Ct. 155, 55 L. Ed. 204; King v. United States, 99 U. S. 229, 25 L. Ed. 373; United States v. Reading R. R., 123 U. S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138; United States v. Cobb (C. C.) 11 Fed. 76; United States v. M. H. & O. R. Co. (C. C.) 17 Fed. 719; 22 Cyc. 1670, and cases there cited; Eliot Nat. Bank v. Gill (D. C.) 210 Fed. 933, affirmed by Circuit Court of Appeals of First Circuit (December 21, 1914), 218 Fed. 600, 134 C. C. A. 358.

The demurrer will be overruled, and the defendant will be given 15 days within which to plead to the declaration.

## In re HARGADINE-McKITTRICK DRY GOODS CO.

(District Court, E. D. Missouri, E. D. February 5, 1917.)

No. 2909.

1. BANKRUPTCY ⊂⊃51—VOLUNTARY PROCEEDINGS—INTERVENTION.
Stockholders of a corporation, which petitioned for voluntary bankruptcy, cannot intervene to object to the adjudication, since the proceedings on such petition are ex parte, and no answer can be permitted.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 49; Dec. Dig. ⊂⊃51.]

2. BANKRUPTCY ⊂⊃43—VOLUNTARY PETITION—AUTHORITY OF CORPORATE DIRECTORS.
The directors of a corporation have authority in Missouri to put the corporation into voluntary bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 38; Dec. Dig. ⊂⊃43.]

3. BANKRUPTCY ⊂⊃51—VOLUNTARY PROCEEDINGS—ADJUDICATION—VACATION.
Where the petition for voluntary bankruptcy is in due form, properly verified, and avers all the jurisdictional and other facts essential to entitle the petitioner to an adjudication, such adjudication must be made, and thereafter any party in interest can move to vacate it upon jurisdictional grounds.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 49; Dec. Dig. ⊂⊃51.]

4. BANKRUPTCY ⊂⊃41—VOLUNTARY PROCEEDINGS—OWNERSHIP OF PROPERTY.
To entitle petitioner to be adjudicated a voluntary bankrupt, it is not essential that it should own any property, or that its property should be subject to administration in bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 40; Dec. Dig. ⊂⊃41.]

5. BANKRUPTCY ⊂⊃404(1)—DISCHARGE—RIGHT OF CORPORATION.
A corporation is entitled in the proper case to receive a discharge in bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 679, 681–691; Dec. Dig. ⊂⊃404(1).]

6. BANKRUPTCY ⊂⊃20(2)—VOLUNTARY PROCEEDINGS—RECEIVERS OF STATE CORPORATION.
The fact that a state court has, by appointing a receiver, acquired jurisdiction over all the property of a petitioner for voluntary bankruptcy, and that such jurisdiction is exclusive, is no defense to the voluntary petition.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. ⊂⊃20(2).]

7. BANKRUPTCY ⊂⊃41—VOLUNTARY PROCEEDINGS—REQUISITES—INSOLVENCY.
It is not essential that a petitioner for voluntary bankruptcy be insolvent.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 40; Dec. Dig. ⊂⊃41.]

8. BANKRUPTCY ⊂⊃20(1)—VOLUNTARY PROCEEDINGS—INJUNCTION BY STATE COURT.
A state court has no power by any form of order or injunction to limit the operation of the Bankruptcy Act, or impair the jurisdiction of a

court of bankruptcy, and cannot enjoin a corporation from filing a petition for voluntary bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊜20(1).]

9. BANKRUPTCY ⊜43—VOLUNTARY BANKRUPTCY—ESTOPPEL—DEFENDING IN STATE COURT.

The fact that a corporation and its directors appeared and contested a suit against them in the state court, in which a receiver was appointed, does not estop them from filing a voluntary petition in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 38; Dec. Dig. ⊜43.]

10. BANKRUPTCY ⊜44 — VOLUNTARY PROCEEDINGS — PETITION — PROVABLE DEBTS.

An allegation in a petition for voluntary bankruptcy that the bankrupt owes debts establishes prima facie the existence of provable debts against the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 43–46; Dec. Dig. ⊜44.]

11. BANKRUPTCY ⊜43—VOLUNTARY PROCEEDINGS—RIGHT—MOTIVE.

The right of a corporation in a proper case under the Bankruptcy Act to file a petition for voluntary bankruptcy cannot be denied because of improper motives.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 38; Dec. Dig. ⊜43.]

12. BANKRUPTCY ⊜114(1)—RECEIVERS—RIGHT TO APPOINTMENT.

To warrant the bankruptcy court in appointing a receiver, it must find that it is absolutely necessary for the preservation of the bankrupt's property that a receiver be placed in charge thereof, under Bankr. Act July 1, 1898, c. 541, § 2 (3), 30 Stat. 544 (Comp. St. 1913, § 9585) authorizing the appointment of receivers in case the court shall find it absolutely necessary for the preservation of estates.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 164, 165; Dec. Dig. ⊜114(1).]

13. BANKRUPTCY ⊜114(1)—RECEIVERS—PETITION—SUFFICIENCY.

A petition for the appointment of a receiver in bankruptcy, which merely alleges the necessity therefor in the language of the statute is not sufficient; but it must allege facts which reasonably establish such necessity.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 164, 165; Dec. Dig. ⊜114(1).]

14. BANKRUPTCY ⊜114(1)—RECEIVER—PREVIOUS APPOINTMENT BY STATE COURT.

Where a voluntary petition in bankruptcy was filed by a corporation after the state court had handed down an opinion announcing the appointment of a receiver, but before the entry of the decree of appointment, no receiver will be appointed in the bankruptcy proceedings, since the appointment by the state court relates back to the announcement thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 164, 165; Dec. Dig. ⊜114(1).]

15. BANKRUPTCY ⊜20(2)—RECEIVER—JURISDICTION—STATE RECEIVER.

Under Bankr. Act, § 3 (4) (Comp. St. 1913, § 9587), making it an act of bankruptcy while insolvent to apply for a receiver or where because of insolvency a receiver has been put in charge, section 67c (section 9651), making void a lien created by any suit or proceeding begun within four months before the filing of a petition in bankruptcy, if it appears, among other things, that it was obtained while defendant was insolvent, and section 67f (section 9651), making void all levies, attachment, or other liens

obtained against an insolvent person within four months prior to filing a petition in bankruptcy, the insolvency of a voluntary bankrupt is an indispensable prerequisite to the exercise by the bankruptcy court of jurisdiction over property of the bankrupt in possession of a receiver of the state court.

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

16. BANKRUPTCY ⊂⊃114(1)—RECEIVERSHIP—SUFFICIENCY OF SHOWING—INSOLVENCY.

Where a petition for voluntary bankruptcy alleged insolvency, but that allegation was based on the guaranty, which the state court had declared to be ultra vires, and for which, if valid, the corporation would have a corresponding claim against the principal debtor, and in the suit against it in the state court the bankrupt had alleged it was solvent, there is not a sufficient showing of insolvency to warrant the appointment of a receiver in bankruptcy, who would take the property from the control of the receiver appointed by the state court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 164, 165; Dec. Dig. ⊂⊃114(1).]

In Bankruptcy. Voluntary petition in bankruptcy by the Hargadine-McKittrick Dry Goods Company, in which certain stockholders of the corporation ask leave to intervene. Petition for intervention denied, petitioner adjudged a bankrupt, and petitioner's application for appointment of receiver denied.

Chas. A. Houts, of St. Louis, Mo., for alleged bankrupt.

M. G. Reynolds, Randolph Laughlin, Julian Laughlin, and Chase Morsey, all of St. Louis, Mo., for receiver.

DYER, District Judge. On the 6th of January, 1917, the Hargadine-McKittrick Dry Goods Company, a corporation, filed in this court a voluntary petition in bankruptcy, and at the same time presented an application for the appointment of a receiver to take charge of its assets. The following rule was made by Judge Adams when he was judge, to wit:

Rule 11: "Upon the entry of an order of adjudication in bankruptcy, unless otherwise directed by the court, the case shall be forthwith referred generally to the referee for the district in which the bankrupt has his principal place of business, resides, or has his domicile, and after such reference the referee is authorized to fix the time when, and place where, he will act upon matters arising in the case."

The practice since the adoption of that rule has been that, upon the filing of a voluntary petition in bankruptcy, an order of adjudication was entered as a matter of course, and the proceeding immediately referred to the referee in bankruptcy. However, after the petition had been filed in this case and the order of adjudication entered, counsel who had been engaged in an action in the circuit court of the city of St. Louis against the petitioner herein and others, appeared on the same day and made objection to the adjudication, and asked to be heard in opposition thereto. The court, being willing to hear the objections, ordered the adjudication set aside and fixed a day for a full hearing. At the same time certain stockholders of the Hargadine-

McKittrick Dry Goods Company filed a petition, asking that they be allowed to intervene for the purpose of resisting the petition in bankruptcy.

At the hearing counsel were heard at great length, and briefs were filed by counsel representing both the Hargadine-McKittrick Dry Goods Company and the interveners, which show much industry and learning. At that hearing and in the briefs submitted several important questions were pressed upon the court's attention that must now be disposed of: (1) The right of stockholders to intervene herein for the purpose of resisting the petition in bankruptcy. (2) The right of the company to be adjudicated a bankrupt on a petition in due form and containing all necessary averments. (3) How far a court in bankruptcy is bound by a decree of a state court, and the right of a court in bankruptcy to take possession of and administer property already in the custody of a receiver appointed by a state court after an adjudication and decree entered, wherein the alleged or proposed bankrupt was a party. These questions have been considered and the court will now proceed to dispose of them.

[1] The petition for leave to intervene must be denied, for the bankrupt law does not permit a defense in limine to a voluntary petition in bankruptcy. The proceedings upon such a petition are properly ex parte, and no answer can be permitted. In re Jehu (D. C.) 94 Fed. 638; In re Ives, 113 Fed. 911, 51 C. C. A. 541; In re Carleton (D. C.) 115 Fed. 246; In re Junck & Balthazard (D. C.) 169 Fed. 481; National Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113.

[2] In the opinion of the court the petitioner is entitled to have an adjudication of bankruptcy entered upon its voluntary petition. It appears, from the petition in bankruptcy and the accompanying documents, that the filing of the petition was authorized by the board of directors of the bankrupt, and in Missouri the directors of a corporation have authority to put the corporation into voluntary bankruptcy. Dodge v. Kenwood Ice Co., 204 Fed. 577, 123 C. C. A. 103; Home Powder Co. v. Geis, 204 Fed. 568, 123 C. C. A. 94; In re Gaunacevi Tunnel Co., 201 Fed. 316, 119 C. C. A. 554; Chew v. Ellingwood, 86 Mo. 260, 56 Am. Rep. 429; Huse v. Ames, 104 Mo. 91, 15 S. W. 965.

[3] The petition is in due form and is properly verified, and avers all the jurisdictional and other facts essential to entitle the petitioner to have an order entered adjudicating it bankrupt. After the adjudication has been made, any party who has the requisite interest in the proceedings may move to vacate the adjudication upon jurisdictional grounds. In re Garneau, 127 Fed. 677, 62 C. C. A. 403; In re Gaunacevi Tunnel Co., 201 Fed. 316, 119 C. C. A. 554.

Although, in the present posture of the case, no formal defense to the petition is or can be entertained, the court has heard the suggestions made on behalf of certain stockholders in opposition to an adjudication of bankruptcy. As these grounds of objection have been presented by counsel in their briefs, and may be renewed upon a motion to vacate the adjudication, the court deems it proper to say that the objections urged appear to be untenable.

[4, 5] In order that the petitioner may be entitled to be adjudicated a bankrupt, it is not essential that it should own any property, or, if it does own property, that such property should be subject to administration in bankruptcy, for it must be borne in mind that a corporate bankrupt is entitled, in a proper case, to receive a discharge in bankruptcy. In re Marshall Paper Co., 102 Fed. 872, 43 C. C. A. 38; Firestone Co. v. Agnew, 194 N. Y. 165, 86 N. E. 1116, 24 L. R. A. (N. S.) 628, 16 Ann. Cas. 1150.

[6] The fact that a state court has acquired jurisdiction over all the property of the petitioner, and that such jurisdiction is exclusive and indefeasible, is not available as a defense to its voluntary petition in bankruptcy. In re Sterlingworth Railway Supply Co. (D. C.) 164 Fed. 591; In re Moench & Sons, 130 Fed. 685, 66 C. C. A. 37.

[7] It is urged that the petitioner is not insolvent, but in a voluntary case it is not necessary that the bankrupt be insolvent. In re Foster Paint & Varnish Co. (D. C.) 210 Fed. 652.

[8] It is further contended that this court is without jurisdiction to adjudge the petitioner a bankrupt, because it is asserted that the state court has enjoined the bankrupt company and its directors from filing a voluntary petition in bankruptcy. The interlocutory decree in the state court contains, among other things, the following provisions:

"That said Hargadine-McKittrick Dry Goods Company, its officers, directors, and agents, and the individual defendants, Thomas H. McKittrick, Hugh McKittrick, Walter McKittrick, Ralph McKittrick, Charles C. English, Martin P. Donahoe, George B. Halliday, Robert McKittrick Jones, George M. Wright, and E. C. Simmons, be and they are hereby enjoined and restrained from interfering with the receiver in his taking and holding possession of the assets and properties of said company, from disposing or attempting to dispose in any way of any of said assets and properties, and from incumbering or embarrassing, or attempting to incumber or embarrass, or from doing any other act or thing to defeat or embarrass the receiver in the discharge of his duties herein."

In the opinion of this court the decree of the state court cannot properly be so construed or applied as to affect the jurisdiction of this court or to impair the right of the bankrupt and its directors to file a voluntary petition in bankruptcy. It is not within the power of the state court to limit the operation of the Bankruptcy Act, or impair the jurisdiction of this court as a court of bankruptcy, by any form of order or injunction. If the rule were otherwise, any court of general jurisdiction could, in any given case, exclude a court of bankruptcy from the exercise of its lawful jurisdiction by merely forbidding a debtor party from invoking the jurisdiction of the court of bankruptcy, and such a principle would be manifestly inadmissible.

[9] It is further contended that the bankrupt company, by appearing in the suit pending in the state court and litigating the matters therein involved, has estopped itself from filing a voluntary petition in bankruptcy. This contention seems to be entirely untenable, as none of the elements essential to constitute an estoppel are present. The fact that the bankrupt company and its directors were made parties defendant in the suit prosecuted against them in the state court, and that they appeared therein and contested the suit, can in no way estop the company or its directors from filing a voluntary petition in bankruptcy.

[10] It is further urged that the bankrupt company owes no provable debts, and for that reason it is not entitled to go into voluntary bankruptcy. But it is alleged in the petition that the bankrupt "owes debts," and this allegation must be treated as making a prima facie case, entitling the petitioner to be adjudicated a bankrupt. Furthermore, it does not seem to be seriously denied that the bankrupt owes one or more debts. Upon this phase of the case it is enough to say that the petition in bankruptcy is prima facie sufficient, and if it ultimately turns out that the company owes no provable debt, it will then be the duty of the court to dismiss the petition.

[11] It is also contended that the bankrupt company and its directors, in filing the petition in bankruptcy, are endeavoring to employ the process of this court to evade the decree of the circuit court of the city of St. Louis, and thereby perpetrate a fraud upon the stockholders who are seeking redress in the suit now pending in the state court. This contention involves the assumption that an adjudication of bankruptcy will have the effect of depriving the circuit court of the city of St. Louis of jurisdiction to proceed with the suit now pending therein, and will operate to supersede the administration of the bankrupt's property in the state court by an administration in this court. But, as already pointed out, it is clear that an adjudication of bankruptcy will not necessarily bring about any of the suggested results. In filing its voluntary petition in bankruptcy the petitioner is availing itself of a statutory right, and under the allegations of its petition the petitioner is entitled to be adjudicated bankrupt, and this court has no discretion to refuse the adjudication, because of any views entertained by the court as to the petitioner's motives or purposes in filing the petition.

[12] The petition praying for the appointment of a receiver does not make such a showing as justifies the court in appointing a receiver. In order to warrant the court in appointing a receiver, the court must find that it is absolutely necessary for the preservation of the property of the bankrupt that a receiver be placed in charge thereof. Bankruptcy Act, § 2 (3); Faulk & Co. v. Steiner, 165 Fed. 861, 91 C. C. A. 547; Matter of Oakland Lumber Co., 174 Fed. 634, 98 C. C. A. 388.

[13] Where the appointment of a receiver in bankruptcy is sought, it is not enough to allege the necessity for such appointment in the language of the statute, but the moving papers must set forth the specific facts which reasonably establish such necessity. Faulk v. Steiner, supra; In re Oakland Lumber Co., supra. In the present case the petition alleges no concrete facts which show that the appointment of a receiver herein is necessary for the preservation of the bankrupt's property, and for that reason the court must decline to appoint a receiver.

[14] There is another and more cogent reason why the court must decline to appoint a receiver in this case. It appears from the statements of counsel that the circuit court of the city of St. Louis, through the medium of a receiver appointed by it, has heretofore taken possession of all of the bankrupt's property, and under the facts as here presented it does not appear that a receiver in bankruptcy appointed by this court would be entitled to take possession of any of the bankrupt's property, now in the custody of the receiver appointed by the state court, and hence the appointment of a receiver by this court would ap-

parently be an entirely useless and futile proceeding. As stated by counsel, the facts in relation to the state court receivership are these: In December, 1915, certain stockholders of the bankrupt company instituted a suit in the circuit court of the city of St. Louis against the bankrupt company, its officers, directors, and others, the general purpose of which was to charge the directors and other defendants with certain moneys belonging to the bankrupt company, which it was alleged they had wrongfully diverted from the corporation, to obtain an accounting against the defendants, to remove the officers and directors, enjoin the officers and directors from disposing of the company's property to secure the appointment of a receiver to take charge of the company's property and prosecute such suits for the recovery of property as the company might be entitled to maintain, to dissolve the corporation, and for the liquidation and distribution of the company's assets through the medium of the receiver. The suit just mentioned was tried in due course in the state court, and on December 29, 1916, the judge of the division of the circuit court of the city of St. Louis in which it was pending handed down his opinion therein, made and filed certain findings of fact and conclusions of law, announced the appointment of a receiver, and directed counsel in the case to prepare an interlocutory decree in conformity with the court's opinion and findings. This interlocutory decree was drawn up and entered in the case on January 8, 1917. In this decree the court held that the officers and directors of the defendant company were liable for certain moneys of the company, which it was found had been wrongfully expended under their direction, directed an accounting in respect thereto, appointed Henry S. Caulfield, receiver of all the company's property, directed the receiver to take possession of such property, and reserved jurisdiction to make such further orders as might be appropriate in the case. On January 8, 1917, the receiver appointed by the state court qualified and took possession of all of the property of the company. In the meantime, on January 6, 1917, the company, acting through its officers and directors, filed its petition in bankruptcy in this court, and also filed herein its petition praying the appointment of a receiver. Upon this state of facts it is now urged on behalf of the bankrupt company that this court should upon its petition appoint a receiver in bankruptcy, and it is further insisted that such receiver, when appointed is entitled to take charge of the bankrupt's property now in the custody of the receiver appointed by the state court.

It is evident from the facts above stated that the state court had acquired jurisdiction over all the bankrupt's property prior to the filing of the petition in bankruptcy, for the state court's order appointing a receiver, etc., must be treated as having taken effect, by relation, from December 29, 1916, the date on which the court delivered its opinion and announced its findings, although its formal order was not actually reduced to writing and entered until January 8, 1917. Robinson v. Govers, 138 N. Y. 425, 34 N. E. 209; Rochester Water Co. v. Rochester, 84 App. Div. 71, 82 N. Y. Supp. 455.

[15] Since the jurisdiction of the circuit court of the city of St. Louis had attached over the property of the bankrupt company prior to the filing of the petition in bankruptcy, and since the receiver ap-

pointed by that court is now in possession of all the bankrupt's property, that can be no justification for the appointment of a receiver by this court, unless under the provisions of the Bankruptcy Act the administration of the bankrupt's property in the state court must be superseded by an administration in this court. Under the facts here presented this court would appear to have no authority to put its receiver in charge of the property now in the custody of the receiver appointed by the circuit court of the city of St. Louis. This is so because the insolvency of the bankrupt company is an indispensable prerequisite to the exercise by this court of jurisdiction over the property now in the custody of the receiver of the state court. Bankruptcy Act, § 3 (4), § 67c, § 67f; In re Watts, 190 U. S. 1, loc. cit. 27, 23 Sup. Ct. 718, 47 L. Ed. 933; Bank v. Gudger, 212 Fed. 49, 128 C. C. A. 505; Graham Mfg. Co. v. Davy, 38 Am. Bankr. Rep. 118.

[16] The showing here made not only fails to establish the company's insolvency, but, on the contrary, convinces the court that the company is solvent. It is true that the bankrupt company in its schedules sets forth an aggregate indebtedness which exceeds its assets as scheduled; but the principal indebtedness specified in the bankrupt's schedules consists of an alleged liability to the Missouri Pacific Railroad Company arising upon a guaranty of a lease, amounting to about $460,000, and from the facts brought to the attention of the court it seems highly probable that this is not an indebtedness which is provable in bankruptcy against the bankrupt company. The circuit court of the city of St. Louis has held that the making of the guaranty here in question was an ultra vires act on the part of the bankrupt company and its officers, and although this finding is not a conclusive determination of the rights of the railroad company, yet, for present purposes, it may properly be accepted by this court as establishing, prima facie, the invalidity of the alleged indebtedness. Furthermore, in respect of this alleged indebtedness to the Missouri Pacific Railroad Company, it appears that the bankrupt company stands in the position of a surety for the Railway Exchange Building Company, and hence, if we are to treat the liability arising from this guaranty as a debt of the bankrupt company this indebtedness, presumably, would be offset by a corresponding claim of the bankrupt company against the Railway Exchange Building Company, the principal debtor. If the alleged liability of the bankrupt to the Missouri Pacific Railroad Company is not a debt, or if it is a debt which is counterbalanced by a corresponding asset, the bankrupt company is amply solvent. The view that the company is solvent is further supported by the fact that in its answer to the suit instituted against it in the state court the company formally alleged that it was solvent, and it appears to have at all times maintained that position in that court.

The foregoing considerations constrain the court to conclude that prior to the commencement of this bankruptcy proceeding, the circuit court of the city of St. Louis had acquired jurisdiction over the property of the bankrupt, that such jurisdiction can be in no way superseded or impaired by the present proceeding in bankruptcy, and for these reasons this court is not justified in appointing a receiver. In view of all the facts brought to its attention, this court cannot regard this case

otherwise than as an effort on the part of the officers and directors of the bankrupt company to evade the process of the circuit court of the city of St. Louis, and to escape the performance of its decree. No creditor of the bankrupt company seems to feel any concern about the collection of his debt, and the moving parties in the present bankruptcy proceedings are the officers and directors of the company. These are the same persons who by the judgment of the circuit court of the city of St. Louis have been held liable to the company or its stockholders for a large sum of money. If the defendants in the case pending in the state court are dissatisfied with the decree of that court, they should seek a remedy by way of appeal, for it seems reasonably clear that this court has no authority to make any order or to take any action that will deprive the circuit court of the city of St. Louis of its plenary jurisdiction over the suit now pending therein.

In conformity to these views orders will be entered: (1) Denying the petition of Christian Zeitinger et al. to intervene herein for the purpose of opposing the voluntary petition in bankruptcy. (2) Adjudging the petitioner Hargadine-McKittrick Dry Goods Company bankrupt upon its voluntary petition. (3) Denying the application of the bankrupt for the appointment of a receiver.

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## UNITED STATES v. UNITED STATES BREWERS' ASS'N.

## SAME v. ALTOONA BREWING CO. et al.

(District Court, W. D. Pennsylvania. December 23, 1916.)

Nos. 25, 26.

1. UNITED STATES ⊜11—POWER OF CONGRESS—ELECTIONS OF REPRESENTATIVES.

   Under Const. art. 1, § 2, cl. 1, providing that the House of Representatives shall be composed of members chosen by the people of the several states and that the electors shall have the qualifications requisite for electors of the most numerous branch of the state Legislature; article 1, § 4, cl. 1, providing that the times, places, and manner of holding elections for Senators and Representatives shall be prescribed by the Legislature of the state, but that Congress may make or alter such regulations except as to place of choosing Senators; article 1, § 8, cl. 18, giving Congress power to make laws necessary to carry into execution the powers vested therein; and article 6, cl. 2, making the Constitution and the laws enacted in pursuance thereof the supreme law of the land—the right to vote for Representatives is one conferred by the federal Constitution, though the qualifications for electors are determined by the states, and Congress can protect the electors in the enjoyment of that right.

   [Ed. Note.—For other cases, see United States, Cent. Dig. § 7; Dec. Dig. ⊜11.]

2. UNITED STATES ⊜11—POWER OF CONGRESS—ELECTIONS OF REPRESENTATIVES.

   Congress can exercise its constitutional power to regulate the times, places, and manner of holding elections for Representatives, though state officers are to be chosen at the same election.

   [Ed. Note.—For other cases, see United States, Cent. Dig. § 7; Dec. Dig. ⊜11.]

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3. UNITED STATES ⟸11—RIGHT OF SUFFRAGE—POWER OF CONGRESS—ELECTIONS OF REPRESENTATIVES.

Under Const. art. 1, § 2, cl. 1, providing that the House of Representatives shall be composed of members chosen by the people of the several states and that the electors shall have the qualifications requisite for electors of the most numerous branch of the state Legislature; article 1, § 4, cl. 1, providing that the times, places, and manner of holding elections for Senators and Representatives shall be prescribed by the Legislature of the state, but that Congress may make or alter such regulations except as to place of choosing Senators; article 1, § 8, cl. 18, giving Congress power to make laws necessary to carry into execution the powers vested therein; and article 6, cl. 2, making the Constitution and the laws enacted in pursuance thereof the supreme law of the land—Congress had power to enact Cr. Code, § 83 (Act March 4, 1909, c. 321, 35 Stat. 1103 [Comp. St. 1913, § 10251]), forbidding any corporation from making a money contribution in connection with any election at which a Representative in Congress is to be voted for, since any interference with the right of the elector to make up his mind for whom he will vote is as much an interference with his right of suffrage as preventing him from voting, and a law intended to secure a free and intelligent choice by preventing the concerted use of money is a regulation of the manner of hold ing the election.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 7; Dec. Dig. ⟸11.]

4. CRIMINAL LAW ⟸13—CAMPAIGN CONTRIBUTIONS—STATUTE—UNCERTAINTY.

Cr. Code, § 83, prohibiting any corporation from making money contributions in connection with an election at which Representatives in Congress are to be voted for, is not invalid for uncertainty because it does not define what shall be a money contribution in connection with an election, since that expression has a definite meaning, though it might be difficult to apply it in particular cases.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 13, 14; Dec. Dig. ⟸13.]

5. CONSTITUTIONAL LAW ⟸90—FREEDOM OF THE PRESS—CAMPAIGN CONTRIBUTIONS.

Cr. Code, § 83, forbidding corporations from making contributions in connection with an election at which Representatives are to be voted for, does not prohibit the freedom of speach or of the press.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 172; Dec. Dig. ⟸90.]

6. STATUTES ⟸64(6)—PARTIAL INVALIDITY—EFFECT.

If the provision of Cr. Code, § 83, prohibiting money contributions by corporations in connection with an election at which Presidential and Vice Presidential electors are to be voted for, is invalid because those electors are state officers, such invalidity does not affect the validity of the section in so far as it applies to elections for Representatives in Congress.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 63, 195; Dec. Dig. ⟸64(6).]

7. CONSPIRACY ⟸43(6)—INDICTMENT—OBJECT OF CONSPIRACY.

An indictment against corporations for conspiracy to make money contributions in connection with an election at which Representatives in Congress are to be voted for, contrary to Cr. Code, § 83, need not allege that offense with the particularity of an indictment directly charging it as an offense, but is sufficient if it identifies the offense to a common intent.

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

8. INDICTMENT AND INFORMATION ⊜71—REQUISITES—DESCRIPTION OF OFFENSE.

An indictment is sufficient if it advises the defendants of the nature and cause of the accusation against them with such particularity as to enable them to prepare the defense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 144, 174, 193, 194; Dec. Dig. ⊜71.]

9. INDICTMENT AND INFORMATION ⊜60—REQUISITES—EVIDENCE—MEANS OF COMMITING CRIME.

An indictment must fully and clearly set out the elements which constitute the crime, but need not allege matters of evidence nor the means by which the crime was to be accomplished, unless the act is one the criminality of which depends on the circumstances under which it was done.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 182, 266, 267; Dec. Dig. ⊜60.]

10. CONSPIRACY ⊜43(5) — INDICTMENT — OVERT ACTS — CONNECTION WITH CHARGE.

An indictment for conspiracy need not, in alleging overt acts committed by one of the conspirators, set forth the manner in which those acts tended to effect the purpose of the conspiracy; it being sufficient to allege that they were done to effect that purpose.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 89; Dec. Dig. ⊜43(5).]

The United States Brewers' Association and others and the Altoona Brewing Company and others were indicted for conspiring to make money contributions in connection with an election at which Representatives in Congress were to be voted for. On motions to quash the indictments and demurrers to the indictments. Motions to quash denied, and demurrers overruled.

E. Lowry Humes, U. S. Atty., of Pittsburgh, Pa.

Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., for United States Brewers' Ass'n and others.

James Francis Burke, of Pittsburgh, Pa., for Ft. Pitt Brewing Co.

THOMSON, District Judge. We have here two indictments, one against a large number of Pennsylvania brewing corporations, and the other against a large number of brewing corporations of the state of Pennsylvania, and the United States Brewers' Association, a corporation of the state of New York. The indictments are similar in form and charge the defendants named therein, under section 37 of the Penal Code, with conspiracy to violate section 83 of the Criminal Code of the United States, prohibiting money contributions to be made by certain corporations in connection with any election at which, among others, Representatives in Congress are to be voted for.

To the indictments so found the defendants have demurred, and have also filed motions to quash. The motions to quash challenge the constitutionality of section 83 of the act of Congress, while the demurrers deny the validity of the indictments as to certain matters of substance and form. These will be dealt with in a single opinion. If section 83 is void because it violates the Constitution, the offense therein prescribed against would not exist, and hence there could be no con-

spiracy to commit it. Four reasons are assigned in the motion to quash, against the validity of the statute under the Constitution: First, section 83 was and is not within the power of Congress to enact; second, that it is void for vagueness and uncertainty; third, that it violates the first amendment to the Constitution, in that it attempts to prohibit, make criminal, and punish, the freedom of speech and of the press in the discussion of candidates and of political questions involved in such elections; fourth, that it is void and beyond the power of Congress, in that it attempts to prohibit, make criminal, and punish money contributions made to a candidate for a state office, or to the agent of such candidate or in connection therewith.

In order to keep this opinion within reasonable limits as to length, I shall be compelled to state my conclusions without great elaboration of the reasons upon which these conclusions are based. Section 83 in question provides as follows:

"It shall be unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a money contribution in connection with any election to any political office. It shall also be unlawful for any corporation whatever to make a money contribution in connection with any election at which Presidential and Vice Presidential electors or a Representative in Congress is to be voted for, or any election by any state legislature of a United States Senator. Every corporation which shall make any contribution in violation of the foregoing provisions shall be fined not more than five thousand dollars; and every officer or director of any corporation who shall consent to any contribution by the corporation in violation of the foregoing provisions shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

It will be observed that the section deals with two classes of corporations, namely, federal corporations and those chartered under the laws of a state. The former being creatures of federal law, there is no contention as to them that Congress has exceeded its powers. What as to corporations of the state, with which the act also deals? Turning to the Constitution to determine what powers have been given to Congress over the subject in question, we find the following provisions:

Article 1, § 2, cl. 1, provides as follows:

"The House of Representatives shall be composed of members chosen every second year by the people of the several states and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state Legislature."

Article 1, § 4, cl. 1, provides:

"The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

Article 1, § 8, cl. 18, gives to Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Article 6, cl. 2, provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under

the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

From these provisions of the Constitution and the interpretations put upon them by the federal courts, certain propositions may be safely asserted:

[1] 1. The right to vote for federal officers is conferred by the federal Constitution, the House of Representatives being chosen every second year by the people of the several states, the electors in each state having the qualifications requisite for electors of the most numerous branch of the state Legislature. The elector being thus qualified by state laws, but deriving his right to vote for members of Congress from the Constitution of the United States itself, it follows as a necessary conclusion that Congress has the power to protect him in the enjoyment of that right.

2. While under the Constitution the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the state Legislature thereof, Congress, except as to the places of choosing Senators, may at any time by law make or alter such regulations. Thus the ultimate power was wisely conferred on Congress so that the states might not by any law or obstructive process prevent the election of the Senate and House of Representatives and thus endanger the very existence of the republic itself. Story on The Constitution, par. 817.

3. In the exercise of this authority, Congress in 1842, to prevent an undue preponderance of power to the political party in a state which had a majority of votes however small, enacted that each member should be elected by a separate district composed of contiguous territory. Lest the Legislature of some state should fail to elect Senators at the proper time, Congress by act has compelled the two bodies of the Legislature to meet in joint session on a given day, to vote for Senator, and meeting on each day thereafter until a Senator is elected. To remedy certain evils growing out of the election of members of Congress at different times in different states, Congress required all the elections for said members to be held on the Tuesday after the first Monday of November of every second year. Most state Legislatures for their own accommodation have fixed the same day for the holding of state elections; otherwise, the election on the day fixed by Congress would have been for the choosing of Congressmen alone.

[2] 4. Congress having been vested with power to prescribe the times, places, and manner of holding elections for Senators and Representatives, that body has undoubted power to provide laws to regulate those elections. In the language of the Supreme Court, in Ex parte Yarbrough, 110 U. S. 661, 4 Sup. Ct. 157, 28 L. Ed. 274:

"Will it be denied that it is in the power of that body to provide laws for the proper conduct of those elections? to provide, if necessary, the officers who shall conduct them and make return of the result? and especially to provide, in an election held under its own authority for security of life and limb to the voter while in the exercise of this function? Can it be doubted that Congress can by law protect the act of voting, the place where it is done, and the man who votes, from personal violence or intimidation and the election it-

self from corruption and fraud? If this be so, and it is not doubted, are such powers annulled because an election for state officers is held at the same time and place? Is it any less important that the election of members of Congress should be the free choice of all the electors because state officers are to be elected at the same time? Ex parte Siebold, 100 U. S. 371 [25 L. Ed. 717]."

In the same opinion (110 U. S. at page 666, 4 Sup. Ct. at page 159, 28 L. Ed. 274), it says:

"It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people as that the original form of it should be so. * * * In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger."

See, also, Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715; In re Coy, 127 U. S. 751, 8 Sup. Ct. 1263, 32 L. Ed. 274.

5. In the exercise of its prerogatives and to secure greater economy and efficiency, the government has thought best that certain artificial bodies should be created with certain fixed and definite powers, and acting within certain prescribed limitations. These artificial creatures are not citizens of the United States, and, so far as the franchise is concerned, must at all times be held subservient and subordinate to the government and the citizenship of which it is composed.

6. It may be said that there are three means of participation in the government so far as its representative nature is concerned, namely: By the exercise of the right of suffrage; by persuasion or coercion of the individual possessing that right; and by furnishing the means by which the individual may be persuaded or coerced. The time has not come and probably never will come, when the right of suffrage will be extended to the artificial beings known as corporations.

7. To prevent undue influence by the second and third means, nearly every state has enacted laws commonly called "Corrupt Practices Acts," prescribing limitations on the exercise of influence over the voter at elections. That the government has equal concern in preserving the freedom of the voter and the purity of the ballot when its Representatives in Congress are to be voted for needs only the statement to be conceded.

8. By various acts Congress has undertaken to control the agencies by which political activities in campaigns may be carried on, the amount of money which a candidate may spend, the purposes for which it may be expended, and the manner of accounting for all such expenditures. Section 83 in question is in line with this wise and beneficent legislation by undertaking to place a prohibition against political activities by those artificial beings who are merely the creatures of the law. That Congress may control those corporations which the federal government has created goes for the saying.

[3] 9. And when we reflect that Congress is here dealing with elections at which Representatives in Congress are being voted for; that an election is intended to be the free and untrammeled choice of the electors; that any interference with the right of the elector to make up his mind how he will vote is as much an interference with his

right to vote as if prevented from depositing his ballot; that the concerted use of money is one of the many dangerous agencies in corrupting the elector and debauching the election; that any law the purpose of which is to enable a free and intelligent choice, and an untrammeled expression of that choice in the ballot box, is a regulation of the manner of holding the election—the power of Congress to prohibit corporations of the state from making money contributions in connection with any such election appears to follow as a natural and necessary consequence.

[4] The second reason assigned in the motion to quash alleges the invalidity of the statute because vague and uncertain, failing to define what contributions shall be considered a money contribution in connection with an election.

This reason raises a question of the construction of the act for the court's interpretation and does not go to the constitutionality of the act itself. Nash v. U. S., 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232.

The words "money contributions" are not vague and uncertain, but, on the contrary, their meaning is plain, and their purpose as used in the act unmistakable. Whether, in any given case, an expenditure by a corporation shall be construed as "a money contribution in connection with any election," within the spirit, intent, and meaning of the act of Congress, may become a question for the court or jury in the light of all the circumstances of the case.

It is by no means uncommon, in applying legislative enactments to the varying facts and circumstances, difficulties of interpretation arise, but this fact does not invalidate, or tend to invalidate, the law.

[5] The third reason assigned is that section 83 violates the first amendment to the Constitution, in that it attempts to prohibit, make criminal, and punish the freedom of speech and of the press, in the discussion of candidates and all political questions involved in such election.

The section itself neither prevents, nor purports to prohibit, the freedom of speech or of the press. Its purpose is to guard elections from corruption, and the electorate from corrupting influences in arriving at their choice.

Under the Corrupt Practices Act of Pennsylvania (Act March 5, 1906 [P. L. 78, § 3]), no person, not a candidate or a treasurer of a political committee, may pay, give, or lend any money or valuable thing or any election expenses whatever, except to a candidate or to a political committee. More than once the Supreme Court of the state has sustained the constitutionality of the act. So far as I am aware, it has never been claimed that this general restriction upon political contributions was an infringement of the freedom of speech or of the press.

[6] The fourth reason assigned against the validity of the act is that it tends to prohibit, make criminal, and punish money contributions made to a candidate for a state office, or to the agent for such candidate, or in connection with his election. As I understand defendants' position, this reason is based on the use of the words "any election at which Presidential and Vice Presidential electors" are "voted for."

If it should be held that Congress exceeded its power in including, among others, elections in which Presidential and Vice Presidential electors are to be voted for, on the ground that they are officers of the state and not of the federal government, that would not, in my opinion, invalidate the act except as to that particular provision.

If that which is unconstitutional can be separated from that which is not, the one may be rejected, and the other retained. This rule is recognized in U. S. v. Reese, 92 U. S. 214, 23 L. Ed. 563, and U. S. v. Steffens, 100 U. S. 82, 25 L. Ed. 550, cited in briefs of defendants' counsel.

On the whole, I am of opinion that, in enacting section 83, Congress kept within its constitutional powers. Were I in doubt upon this question, I would resolve that doubt in favor of the constitutionality of the act.

As to the Demurrers.

In support of these, various reasons have been assigned, which I will not stop to consider in detail. They may be summed up in the allegation that the indictment itself does not state sufficient facts or grounds to constitute on the part of the defendants, or either of them, an offense against the United States nor the violation of any law of the United States; and that the indictment is not direct or certain in the description of the offense charged or attempted to be charged against them.

There is a single count in each indictment, drawn under section 37 of the Criminal Code, making it a crime for two or more persons to conspire to commit an offense against the United States, and one or more of such parties do some act to effect the object thereof.

[7] It must be borne in mind that the government has not charged as a substantive offense that the defendants actually within the time set forth made money contributions in connection with the elections set forth in said indictments. On the contrary, they are charged only with conspiracy to commit that offense. In such case, the authorities all show that the offense which is intended to be committed as a result of the conspiracy need not be described with the particularity required in an indictment in which such matter was charged as a substantive crime. Ching v. U. S., 118 Fed. 538, 55 C. C. A. 304; U. S. v. Wilson (D. C.) 60 Fed. 890; Dealy v. U. S., 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545.

The decisions agree that certainty to a common intent is all that is necessary. The conspiracy or unlawful combination is the gist of the offense, and certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy. Williamson v. U. S., 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278.

[8, 9] The indictment is sufficient if it advise the defendants of the nature and cause of the accusations against them, with such particularity as to enable them to prepare the defense. The elements which constitute the crime are facts which must be fully and clearly set out. But matters in the nature of evidence need not be alleged, nor the means by which the crime was to be accomplished, unless the act is one which may or may not be criminal according to the circumstances under

which it is done. Mark Yick Hee v. U. S., 223 Fed. 732, 139 C. C. A. 262.

[10] Neither is it necessary, in alleging overt acts in an indictment committed by one of the conspirators, to set forth in what manner the several overt acts tended to effect the purpose of the conspiracy. It is sufficient to allege that the overt acts were done to effect the object of the conspiracy. Houston v. U. S., 217 Fed. 854, 133 C. C. A. 562.

It was said in U. S. v. McCord (D. C.) 72 Fed. 163:

"Any overt act, however slight, intended to effectuate the object of the conspiracy, and whatever its character may be, whether it is itself criminal or perfectly innocent in its nature, is sufficient to fix the offense and to make it indictable."

An examination of the indictments shows that they set forth definitely the names of the alleged conspirators, the conspiracy to commit an offense against the United States, the nature of the offense, the time and place, and the overt acts committed in and for the purpose of executing the same. These, in my opinion, are sufficient to sustain the indictment. Hyde v. U. S., 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614.

The motions to quash are denied, the demurrers overruled, and the defendants are directed to plead to the indictments.

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DICKINSON v. WILLIS et al.

(District Court, S. D. Iowa, C. D. July 15, 1916.)

1. COURTS ⟸501—ACTIONS AGAINST RECEIVERS—JURISDICTION.
Judicial Code (Act March 3, 1911, c. 231) § 66, 36 Stat. 1104 (Comp. St. 1913, § 1048) providing that a federal court receiver may be sued, without previous leave of the court which appointed him, "in respect of any act or transaction of his in carrying on the business connected with such property," applies only to suits brought for the purpose of imposing some liability on the receiver in respect to his acts. As to all matters relating to the possession, control, and management of the property by the receiver, or the conduct of the business, the jurisdiction of the court which appointed him, and which has possession of the property through him, is exclusive.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1409; Dec. Dig. ⟸501.]

2. RECEIVERS ⟸90—MANAGEMENT OF PROPERTY—ASSUMPTION OF CONTRACTS.
An executory contract made by a corporation is not binding on its subsequent receiver, unless he affirmatively assumes it.
[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 164–166; Dec. Dig. ⟸90.]

In Equity. Suit by Jacob M. Dickinson, receiver for the Chicago, Rock Island & Pacific Railway Company, against Paul Willis, Milo P. Smith, F. F. Dawley, and E. A. Johnson. On motion for preliminary injunction. Granted.

F. W. Sargent, of Des Moines, Iowa, for complainant.
F. F. Dawley, of Cedar Rapids, and E. A. Johnson, of Lisbon, Iowa, for defendants.

WADE, District Judge. On the 20th day of April, 1915, the plaintiff, Jacob M. Dickinson, was appointed receiver for all of the prop-

erty and business of the Chicago, Rock Island & Pacific Railway Company by the United States District Court for the Northern District of Illinois. In the order of appointment it was adjudged and decreed that all parties whomsoever, and wheresoever located or domiciled, be strictly enjoined from in any manner whatsoever interfering with the receiver thus appointed in his operation, control, and management of the business or property of said railway company, which came into his hands by virtue of his appointment. By ancillary proceedings, the order of appointment was confirmed and entered of record in the United States District Court for the Northern District of Iowa and in the United States District Court for the Southern District of Iowa.

Some time prior to the appointment of the receiver as aforesaid, a controversy had arisen between employés operating trains on one of the branches of the Chicago, Rock Island & Pacific Railway Company, known as the "Short Line," and the Brotherhoods of Railway Enginemen, Conductors, and Trainmen; the employés as aforesaid being members of said organizations. This controversy involved certain rights of promotion in service, based upon what is termed "right of seniority." The employés brought an action in the district court of Linn county, Iowa, and procured a temporary injunction restraining the violation of the alleged right of seniority. Certain officers of the Brotherhoods and the Chicago, Rock Island & Pacific Railway Company were made parties defendant. Before the receiver was appointed, the case was dismissed as to the Chicago, Rock Island & Pacific Railway Company under a certain agreement, the meaning of which is now in dispute; the receiver contending that it only bound the railway company to comply with any order made by the district court in the injunction proceedings, while the employés insist that by the agreement the railway company bound itself to observe the terms of the temporary injunction pending appeal, even though the injunction was dissolved by the district court. Upon final hearing the district court of Linn county dissolved the temporary writ of injunction and denied the relief sought by the employés. An appeal from this decision was taken and is still pending. The receiver was never made a party to this case.

On May 24, 1916, Paul Willis, one of the defendants herein, brought another action in the district court of Linn county, Iowa, against the Chicago, Rock Island & Pacific Railway Company, C. W. Jones, general manager, F. J. Easley, assistant general manager, and A. E. Wallace, superintendent of the Minnesota division, alleging that said defendants in said cause had by the agreement heretofore referred to, at the time of the dismissal of the case against the railway company, agreed that they would keep the original temporary injunction in force, regardless of what ruling might be made upon final hearing, pending any appeal to the Supreme Court of Iowa, and until the case could be decided in the Supreme Court, and plaintiff prayed for a temporary injunction against said defendants, restraining them from interfering with the seniority rights as aforesaid.

It will be observed that this second case was commenced more than

a year after the appointment of the receiver, and at the time of the commencement of this suit the receiver was operating the railway lines, and the employés upon said lines including the general manager, assistant general manager, and superintendent, made parties in said action, were in fact the employés of the receiver. The district court of Linn county, Iowa, Hon. Milo P. Smith, Judge, issued a temporary injunction, and thereafter, on the 21st day of June, 1916, an amendment was filed in said case, making the receiver, plaintiff herein, a defendant in said case in the state court. This was the first time the receiver was in any manner made a party to any of the litigation.

Thereupon, and before any order was issued as to the receiver, this action was brought against Paul Willis, the plaintiff in the suit in Linn county, Iowa, Hon. Milo P. Smith, judge, who issued the injunction, and F. F. Dawley and E. A. Johnson, attorneys for Paul Willis, in said case, to restrain further proceedings in the state court, and to restrain the enforcement of the order made by the state court as aforesaid, upon the ground that the district court of Linn county, Iowa, had no jurisdiction of the receiver, and had no jurisdiction to issue any order with reference to the property, employés, or rights of the receiver affecting the possession, control, or operation of said railway system, or its property. Application was made for a temporary injunction, and such application was heard and submitted. The suit commenced by Paul Willis in the district court of Linn county, Iowa, is in effect an action to specifically enforce a contract alleged to have been made with the Chicago, Rock Island & Pacific Railway Company, through its general manager, by which it is claimed the railway company agreed, pending certain litigation between its employés, to maintain the then existing status with reference to what is termed "the right of seniority," which has to do with promotions in the service. The effect is, if enforced, to compel the receiver to employ for certain service certain persons who have acquired right thereto by reason of the length of service in the employment of the Chicago, Rock Island & Pacific Railway Company, and in effect the enforcement of the contract is a restraint upon the receiver to employ persons who have not acquired the proper standing by reason of service for the railway company.

[1] It is above stated that the action is to compel specific performance of this contract. The proceeding in the state court is for this very purpose; the effect of the injunction sought being, if granted, to restrain the violation of the contract. The temporary injunction was granted against the railway company and its manager and superintendent. Of course, the railway company is in no sense a proper party to the proceeding. The manager and superintendent are employés of the receiver, and the injunction granted is in effect a restraint upon the receiver, although he was not a party to the suit at the time the injunction was granted. The receiver has now been made a party to the suit, so that the question has to be determined as to whether the state court has jurisdiction to grant, by injunction against the receiver, specific performance of the contract made by the railway company.

Defendants rely upon section 66 of the Judicial Code, which permits a receiver to be sued without leave of the court which appointed him "in respect of any act or transaction of his in carrying on the business connected with such property." This statute was originally enacted in 1887 (24 Stat. 554, c. 373, § 3), and it is important to bear this date in mind in considering the expressions of the courts in cases decided since the enactment of the statute. This statute uses broad language, and yet it must be conceded that it is not comprehensive enough to include all actions against receivers. Regardless of the language employed by the court in appointing a receiver, and in directing him in the performance of the duties imposed upon him, there must be a certain class of cases as to which the court appointing the receiver has sole jurisdiction.

After a careful study of the cases I am satisfied that the line must be drawn between those cases which seek to recover a judgment against the receiver in the nature of damages and those cases which involve the possession of the property in the hands of the receiver, or the use of such property or the management thereof—the administration of the property in his hands. As to questions of possession, use, and management, I am satisfied that the appointing court, whether it be state or federal, has exclusive jurisdiction. In 34 Cyc. 416, it is said:

"The rule requiring leave to sue a receiver is sometimes modified by local statutes, and has been changed by act of Congress so far as the courts of the United States are concerned, by permitting a receiver appointed by those courts to be sued in another jurisdiction in cases where his act is drawn in question in transactions connected with the property in his hands, arising during the discharge of his duties as such official. Such provision does not authorize the bringing of all actions without limitation, but only such as are of the class mentioned; as to others, leave of court should be obtained. Thus a state statute providing that a receiver may be sued in respect to any act or transaction in carrying on the business connected with the property intrusted to him does not authorize a suit against the receiver, without leave, for the corpus of the estate, and the operation of the federal statute has been restricted in the same manner to causes in respect to acts or transactions of the receiver, and does not limit the power of the court which appointed the receiver to protect the property in his custody from external attack."

In White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67, the court says:

"Any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the Circuit Court, regardless either of the citizenship of the parties or the amount in controversy."

In Smith v. St. Louis & San Francisco Ry. Co., 151 Mo. 397, 52 S. W. 381, 48 L. R. A. 368, it is said:

"Receivers are officers of court to hold and manage property which is in the registry of the court, and persons having any claim to property so situated must submit their claims to the court that has obtained jurisdiction over the res, and the court will not permit its officers to be sued in any other tribunal without its consent. This is not only a law of comity among courts, but is a jurisdictional necessity, for it is manifest that two courts could not, acting separately, successfully manage the property or harmoniously distribute it.

Beach, Receivers (Alderson's Ed.) §§ 229–240; Kerr, Receivers (2d Ed.) p. 196 et seq."

Justice Moody, in Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379, says:

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession, or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application, and not peculiar to the relations of the courts of the United States to the courts of the states. They are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons, and controversies. They are not based upon any supposed superiority of one court over the others but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice, and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the states, and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the states of the Union" (citing many cases).

In Murphy v. John Hoffman Co., 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327, it is 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. The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. 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. Wabash R. Co. v. Adelbert College, 208 U. S. 38, 54, 28 Sup. Ct. 182, 52 L. Ed. 379, 386."

It will be observed that the foregoing cases were decided subsequent to the enactment of the statute relied upon by defendant; and it will also be observed, as the Supreme Court of the United States says, that this exclusiveness of jurisdiction is "not based upon any supposed superiority of one court over the others, but [that the principle] serves to prevent a conflict over the possession of property, which would be unseemly and subversive of justice." Wabash Ry. Co. v. Adelbert College, supra.

This case also points out "that those principles are of general application, and not peculiar to the relations of the courts of the United States to the courts of the states." The same rule would obtain were the receiver appointed in the state court of Linn county, and an action brought in this court which interfered with the ownership, control, or

management of the property. In O'Dell v. Batterman, 223 Fed. 292, 138 C. C. A. 534, the Circuit Court of Appeals, Second Circuit, says:

"Where a court of competent jurisdiction, whether federal or state, takes property into its possession through a receiver appointed by it, the property is thereby withdrawn from the jurisdiction of all other courts. As said by the Supreme Court of the United States in Murphy v. John Hofman Co., 211 U. S. 562, 569, 29 Sup. Ct. 154, 156, 53 L. Ed. 327 (1909): 'The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. 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.' All other courts than the one which has the property in its possession are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. And in Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 54, 28 Sup. Ct. 182, 52 L. Ed. 379 (1908), the Supreme Court declared that for the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as, incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession, or control of the property. The court added that in the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. The principles to which attention has just been called are of general application, and serve to prevent a conflict over the possession of property which would be unseemly and subversive of justice. They have been applied by the Supreme Court of the United States impartially, sometimes in favor of the jurisdiction of the courts of the states, and sometimes in favor of the jurisdiction of the courts of the United States."

In Investment Registry v. Chicago & M. Electric Railway Co. (D. C.) 204 Fed. 500, the court says:

"His counsel is in error in urging that he is asserting an undoubted legal right. The federal statute (Judicial Code [Act March 3, 1911, c. 231] § 66, 36 Stat. 1104 [U. S. Comp. St. Supp. 1911, p. 155]), in relinquishing to parties and to other courts the right to institute and entertain, without leave, proceedings against a federal court receiver in respect of the conduct of their business, has reserved to the appointing courts sole power over the matter of satisfaction of the rights determined in such other courts. Dillingham v. Hawk, 60 Fed. 497, 9 C. C. A. 101, 23 L. R. A. 517; St. Louis S. W. Ry. v. Holbrook, 73 Fed. 112, 19 C. C. A. 385; Mo. Pac. Ry. v. Tex. Pac. Ry. Co. (C. C.) 41 Fed. 314; Willcox v. Jones, 177 Fed. 870, 101 C. C. A. 84; Tex. & Pac. Ry. Co. v. Johnson, 151 U. S. 81, 14 Sup. Ct. 250, 38 L. Ed. 81."

This quotation, I think, indicates something of the proper limitation of the statute in controversy, by holding that the statute "reserved to the appointing courts sole power over the matter of satisfaction of the rights determined in such other courts."

Defendants assume that the language of section 66, "But such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice," means that the appointing court has jurisdiction only when in the individual case it may be determined upon investigation that the ends of justice will not be attained in the state courts. Congress could not have meant this. Congress did not assume that in any case a party could not obtain justice in the state

courts. Congress certainly never intended that the question of jurisdiction of the state court would have to be tried out in the federal court upon the question as to whether the receiver could obtain a just judgment in the court in which the action was brought.

What Congress meant was that "the matter of satisfaction of the rights determined in such other courts" was reserved to the appointing court. It was intended to give the right to bring an action in any court having jurisdiction against the receiver without previous leave of court in any case in which the suitor sought to fix a liability upon the receiver, which, after judgment, would still be subject to the equitable powers of the court appointing the receiver.

But in the case here involved the proceedings in the state court will be final. There will be nothing for the appointing court to act upon. It will have no power to review the validity of the injunction. It becomes effective at once, regardless of what hardship it may impose upon the receiver, and without reference to its effect upon the management of the business for which the receiver was appointed. It is final, and, if not observed by the receiver, he is in contempt of the court, and the court appointing him would have no power to relieve him from proper penalty.

In Durand v. Howard, 216 Fed. 585, 132 C. C. A. 589, L. R. A. 1915B, 998, the Circuit Court of Appeals, Second Circuit, says:

"It is generally considered to be a matter within the discretion of the court whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. In Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 1010, 37 L. Ed. 815 (1893) the Supreme Court speaking through Mr. Justice Gray, said: 'When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation the court assumes the administration of the estate, the possession of the receiver is the possession of the court, and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. Wiswall v. Sampson, 14 How. 52, 65, 14 L. Ed. 322; Peale v. Phipps, 14 How. 368, 374, 14 L. Ed. 459; Booth v. Clark, 17 How. 322, 331, 15 L. Ed. 164; Union Bank v. Kansas City Bank, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341; Thompson v. Phœnix Ins. Co., 136 U. S. 287, 297, 10 Sup. Ct. 1019, 34 L. Ed. 408. It is for that court 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. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him. Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; Texas & Pacific Ry. v. Cox, 145 U. S. 593, 601, 12 Sup. Ct. 905, 36 L. Ed. 829."

It is true that in most of the foregoing cases questions of property were involved, but I see no distinction between the possession of property and the management of property so far as the questions here involved are concerned. If the district court of Linn county, Iowa, has the power to prescribe the class of persons who shall be employed by the receiver, then it has the power to prescribe how many hours a day they shall work, if it were claimed that a contract therefor was made

with the railway company; it has power in a proper case to restrain the receiver from employing members of Brotherhoods, or the reverse. It would also have power, upon presentation of a proper contract made with the railway company, to prescribe by injunction the number of trains that should be run, and the crossings that should be maintained, and the rentals that should be paid, and to enforce mostly any other condition affecting the manner in which the receiver shall conduct the business of his office.

[2] The Circuit Court of Appeals of this Circuit (Eighth) holds that the appointment of a receiver terminates all executory contracts. In Kansas City Southern Railway Co. v. Lusk, 224 Fed. 704, 140 C. C. A. 244, it is said:

"It is well not to lose sight of the question which the District Court had before it. It was simply whether the court in its discretion and as a business proposition would continue to perform the contract of 1898. The contract was not one binding on the receivers until renounced, but was one not binding on them until assumed under the direction of the court."

The same court in Peabody Coal Co. v. Nixon, 226 Fed. 20, 140 C. C. A. 446, says:

"We had occasion in another case (Railway Co. v. Lusk et al., 224 Fed. 704 [140 C. C. A. 244]) at this term to observe that it is not the rule that the contract of the owner of a trust estate is binding on the receivers until renounced, but, contra, that the receivers are not bound by the contract until they have affirmed it and assumed its burdens under the direction of the court."

In this case there was a contract made by the railroad company with the coal company for 20 years, only about one year had expired when the receivers were appointed, and the court appointing the receivers authorized them to renounce the contract.

As applied to the controversy before the court, these cases clearly indicate that as to those agreements and contracts and obligations entered into by the railway company, which are still executory, the appointing court has a large discretion, to be exercised in view of the effect which the enforcements of the contracts would have upon the conduct of the affairs of the receivership; and it must be recognized that no other court, except the appointing court, can have that broad knowledge of the affairs of the receivership which would enable it to direct, either by affirmative order or by injunction, the method of management of the business which the receiver should be compelled to employ.

I am not passing upon the question as to whether this court, not being the appointing court (except as to ancillary appointment), has jurisdiction to try the question involved in the case in Linn county; but, under the foregoing authorities, I am satisfied that this court has jurisdiction to restrain the defendants from continuing the proceedings in the district court of Linn county. This holding is not agreeable to this court. No court is disposed, except upon most urgent necessity, to restrain proceedings in another court; but upon most careful consideration there is no other course open to me. I have in no manner considered the merits of the contention made in

the lower court. I have given consideration only to the question of jurisdiction.

It is proper that I should say in this connection that the specific questions presented to this court have not been presented to the state court, inasmuch as the receiver has not yet appeared therein. The position of plaintiff herein is much stronger than in many of the cases referred to, because of the broad language employed by the court in his appointment, and the directions given, and the restraining orders entered; but, aside from all this, I am satisfied that the rule contended for by the plaintiff obtains, and it will be so ordered, and temporary injunction will issue as prayed.

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## BURROUGHS ADDING MACH. CO. v. SCANDINAVIAN-AMERICAN BANK.

(District Court, W. D. Washington, N. D. January 23, 1917.)

No. 3454.

1. ACTION ⊜25(4)—ACTIONS FOR PURCHASE PRICE—DEFENSES—FRAUD.
Under Act March 3, 1911, § 274b, as added by Act March 3, 1915, c. 90, 38 Stat. 956, providing that in all actions at law equitable defenses may be interposed by answer, plea, or replication, without the necessity of filing a bill on the equity side of the court, a buyer can plead the equitable defense of fraudulent misrepresentations in an action of assumpsit against him by the seller for the purchase price of the goods.
[Ed. Note.—For other cases, see Action, Cent. Dig. § 153; Dec. Dig. ⊜25(4).]

2. FRAUD ⊜11(1)—MISREPRESENTATIONS—STATEMENTS OF FACT.
Representations by the seller of bookkeeping machines, who had examined the system employed by plaintiff, that the work then being done by eight men with adding machines could be done by four men with the bookkeeping machines, whereby the buyer was induced to purchase the machines, were representations of fact, not statements of opinion.
[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 12; Dec. Dig. ⊜11(1).]

3. EVIDENCE ⊜434(11)—PAROL EVIDENCE—WRITTEN CONTRACT OF SALE—FRAUDULENT REPRESENTATIONS.
Parol evidence is admissible to show that the contract for the sale of machines evidenced by written memoranda was procured by fraudulent representations, since such evidence does not vary the contract, but shows that no valid contract had in fact been entered into.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2013, 2014; Dec. Dig. ⊜434(11).]

4. PLEADING ⊜94—ACTIONS BY SELLER—DEFENSES—PLEADING SEPARATELY.
In an action for the purchase price of certain machines, the defenses that the sale had been procured by fraudulent representations and that the machines were mechanically imperfect should be separately pleaded.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 191, 192; Dec. Dig. ⊜94.]

At Law. Assumpsit by the Burroughs Adding Machine Company against the Scandinavian-American Bank. On plaintiff's motion to strike a portion of the answer, or in the alternative to compel defend-

ant to state separately its causes of defense. Motion to strike denied, and defendant ordered to state its defenses separately.

Tucker & Hyland, of Seattle, Wash., for plaintiff.

Ballinger, Battle, Hulbert & Shorts, of Seattle, Wash., for defendant.

NETERER, District Judge. This is an action of assumpsit to recover upon written memoranda by which the defendant ordered certain adding machines. The defendant, answering, admits the execution of the memoranda, and then says: That the plaintiff practiced fraud in inducing the defendant to sign the contract, in that the plaintiff made representations of facts which did not exist, which were believed by the defendant, and which moved it to enter into the contract; that the defendant is a banking concern, employs six bookkeepers and two statement men, and also operated two adding machines, used by the employés in making out the statements of individual accounts; that the plaintiff "made an examination of the defendant's books, its method of bookkeeping, and its manner and method of getting out statements for each individual depositor in said bank, and familiarized himself with the amount of work to be done, * * * and further stated, in effect, to the defendant, that the machines would do the work of four men, and that the work could be done, that was being done by the eight men and two machines then employed, by four men and the plaintiff's machines; that the defendant's officers stated that, if such statements were true, it would purchase the four machines, and that the defendant was assured such statements were true, and that the defendant thereupon signed the order; that the machines were thereafter installed, and experts were employed, and the machines given a thorough trial, and "utterly failed to perform the work, either in character or amount, represented by the plaintiff; that said machines, and each and all of them, were not mechanically perfect, were not efficient, and could not do and perform the work represented by the plaintiff, and after a thorough trial, and after the assistance of experts of the plaintiff company, it developed that said machines were a failure, and on account thereof this defendant was unable to use them, and was required to go back to its former system of doing its work"—and then states that the representations were false, were known to be false at the time, and that the machines have been stored, subject to the order and disposition of the plaintiff.

The plaintiff has moved to strike all of that part of the answer which sets up the fraudulent representations, as irrelevant and immaterial, and not proper to be set up in a defense of the matters set forth in the complaint, and in the alternative moves that the defendant be required to state separately its causes of defense, one appearing on the ground of false representations, and the other being on the ground of failure of the machines to be mechanically perfect, in the event the court should deny the first motion.

[1] This defense is urged under section 274b of the act of March 3,

1915 (38 Stat. 956; 1916 Supp. Fed. Stat. Annot. page 138), which provides:

"That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

Prior to the enactment of this provision equitable defenses could not be asserted in a law action, but under this provision the equitable defense can be urged in the instant case.

The plaintiff contends that the memoranda cover the entire agreement of the parties, and that there is no warranty in the written memoranda, and therefore the rights of the defendant are limited by the agreement, and that the representations claimed to have been made are merely the vendor's opinion, judgment, or estimate as to what the machines would do, and do not amount to a warranty, and quotes the rule set out in 35 Cyc. 383, and also, Carver-Shadbolt Co. v. Norman Loch, 87 Wash. 453, 151 Pac. 787, in which the court held that representations, made upon selling a hay stacker, that it would stack hay from 50 cents to $1 cheaper than a "T" stacker in use by the vendee, cannot be held to be a warranty, but are a mere expression of opinion constituting "seller's praise," and not actionable, and also cites De Witt v. Berry, 134 U. S. 306, 10 Sup. Ct. 536, 33 L. Ed. 896, in which it was said that, if a contract of sale is in writing and contains no warranty, parol evidence is not admissible to add a warranty; and Seitz v. Brewers' Refrigerating Machine Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837, is also cited by the plaintiff. In that case it was held that since the contract was couched in terms importing a complete legal obligation, and no uncertainty as to the object or extent of the engagement obtained, it would be conclusively presumed that the whole engagement of the parties and the manner of their undertaking were reduced to writing, and the parties would be bound thereby. The court expressly stated, however, that there was no pretense of fraud, accident, or mistake.

In Milwaukee Boiler Co. v. Duncan, 87 Wis. 120, at page 125, 58 N. W. 232, at page 234 (41 Am. St. Rep. 33), an action to recover the balance due on the price of a boiler furnished upon the defendant's written order, the court, in refusing to consider a parol contract sought to be established with relation to a warranty, said:

"It is equally well settled that, if the article is sold by a formal written contract which is silent on the subject of warranty, no oral warranty made at the same time or previously can be shown, as the writing is conclusively supposed to embody the whole contract; nor can any additional oral warranty be ingrafted or added to one that is written."

In Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 903, the court stated that an answer and counterclaim alleging a written contract of sale of drills and disks provided that they were of proper pattern, and properly constructed to do the work at the place where the vendees were employed, and which was entered into in reliance upon such statements and representations, does not state a defense or counterclaim for fraud and deceit. The court (13 N. D. at page 523, 101 N. W. at page 904), however, said:

"It is not to be disputed that fraudulent representations of a fact will, under certain conditions, entitle the purchaser to annul the contract. It is difficult to construe this allegation of the answer as a statement of an existing or past fact. * * *"

[2] In this case I think we must bear in mind that the defendant employed a certain system for doing a given kind and amount of work; that the plaintiff examined into the amount and character of work, the facilities employed, and after such examination sold to the defendant the machines to do that particular work with a given number of men. The machines were sold for a definite purpose and for a definite character of work, and "utterly failed" to perform the work. The language in the answer is conclusive that the defendant was induced to enter into the contract by representations of the plaintiff, said to be false and fraudulent. It is a well-settled exception to the general rule excluding parol evidence to affect a written contract that, where the parties were induced to enter the same by false and fraudulent representations, parol evidence may be received for the purpose of showing fraud. 14 Amer. & Eng. Enc. of Law (2d Ed.) page 199. The contention of the defendant is, not that parol evidence should be received to vary the terms of the written contract, but rather that, because of the false and fraudulent representations made, no contract was entered into. There is a distinction between statements to vary the terms of a contract and statements to show that no contract in fact had been entered into. Schroeder v. Hotel Commercial Co., 84 Wash. 685, 147 Pac. 417. In the one case the parol testimony to show specific warranties is not admissible, because it varies the terms of a written contract; whereas, in the other case, fraudulent representations may be shown for the purpose of vitiating the contract.

In Kirby v. Thurmond (Tex. Civ. App.) 152 S. W. 1099, an action to rescind a contract upon the ground of misrepresentations, the plaintiff alleging that the defendant misrepresented the quantity of the goods in the store, amount of business transacted, etc., in the written contract making the transfer appeared this clause:

"It is understood that said stock is sold as it now stands and the vendor does not warrant as to quantity."

The defendant contended that parol testimony could not be received to vary the terms of the written contract. The court held that fraud vitiates all contracts, and that, if a party perpetrates a fraud that induces another to change his relation, parol evidence may be received to establish the fact. If the statements of the defendant in its answer are true, and the court should hold that parol evidence could not

be received as to statements made which induced the defendant to sign the contract, then the court would hold the maxim that fraud vitiates every transaction no longer to be the rule. Such a principle would in a short time break down every barrier which the law has erected against fraudulent dealing. With respect to the matters charged in the answer and the transactions set forth between the parties, it cannot be said that the parties dealt with each other at arm's length, and that the defendant had knowledge, or could have obtained it, as to the capacity of the machines; but the answer states that the plaintiff was advised and examined into the need of the defendant, and, after ascertaining the need of the defendant, made the representations and sold the machines to meet this demand, and that the defendant, being in ignorance of the fact, believed the statements which were thus falsely and fraudulently made. I think the defendant clearly comes within the holding of the Supreme Court of the United States in Smith v. Richards, 13 Pet. (Curtis Ed.) 18, in which the court, at page 24 (10 L. Ed. 42), said:

"In 1 Maddock's Chancery, 208, it is thus stated: If, indeed, a man, upon a treaty for any contract, make a false representation, whether knowingly or not, by means of which he puts the party bargaining under a mistake upon the terms of bargain, it is a fraud, and relievable in equity. The doctrine thus laid down is almost in the very words used by the Chancellor, in the case of Neville v. Wilkinson, L. Brown's Chan. Cases, 546, * * * and the part of the proposition embraced by these words is founded upon the case of Ainslie v. Medicot, 9 Vesey, 21, which fully sustains Mr. Maddock. In this latter case the following strong language is used: 'No doubt by a representation a party may bind himself just as much as by an express covenant. If, knowingly, he represents what is not true, no doubt he is bound. If, without knowing that it is not true, he takes upon himself to make a representation to another, upon the faith of which that other acts no doubt he is bound, though his mistake was perfectly innocent. * * * In 1 Story's Equity, 201, 202, it is thus stated: 'Where the party intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him; in every such case * * * there is an evil act, with an evil intent—dolum malum ad circumveniendum. And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead, as by positive assertions.' Whether the party thus misrepresenting a fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know, or believe to be true, is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a fact, by mistake, it is equally conclusive; for it operates as a surprise and imposition on the other party. Or, as Lord Thurlow expresses it, in Neville v. Wilkinson, 'it misleads the parties contracting, on the subject of the contract.'"

[4] I think the motion to strike should be denied. The defendant however, should separately state his causes of defense, so that one will set out the fraudulent representations, and the other the mechanically imperfect construction.

PHILADELPHIA, H. & P. R. CO. et al. v. LEDERER, Collector of Internal Revenue.

(District Court, E. D. Pennsylvania. January 18, 1917.)

Nos. 3256–3280.

1. INTERNAL REVENUE ⊂=38—EXCISE TAX—ACTION TO RECOVER—ISSUES.
In a suit to recover the excise tax erroneously paid by a corporation which was not doing business but merely leasing its property to another which operated its railroad and paid a fixed rental therefor, the lease cannot be collaterally attacked by showing that the lessee claimed under it as assignee though the lease was not assignable.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ⊂=38.]

2. ABATEMENT AND REVIVAL ⊂=53—DEATH—RECOVERY OF CUSTOMS DUTIES—ACTION ON IMPLIED CONTRACT.
An action to recover internal revenue taxes erroneously collected is assumpsit on an implied contract, and survives against the personal representatives of the collector if he dies pending the suit.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 251, 252; Dec. Dig. ⊂=53.]

3. INTERNAL REVENUE ⊂=38—TAX ILLEGALLY COLLECTED—PARTIES—SUCCESSORS IN OFFICE.
In the absence of statute, one from whom internal revenue was illegally collected cannot recover the amount from the successor in office of the collector who made the collection.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ⊂=38.]

4. INTERNAL REVENUE ⊂=38—TAX ILLEGALLY COLLECTED—RECOVERY—STATUTE.
Act March 3, 1863, c. 76, § 12, 12 Stat. 741 (Comp. St. 1913, § 1635), providing that, when a recovery is had against a collector of the revenue for any money exacted by him and paid into the treasury and the court certifies that there was probable cause for the act of the collector, no execution shall issue against his property, but the judgment shall be paid out of the treasury, does not make the suit one against the officer in his official capacity, so as to permit recovery against him for money collected by his predecessor in office, since the granting or refusal of the certificate of probable cause is within the discretion of the court, and if it were refused the officer would be held liable for money which he never received.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ⊂=38.]

5. INTERNAL REVENUE ⊂=38—RECOVERY OF TAX—SUCCESSOR IN OFFICE—STATUTE.
Act Feb. 8, 1899, c. 121, 30 Stat. 822 (Comp. St. 1913, § 1594), providing that suits begun against officers of the United States in their official capacity may be continued against their successors in office, does not authorize the institution of a suit against an internal revenue collector for taxes erroneously collected by his predecessor in office against whom no action was brought; plaintiff's remedy being by proceeding against the predecessor under Rev. St. § 3226 (Comp. St. 1913, § 5949), or by proceeding under Judicial Code, § 24, par. 20 (Act March 3, 1911, c. 231, 36 Stat. 1093 [Comp. St. 1913, § 991]).

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ⊂=38.]

At Law. Action by the Philadelphia, Harrisburg & Pittsburgh Railroad Company and others against Ephraim Lederer, Collector of Internal Revenue for the First Collection District of Pennsylvania. On defendant's motion for a new trial and for judgment upon a point of law reserved. Motion denied.

Wm. Clarke Mason, of Philadelphia, Pa., for plaintiffs.

Edward S. Kremp, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The several railroad companies, plaintiffs, brought suit to the use of the Philadelphia & Reading Railway Company, as lessee of their railroad properties, against Ephraim Lederer, as United States collector of internal revenue, for taxes for the fiscal years 1909, 1910, 1911, and 1912, paid under protest as special excise taxes with respect to the carrying on or doing of business by them as corporations organized for profit and having capital stock represented by shares, under the provisions of section 38 of the act of Congress approved August 5, 1909 (Act Aug. 5, 1909, c. 6, 36 Stat. 112 [Comp. St. 1913, §§ 6300–6307]). By agreement of counsel, the cases were tried together before the same jury.

It was alleged in the statements of claim, and proved at the trial, that the several plaintiff corporations were not actively engaged in the operation of their railroads, but that the Philadelphia & Reading Railway Company was, during the period in question, operating them under lease, and that the income for which return was made and the taxes in question collected was received by the several plaintiffs as rental for their roads and distributed by them as dividends to their stockholders. The facts in relation to the carrying on of business by the plaintiffs, as shown by the various leases under which the railroads were operated, clearly brought all of the plaintiffs within the law as laid down in the Minehill Case, 226 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842.

[1] As to the Philadelphia, Harrisburg & Pittsburgh Railroad Company, it was contended on behalf of the collector that the Philadelphia & Reading Railway Company was not operating the road as lessee, because it claimed as assignee under a lease which was not upon its face assignable. As the testimony conclusively showed that the rental had been paid to the plaintiff as lessor, and that the road had been, since the assignment, operated by the Philadelphia & Reading Railway Company, under the terms of the lease, no sufficient ground is presented for a collateral attack upon the lease.

The principal contention in the case, however, was based upon the fact that the taxes for 1909, 1910, and 1911 were not paid to or collected by the defendant, but were paid to and collected by his predecessor in office, William McCoach. It was therefore contended on the part of the defendant that, even if all the taxes were unlawfully collected under the decision in the Minehill Case, a verdict and judgment could not go against him for the taxes paid to Collector McCoach. Upon the conclusion of the evidence, the court, after some

preliminary comment, directed a special verdict in each case in the following language:

"You are therefore instructed to find a verdict in favor of the plaintiff for taxes paid to Mr. McCoach for 1909, 1910, and 1911, the sum of * * *, and for the amount paid to Mr. Lederer for the year 1912, the sum of * * * the amounts in each case being inclusive of interest from the date of payment. This verdict is found subject to a point of law reserved by the court as to whether under the evidence the plaintiff is entitled to recover anything for the taxes paid to Mr. McCoach."

The jury returned a special verdict in each case accordingly.

[2] The cause of action in these cases is assumpsit upon an implied contract to return money unlawfully received. The nature of the action is clearly determined in the case of Patton v. Brady, Ex'x, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713, where Mr. Justice Brewer reviews the prior cases, and it is held that, where a collector dies pending the suit, the suit survives against his personal representative. That upon a judgment in such an action the collector is personally liable and execution can, except for statutory provisions, be had against his property, there appears to be no doubt.

In suits brought against collectors of the revenue for acts done by them or for the recovery of money exacted by or paid to them and by them paid into the treasury, Congress by the Act of Sept. 24, 1789, c. 20, 1 St. 92, re-enacted by the Act of March 3, 1863, c. 76, § 13, 12 St. 741, made it the duty of district attorneys to appear in behalf of the defendants in such suits unless otherwise instructed by the Secretary of the Treasury. Rev. Stat. § 771 (Comp. St. 1913, § 1296). And, in order to protect collectors from personal liability for official acts in proper cases, by section 12 of the Act of March 3, 1863, Rev. St. § 989 (Comp. St. 1913, § 1635), Congress provided:

"When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the treasury."

[3] There is no principle of the common law by virtue of which a plaintiff, whose money has been unlawfully taken by a collector of internal revenue, who, but for the provisions of section 989, would be liable to have his individual property taken in execution upon a judgment rendered in a suit brought against him, can recover the amount thus taken from the collector's successor in office who has had nothing to do with the unlawful taking.

[4] It is contended on behalf of the plaintiffs that, because of the provision that, upon a certificate by the court of probable cause, no execution shall issue against the collector, but the amount upon final judgment shall be provided for and paid out of the proper appropriation from the treasury, the suit has become one against the officer in his official capacity, and therefore a right of action survives

against his successor in office. With the exception of the case of Armour v. Roberts (C. C.) 151 Fed. 846, no authority has been pointed out to the court upon which this proposition is based; but, so far as proceedings for compelling the performance of official duties by mandamus or the prevention of official acts by injunction, the contrary has been in principle repeatedly held. United States v. Boutwell, 17 Wall. 604, 21 L. Ed. 721; Warner Valley Stock Co. v. Smith, 165 U. S. 28, 17 Sup. Ct. 225, 41 L. Ed. 621; United States ex rel. Bernardin v. Butterworth, 169 U. S. 600, 18 Sup. Ct. 441, 42 L. Ed. 873; Pullman Company v. Croom, 231 U. S. 571, 34 Sup. Ct. 182, 58 L. Ed. 375.

[5] It is argued by counsel for plaintiffs, however, that a suit for taxes collected by his predecessor lies against the defendant by reason of the Act of February 8, 1899, c. 121, 30 St. 822, U. S. Comp. St. 1913, § 1594, under the provisions of which, by proper steps, successors of officers of the United States may be substituted for them in suits commenced against the latter in their official capacity. This act does not help the plaintiffs, for it in terms is intended to prevent the abatement of suits, actions, or other proceedings which have already been lawfully commenced by or against an officer of the United States in his official capacity or in relation to the discharge of his official duties, by reason of his death or the expiration of his term of office, or his retirement, or resignation, or removal from office. It is unnecessary to determine whether the act was intended to apply to suits to enforce the personal liability of a collector for taxes wrongfully collected by him in his official capacity, for in the present case no suit, action, or proceeding was brought against Collector McCoach. It is not for the courts to extend the statutory provisions by which Congress has authorized the payment out of the treasury of judgments against collectors of internal revenue and other officers. Their provisions are plain. Upon taking the steps provided for in section 3226, Revised Statutes (Comp. St. 1913, § 5949), suit could have been brought by the plaintiffs against Collector McCoach at any time after six months from the date of the appeal for refund to the Commissioner of Internal Revenue. The plaintiffs had a further remedy under the provisions of the Judicial Code of March 3, 1911, c. 231, § 24, par. 20, 36 St. 1087, 1093 (Comp. St. 1913, § 991), formerly the Tucker Act of March 3, 1887, c. 359, §§ 1 and 2, 24 St. 505, to recover the amount of taxes paid under protest. United States v. Emery, 237 U. S. 28, 35 Sup. Ct. 499, 59 L. Ed. 825.

The district attorney contends, and his contention is sound, that section 989 of the Revised Statutes does not authorize a certificate of probable cause, except in favor of the collector to whom the tax was paid, and that, if section 989 should be held to apply to a suit brought against his successor, the court might in its discretion refuse the certificate of probable cause, the granting of which is discretionary and not reviewable, as decided in the case of United States v. Abatoir Place, 106 U. S. 160, 1 Sup. Ct. 169, 27 L. Ed. 128, and thereby the present collector would become personally liable for the act of his predecessor. While, under the facts in the present case, prob-

able cause would no doubt be shown if the taxes for 1909, 1910, and 1911 came within the provisions of section 989, the court would, in granting such a certificate in this case, go beyond the plain terms of the statute. The present question was before Judge Augustus N. Hand in the case of Roberts v. Lowe (D. C.) 236 Fed. 604, upon demurrer to a complaint, and the same conclusion reached by him. I concur with Judge Hand in finding no sufficient basis for the contrary conclusion reached by Judge Smith McPherson in the case of Armour v. Roberts (C. C.) 151 Fed. 846.

Judgment will be entered upon the special verdict for the plaintiff for the amount of the taxes paid to Collector Lederer for the year 1912 in each case. In view of the decision in the Minehill Case, the defendant's motions for new trial are refused.

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## MARTIN v. MATSON NAV. CO. et al.

(District Court, W. D. Washington, N. D. January 22, 1917.)

No. 3377.

1. CORPORATIONS ⊕=632—CITIZENSHIP.

The state in which a corporation is organized determines its citizenship, whether it has offices and transacts business in the state in which suit is brought or not.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2487, 2488; Dec. Dig. ⊕=632.]

2. REMOVAL OF CAUSES ⊕=36—RIGHT OF REMOVAL—DENIAL.

The right of removal on account of diversity of citizenship may not be defeated by fraudulent joinder of a resident defendant having no connection with the controversy.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. ⊕=36.]

3. REMOVAL OF CAUSES ⊕=86(2)—PETITION—ALLEGATIONS.

A nonresident defendant, seeking removal on account of diversity of citizenship of an action in which a resident defendant was joined, must allege facts showing the joinder was fraudulent, unless that is apparent on the face of the complaint, and merely to apply the word "fraudulent" is insufficient.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 170, 173; Dec. Dig. ⊕=86(2).]

4. REMOVAL OF CAUSES ⊕=47—ISSUE—DETERMINATION.

For the purpose of removal of a cause, the issue tendered is what plaintiff makes it in his complaint.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 92; Dec. Dig. ⊕=47.]

5. REMOVAL OF CAUSES ⊕=36—RIGHT TO REMOVE—FRAUDULENT JOINDER.

The complaint in an action begun in the Washington state courts by a citizen of that state alleged that a steamship company, a California corporation, operated a steamship between the ports of that state and Washington, that the two individual defendants were the chief engineer and assistant engineer of the vessel, and that plaintiff's intestate, while employed as a mechanic by putting bolts in the base of the engine, was killed when the assistant engineer negligently opened the valve, allowing

hot water to flow upon deceased. The complaint further alleged that the engines were under the control of the two individual defendants, and it was their duty to warn deceased before opening the valve. The chief engineer, who of all the defendants was the only citizen of Washington, was absent at the time of the accident. *Held*, that the cause was properly removable to the federal courts by the corporate defendant, there being diversity of citizenship and the joinder of the chief engineer being improper, for his liability, if any, was entirely distinct from the liability of the corporate defendant for the negligent act of the assistant engineer.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. ⊂=36.]

At Law. Action by Louise Martin against the Matson Navigation Company, a corporation, and others, begun in the state court and removed to the federal District Court. On motion to remand. Motion denied.

Vanderveer & Cummings, of Seattle, Wash., for plaintiff.

Ballinger, Battle, Hulbert & Shorts, of Seattle, Wash., for defendants

NETERER, District Judge. This action was commenced in the state court and removed to this court upon the grounds of separable controversy and fraudulent joinder, and a motion to remand has been made, in which it is denied that there was a fraudulent joinder. The complaint, in substance, alleges that the defendant company is a California corporation, doing a common carrier of passengers and merchandise business between the ports of Washington and California, and as such operated the steamship Hyades; that the defendants Snyder and Clarke were employed by the defendant company as chief engineer and assistant engineer, respectively, on said steamship; that on March 3, 1916, one William Brown was employed by the Standard Boiler Works, of Seattle, as a mechanic, and on said day was engaged in putting certain bolts in the base of the engine of the vessel, pursuant to contract of the boiler company and the defendant company, and while so engaged had removed a plate from the deck of said vessel from which the engines and machinery were controlled and operated, and had "crawled down underneath the engines, condenser, and hot well, and while in this position the defendant Miles R. Clarke negligently and carelessly opened the valve controlling the flow of water in said hot well and condenser in such a manner as to cause the same to overflow and flood the place where the said William Brown was engaged at his work, and to cause hot and boiling water to fall upon, envelop, and horribly burn and scald the body of said William Brown," from the effects of which he died on the 5th of March following; that the said engines, boiler, and hot well were at all times mentioned under the supervision and control of the defendants Miles R. Clarke and Charles W. Snyder, "and that it was the duty of the said Miles R. Clarke and Charles W. Snyder to warn said William Brown of the danger to said William Brown from the source aforesaid"; and that it was "the further duty of the said Miles R. Clarke and said Charles W. Snyder to so operate said engines, boilers, and hot well as not to endanger the life of said William Brown while engaged in

said work as aforesaid." The mother of the deceased prosecutes this action.

The petition for removal states that Clarke is a resident of California and has not been served with process, and that Snyder is a resident of the state of Washington; denies that Snyder at the time of the accident had charge of the operation and control of the vessel or any portion thereof, and states that he was not aboard the vessel, which fact was known to the plaintiff, and that he was fraudulently joined to defeat removal to this court on the ground of diversity of citizenship; and further states that the causes of action, if any, are separable, and that, if the defendant company is liable at all, it is under the doctrine of respondeat superior, and not by reason of any concurrent negligence of the defendant company.

The plaintiff denies that Snyder was fraudulently joined, but alleges that Brown met his death at a place under the supervision and control of said Snyder, "at a time when he was known by said Snyder to be at said place upon the express invitation of the defendant Matson Navigation Company, said Snyder's master, and that there was inherent in said place the danger which caused the death of the said deceased, which fact was known to said Snyder."

[1-4] The state in which a corporation is organized determines the citizenship, whether it has offices and transacts business in the state in which the suit is sought to be brought or not. Johanson v. Alaska Treadwell Gold Mining Co., 225 Fed. 270. The right of removal may not be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy; but the defendant seeking removal must allege facts that force the conclusion that the joinder is fraudulent, unless it is apparent upon the face of the complaint, and merely to apply the term "fraudulent" will not suffice. Chesapeake & Ohio Ry. v. Cockrell, 232 U. S. 146, 34 Sup. Ct. 278, 58 L. Ed. 544; Illinois Central R. R. Co. v. Sheegog, 215 U. S. 308, 30 Sup. Ct. 101, 54 L. Ed. 208; Wecker v. National Enameling Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757; Alabama Southern Ry. Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 54 L. Ed. 441, 4 Ann. Cas. 1147; Louisville & Nashville R. R. Co. v. Wangelin, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473. For the purposes of removal the issue tendered is what the plaintiff makes it in his complaint. Bradshaw v. Bowden (D. C.) 226 Fed. 323.

[5] The liability, if any, of the defendant company, alleged in the complaint, is solely on the ground of the relationship of petitioner as master of Miles R. Clarke, a servant, under the doctrine of respondeat superior, and not by reason of any concurrent or wrongful act of the defendant company. The relation of the defendant Snyder was that of servant. It is apparent upon the face of the complaint that the duties of the defendants Snyder and Clarke were that of chief and assistant engineer, respectively. It is affirmatively stated in the complaint that the injury was caused "by the defendant Miles R. Clarke negligently and carelessly opening the valve controlling the flow of water in said hot well and condenser in such a manner as to cause the same to overflow and flood the place where the said William Brown was engaged at his work, and to cause the hot and boil-

ing water to fall upon * * * said William Brown. * * *" It is apparent that it was an act of commission on the part of Clarke, a servant, which was the cause of the injury, and not an act of omission on the part of Snyder, a fellow servant of the person who committed the act. The mere fact that the allegation is made in the complaint that it was the duty of Snyder to notify the deceased of the danger does not make Snyder a party to the injury, in the face of the other statements. There might be some force to the argument of counsel for the plaintiff if the valve controlling the flow of water in said hot well and condenser had been opened by a stranger in the absence of Snyder, the servant of the defendant company, his duty at the time being to be in charge of this part of the vessel; but in the face of the affirmative act of the fellow servant of equal responsibility, who was present and in charge of the apparatus, and in the absence of a statement directly connecting the defendant Snyder with the act of commission, the conclusion is inevitable that the defendant Snyder, is not a proper party, and that there is no joint liability between the defendant Snyder and the defendant company. The record concedes that the defendant Clarke is a resident of California upon whom no process has been served. There is a diversity of citizenship, and the right of removal therefore obtains.

The motion to remand is denied.

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## In re BITTLE.

(District Court. E. D. Pennsylvania. January 30, 1917.)

No. 5917.

BANKRUPTCY ⊂391(3)—PROCEEDING IN STATE COURT—STAY.

Action in a state court against bankrupt by a creditor will not be stayed by the bankrupt court, though it be creditor's purpose, on any judgment obtained, to attach funds in the trustee's hands, even if this would be a nullity.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 649–654; Dec. Dig. ⊂391(3).]

In Bankruptcy. In the matter of Reuben T. Bittle, bankrupt. Sur petition to stay proceedings in state court. Petition dismissed.

Louis Greenblatt, of Philadelphia, Pa., for petitioner-bankrupt.
Erwin Sturm, of Philadelphia, Pa., for respondent-landlord.

DICKINSON, District Judge. The petitioner is the bankrupt. The respondent is his landlord. An execution issued, and levy was made upon property of the defendant which was subject to the landlord's claim for rent. The landlord gave notice of his claim to the sheriff. A petition in bankruptcy followed and (presumedly) the execution was stayed and a receiver in bankruptcy appointed. The bankrupt claimed his exemption, and under an arrangement made the receiver sold the property; the claim to the exemption being transferred to the fund. An adjudication was entered and a trustee appointed in due course, who succeeded to possession of the fund. The

landlord filed his proof of claim. He then, without leave of the court, brought an action against the bankrupt in a state court. His claim is for unaccrued rent to the end of the term, asserted to have become due and payable by reason of a provision of the lease making the rent so payable in the event of an execution issuing against the tenant. There is also averred to be a waiver of exemption in the lease. The avowed purpose of the action is to secure judgment against the tenant, issue thereon an attachment in execution, with the trustee as garnishee, and thus reach the exemption fund in satisfaction of the claim and through this test test the validity of the waiver.

A most curious situation is thus presented. Although the landlord has not formally invoked the remedy, there is, at least, plausible ground for the assertion of his right to have leave to sue in the state court and to have the question of the discharge of the bankrupt withheld until he has tested in the state court the right of the tenant to claim his exemption against the landlord. Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061; In re Brumbaugh (D. C.) 128 Fed. 971; In re W. C. Allen & Co. (D. C.) 134 Fed. 620; In re Castleberry (D. C.) 143 Fed. 1018; In re Meredith (D. C.) 144 Fed. 230; In re Loden (D. C.) 184 Fed. 965.

Where, however, as here, the exemption set aside is represented by moneys, and does not consist of goods or chattels, there is authority for the proposition that, as the bankrupt court must (as is averred) make some disposition of the fund, it may administer it by either awarding it to the bankrupt or to the landlord as having the better claim of right to it. In re Sloan (D. C.) 135 Fed. 873; In re Renda (D. C.) 149 Fed. 614.

If this be a sound proposition, then there is no occasion for us to do anything beyond proceeding to determine to whom the $300 properly belongs. It is in consequence needless to do what the landlord asks to have done. Moreover, In re Renda (D. C.) 149 Fed. 614, is an authority for the proposition that the $300 cannot be attached in the hands of the trustee because in custodia legis, and that the proceedings in the state court ending in such attachment would be a nullity. If this be the law, then what the landlord asks to have done would be a futile thing.

There is an apparent conflict of views as to the application of the doctrine of the Lockwood Case where the exemption is in the form of money. Upon this we are not now called to pass. The landlord has, however, the right, in the first instance, to choose his forum. Of this right we will not deprive him, nor will we attempt to forecast the result of his resort to the state court. He may reach this fund, if it is his right to do so, and should be permitted to make the attempt. If it is beyond the reach of any process open to him, that is his misfortune. He must decide upon the remedy which he will ask to have applied, and it is not the province of the court to indicate the course which, in the opinion of the court, is the best for him to pursue. He is seeking recourse to the state court, and we confine ourselves to the matter before the court by refusing the petition to stay his hand.

Petition dismissed.

## DUNLOP v. BAKER et al.

(Circuit Court of Appeals, Fourth Circuit. November 9, 1916.)

No. 1424.

1. SPECIFIC PERFORMANCE ⊜57—CONTRACTS ENFORCEABLE—OPTION—"CONTRACT OF SALE."

A written instrument, under seal and expressing a consideration, granting an option to purchase real estate, on election by the other party to exercise the option, becomes a valid and binding "contract of sale," which may be specifically enforced in equity.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 178; Dec. Dig. ⊜57.

For other definitions, see Words and Phrases, First and Second Series, Contract of Sale.]

2. VENDOR AND PURCHASER ⊜21—VALIDITY OF CONTRACT—CERTAINTY.

Expression of the time of payment is not essential to the validity of a contract for the sale of real estate.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 6, 25, 26, 89; Dec. Dig. ⊜21.]

3. SUNDAY ⊜13—CONSTRUCTION OF STATUTE—VALIDITY OF CONTRACTS.

Code Va. 1904, § 3799, which makes it a criminal offense if "a person on the Sabbath day be found laboring at any trade or calling," does not render illegal an instrument granting an option to purchase real estate, because executed on Sunday.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 36–44; Dec. Dig. ⊜13.]

4. BANKRUPTCY ⊜293(1)—JURISDICTION OF COURT—CONTROVERSIES RESPECTING PROPERTY.

A court of bankruptcy has jurisdiction to determine any controversy over the distribution of property which has come into its possession as part of the estate of a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 411; Dec. Dig. ⊜293(1).]

5. BANKRUPTCY ⊜254—JURISDICTION OF COURT—SPECIFIC ENFORCEMENT OF BANKRUPT'S CONTRACTS.

On the day before filing his petition in bankruptcy, a bankrupt and his wife executed an instrument granting to petitioner an option to purchase certain land. After the adjudication, but within the time limited by the option, petitioner filed his petition in the bankruptcy court, praying for specific performance, and offering to pay a sum, in addition to the option price, sufficient to complete payment of all claims against the estate and the costs of the proceedings. *Held*, that the court had jurisdiction to entertain the petition, and that by filing it petitioner accepted the offer made by the option, and converted it into a contract of sale, which, being valid, he was entitled to have enforced, subject only to the rights of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊜254.]

6. BANKRUPTCY ⊜267—CONTRACT OF BANKRUPT—PETITION FOR SPECIFIC ENFORCEMENT.

Petitioner was not barred of the right to the benefit of his contract by the fact that the land was subsequently sold by the trustees under an order which expressly transferred all liens upon and claims to the property to

its proceeds, but was entitled to any surplus of the proceeds after payment of the debts and costs and expenses of the proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 371, 380; Dec. Dig. ⊂=267.]

Johnson, District Judge, dissenting.

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

In the matter of Robert Edward Baker, bankrupt. Petition by J. J. Dunlop against Robert Edward Baker and wife, and D. Hamilton Willcox, Lawrence P. Poole, and C. H. Joyner, trustees. From an order denying his petition for equitable relief, Dunlop appeals. Reversed.

L. L. Lewis, of Richmond, Va., and Charles E. Plummer, of Petersburg, Va., for appellant.

Richard H. Mann and Bernard C. Syme, both of Petersburg, Va., and Edwin P. Cox, of Richmond, Va. (Mann, Syme, Wilson & Mann, of Petersburg, Va., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and JOHNSON, District Judge.

WOODS, Circuit Judge. The ultimate practical question in this appeal is whether the bankrupt, Robert E. Baker, may escape from an option agreement made by him to sell a tract of land to the petitioner, J. J. Dunlop, which turned out to be disadvantageous. The option executed by Baker and his wife, Lillie M. Baker, under seal, was in these words:

"For and in consideration of one dollar, to me in hand paid, the receipt of which is hereby acknowledged, and other good and sufficient considerations, I hereby agree to give J. J. Dunlop, or assigns, the exclusive right to purchase the 418 acres of land owned by Robt. E. Baker, situated in Prince George county, state of Virginia, with the appurtenances thereunto belonging, for the sum of $12,000 from the 9th day of April, 1915, to the 9th day of July, 1915, upon the following terms, $200 on signing of contract, and trust for balance of equity, on the delivery of good and sufficient warranty deed, and the balance as follows: Purchaser to assume existing trust on property."

The date on the paper was April 9, 1915, but the real day of execution was Sunday, April 11, 1915. On the following day, April 12th, Baker filed his petition in bankruptcy, and the adjudication immediately followed. Among the assets set down in his schedule by the bankrupt was the tract of land described in the option at a valuation of $12,000. On May 1st, Dunlop filed a petition in the bankruptcy proceedings, setting up the option, and asking that he be allowed to pay into court the purchase money, $12,000, and that, upon the payment, the trustees be directed to convey the land to him free of liens. On May 8th the bankrupt, answering the petition, admitted its allegations and joined in its prayer. On May 20th Dunlop filed an amended petition, alleging that when he filed the original petition he was advised that the bankrupt's assets would be more than sufficient to pay

his debts, but that it had developed at the hearing before the referee that the liabilities might exceed the assets; that the rights of the petitioner under his option were inferior to the lien given to the trustees for the benefit of creditors under section 47 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557 [Comp. St. 1913, § 9631]); that in order to protect his rights he offered to pay into court such amount, in addition to the purchase price of $12,000, as may be necessary to pay all the debts of the bankrupt and costs of the proceedings; that in exercising his rights to discharge the lien of the trustees he was—

"entitled to be subrogated to all rights against the bankrupt and his creditors, and therefore to the right to contest all claims which may be filed against said bankrupt, and the further right to require the marshaling of the assets of said bankrupt, and such application of said assets as will protect your petitioner's right in the premises."

The petitioner asked on these allegations that the title be made to him on his making a deposit in bank awaiting the determination of the questions that might arise, and to be applied as the court might determine. The bankrupt, by his answer filed on May 28th, completely reversing his position, denied the rights of the petitioner to have the relief sought, even under the facts stated in the petition, and set up the following affirmative defenses: (1) Want of any consideration for the option; (2) such indefiniteness and uncertainty in the option as to make it incapable of enforcement; (3) invalidity of the contract because executed on Sunday. The answer of Lillie M. Baker, wife of the bankrupt, set up substantially the same defenses.

It is needless to recite the steps through which the controversy finally reached the District Court and was decided. The court dismissed the petition and ordered the land to be sold at public auction; but the order provided "that all valid liens upon and claims to the said property be, and they are hereby, transferred and shall attach to the proceeds of sale." At the sale the land brought $31,000. The aggregate of the debts of the bankrupt and costs and expenses of the proceedings is $18,853.43.

The facts agreed on before the District Court may be thus summarized: (1) Execution of the option on Sunday, and the procurement by Dunlop of other options on other lands in the vicinity during the months of April and May, 1915; (2) the sale of other lands near by just before the trial at $125 per acre; (3) the knowledge by Dunlop, immediately after he had procured the option, that Baker, before giving it, had signed his petition and schedule in bankruptcy, and had placed them in the hands of his attorney for filing; (4) the existence of liens on the land at the time the option was given, in the form of deeds of trust, aggregating $8,000 and interest.

[1] For the sake of clearness we consider, first, whether there was ever any contract to sell the land binding on the bankrupt. The defense of want of consideration cannot be sustained; for the option was under seal and expressed the consideration of "one dollar and other good and sufficient consideration," and no evidence is offered that the paper spoke falsely in this respect. The point was elaborately

discussed by Judge Cardwell in Watkins v. Robertson, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194, 115 Am. St. Rep. 880, the court holding that an option under seal for the sale of certain shares of stock, expressing the consideration of $1 and the condition that it be accepted within a stated time, should be treated as an irrevocable covenant, of which equity would enforce specific performance upon due acceptance by the optionee. The court said that the case of Graybill v. Brugh, 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. Rep. 894, which expressed a contrary view, was to be considered practically overruled by Central L. Co. v. Johnston, 95 Va. 223, 28 S. E. 175. The Supreme Court of the United States thus states the familiar rule:

"The covenant in the lease giving the right or option to purchase the premises was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and being under seal must be regarded as made upon a sufficient consideration, and therefore one from which the defendant was not at liberty to recede. When accepted by the complainant by his notice to the defendant, a contract of sale between the parties was completed. * * * When a contract is of this character, it is the usual practice of courts of equity to enforce its specific execution upon the application of the party who has complied with its stipulations on his part, or has seasonably and in good faith offered, and continues ready, to comply with them." Willard v. Tayloe, 75 U. S. (8 Wall.) 557, 19 L. Ed. 501, 21 L. R. A. 129, note.

[2] The defense of indefiniteness and uncertainty is equally unfounded. The option clearly meant that upon its acceptance and the execution of the contract of sale the purchaser was to pay $200 in cash, assume the payment of the debts secured by the trust deeds covering the property, and execute for the benefit of the seller a trust deed as security for the difference between the purchase price, $12,000, and the aggregate of the cash payment and the liens assumed by the purchaser. This construction of the contract was assented to as correct by the bankrupt in his answer to the original petition. The only item not definitely fixed was the time for the payment of the balance going to the seller. But it is settled by authority from which there is no dissent that expression of the time of payment is not essential to the validity of a contract of sale. If no time be mentioned, it is to be inferred that either immediate payment or payment in a reasonable time according to the circumstances is intended. 36 Cyc. 597, and authorities cited.

[3] This brings us to the question whether an option executed for valuable consideration is invalid because executed on Sunday. The Virginia statute provides:

"If a person on the Sabbath day be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business, except household or other work of necessity or charity, he shall be deemed guilty of a misdemeanor," etc. Code 1904, § 3799.

In the absence of any construction of this statute by the Virginia court, we must depend upon reason and the construction of similar statutes by other courts. The state statutes on the subject may be divided into two classes. In a large number of the states the prohibition

is against the doing of any business or labor on Sunday. In these states it has been generally held in cases too numerous for citation that the giving of a note, or bond, or mortgage, or conveyance is doing business, and therefore is within the statute.

In other states, however, the statutes do not make every isolated business transaction criminal. These express a different purpose, namely, the stopping and breaking of the continuity of the trades and callings—the regular everyday occupations—of the people, to the end that the individual and the public at large may have the benefits expected from the general observance of the Sabbath. Their language seems carefully chosen to exclude the idea that the citizen may be harassed by prosecution for every incidental or isolated transaction he may make on Sunday. The English statute is in this class, enacting that:

"No persons shall do or exercise any worldly labor, business, or work of their ordinary calling upon the Lord's day."

So it was held in Drury v. Defontaine, 1 Taunt. 131, and Bloxsome v. Williams, 3 B. & C. 232, that the sale of a horse and a contract of hiring, not made in the ordinary calling of either party to the contract, were valid. Rex v. Inhabitants of Whitnash, 7 B. & C. 596. The Georgia, North Carolina, and South Carolina statutes in like terms were given the same construction in Dorough v. Equitable Mortgage Co., 118 Ga. 178, 45 S. E. 22; Rodman v. Robinson, 134 N. C. 503, 47 S. E. 19, 65 L. R. A. 682, 101 Am. St. Rep. 877; Hellams v. Abercrombie, 15 S. C. 110, 40 Am. Rep. 684. The Virginia statute is substantially the same. The difference between doing "any labor, business, or work of their ordinary calling" of the English statute, and the "laboring at any trade or calling" in the Virginia statute, is too shadowy for judicial recognition. Both statutes limit the prohibition to the prosecution of any usual or regular occupation or business, and they exclude the idea of punishment for isolated transactions. On the point now involved the distinction between "their ordinary callings" of the English statute, and "any trade or calling" of the Virginia, is unsubstantial. One transaction, such as hiring a servant, or conveying land, or taking a note or option, unconnected by continuity with other transactions of a like nature, cannot be laboring at a trade or calling of any kind. There is no evidence that either Baker gave, or that Dunlop took, the option in the course of any trade or calling. True, it was agreed that Dunlop during the months of April and May was getting options on other lands in the vicinity, but that does not warrant the conclusion that he was engaged in taking options as a calling or vocation. We think the fact that the option was taken on Sunday did not invalidate it.

It is true that the granting or refusing of specific performance is a matter within the discretion of the court, controlled by the general principles of equity; but judicial discretion does not extend to the refusal of specific performance of a definite contract untainted by injustice or hardship. Certainly the mere rise in the value of the property has never been recognized as a justification for denying the purchaser the right to the land for which he has bargained. There is no element of injustice or hardship, and we can discover no ground which would justify a court of equity in refusing to enforce the contract. Willard v. Tayloe, 75 U. S. 557, 19 L. Ed. 501.

[4] Having reached the conclusion that the option was good, the next question is: What rights did Dunlop, the optionee, have enforceable in the bankruptcy proceedings? There can be no doubt that the petition of Dunlop, setting up his status with respect to the property, and asking that he have title to it in compliance with the terms of his option, and the denial by the trustees and the bankrupt of his right to the relief asked, made a controversy in relation to the bankrupt estate which the court had jurisdiction to determine under section 2 of the Bankruptcy Act (Comp. St. 1913, § 9586). There was abundant power in the court to decree specific performance, or grant any other equitable relief which may be necessary in the administration and distribution of the bankrupt estate. In Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157, the true result of a review of the cases was said to be:

"That when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein." Hebert v. Crawford, 228 U. S. 204, 33 Sup. Ct. 484, 57 L. Ed. 800.

Clearly the appeal presents to this court one of those controversies arising in bankruptcy proceedings appealable under section 24a of the act (Comp. St. 1913, § 9608). Moody v. Century Bank, 239 U. S. 374, 36 Sup. Ct. 111, 60 L. Ed. 336.

[5] The bankruptcy court having jurisdiction of the subject-matter and the custody of the property, the filing of the petition for the enforcement of the option was an acceptance of it, and the contract of purchase was thereby perfected, and became binding on both parties, subject, of course, to the rights of creditors. The law has been long settled that the filing of the bill for specific performance is a sufficient acceptance of an offer to sell, making mutual a unilateral contract. Ives v. Hazard, 4 R. I. 14, 67 Am. Dec. 500; Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; 21 L. R. A. 131, note. But if it be considered that the filing of the original petition did not have this effect, because of the intervening lien in favor of the trustees, it cannot be doubted that the filing of the amended petition of May 26th was an acceptance, and made the contract binding. At that time the option had not expired, and Baker had not in any way attempted to withdraw it. It is true that bankruptcy had supervened, but that had no other effect than to place the property in the hands of the bankruptcy court, with a lien on it for the debts of the bankrupt and the costs superior to the claim of Dunlop. Nothing but this lien stood between Dunlop and his right to a conveyance of the land upon payment of the purchase money agreed on. It follows that, when he offered to pay a sum in addition to the agreed price sufficient to satisfy the claims superior to his own, he was entitled to the land. In principle the case stands as if Baker had given the option, and then executed to another a mortgage without notice of the option for more than the price stated in the option. Surely, in that case Baker could not have set up the mortgage as an obstruction to specific performance, in the face of the offer of the optionee to pay enough above the price agreed on to remove the incumbrance.

Finally, we think these conclusions may be stated as evident: Before the petition in bankruptcy, Dunlop had an option on the land, good and enforceable against Baker. After the filing of the petition in bankruptcy, the right of Dunlop became subordinate to the superior lien of the trustees, to the extent of the bankrupt's debts and the costs of the proceedings. When Dunlop filed his petition to be allowed to exercise his option, and to protect it by paying into court, not only the option price, but a sum which, together with the price, would satisfy the debts and costs, equity required that he be allowed to pay in the money and to have a conveyance of the property. As holder of a claim to the property subordinate to the lien in favor of the trustees for the benefit of creditors, under a familiar equity rule, he had the right to be subrogated to the rights of the trustees and creditors upon payment of all debts and costs.

The personal pronoun "I," in the clause of the option "I hereby agree to give J. J. Dunlop, or assigns, the exclusive right," etc., refers to both Robert E. Baker and Lillie M. Baker, since both signed the option. Holman v. Gilliam, 6 Rand. (Va.) 39. The decree of the court should have been in accordance with these conclusions, and conveyance should have been made to Dunlop upon payment, according to his offer, of all debts and costs of the proceedings.

[6] It is argued, however, that these rights have been lost by the sale of the land under the order of the court. Without objection from the bankrupt or the trustees, the order of sale provided:

"That all valid liens upon and claims to the said property be, and the same are hereby, transferred and shall attach to the proceeds of sale."

Under this order the optionee, Dunlop, has the same right in the proceeds of sale as he had in the land before its sale. The debts and costs considerably exceed the price mentioned in the option. The effect of giving Dunlop the benefit of his option and subrogation to the rights of creditors, which he would have had but for the error of the court in refusing his offer, is to decree the payment to him of the surplus proceeds of the sale after the payment in full of all the debts of the bankrupt, and the costs of the administration; and it will be so decreed.

Reversed.

JOHNSON, District Judge (dissenting). I dissent. Surely there is no principle of law or equity correctly applied that requires a court of bankruptcy to give to a mere unilateral option, which had not been accepted at the time of adjudication in bankruptcy, the same legal effect as a deed of warranty. Surely the court is not constrained to rule that the holder of an unaccepted option at the time of bankruptcy shall come into the bankrupt court and have his option declared superior to the dower rights of the bankrupt's wife. It is shocking to the conscience to be told that the holder of a Sunday unilateral option, which had not been accepted at the time of bankruptcy, should be held to have the equity of redemption, and be entitled to the same rights as if he had actually entered into a contract to purchase the land and had actually paid every dollar of the purchase money. The

majority opinion does all these things in the teeth of the fact that no part of the purchase money has been paid.

There was no contract between Baker and Dunlop for the sale of the land at the time of Baker's adjudication in bankruptcy. It is not contended that Dunlop, at the time of Baker's adjudication in bankruptcy, had anything more than a unilateral option, which permitted, but did not obligate, him to purchase a certain tract of land within three months for the sum of $12,000. That offer was not accepted prior to the adjudication. The court of bankruptcy at the time of adjudication takes charge of the the bankrupt's property to administer according to law. The claims that can be proved against the bankrupt estate are defined in section 63a and section 63b of the Bankrupt Act (Comp. St. 1913, § 9647). Section 63a provides for liquidated demands owing at the time of the filing of the petition, and section 63b provides for unliquidated demands. It will be observed that section 63b in no manner enlarges the character of claims referred to in section 63a. Whether the demand or claim is liquidated or unliquidated, it must have existed at the time of the filing of the petition. What the bankrupt earns after his adjudication is his own, and the trustee has no claim on it. Likewise obligations subsequent to adjudication cannot be proved against the bankrupt estate. Neither subsequent claims nor subsequent earnings have any part in the proceeding. The discharge in bankruptcy releases the bankrupt from provable demands only; that is, such as existed at the time of adjudication and could have been proved under sections 63a and 63b.

The majority opinion holds that the court of bankruptcy has jurisdiction to entertain an action against the trustee in bankruptcy for specific performance, and it treats Dunlop's petition as an acceptance of the option and as the bringing of the suit in equity for specific performance. I am unable to find any provision in the bankruptcy law that gives any person a right of action for specific performance against the trustee in bankruptcy or that gives the court of bankruptcy jurisdiction of such a controversy. The bankruptcy law as amended in 1910 makes the trustee in bankruptcy an innocent purchaser and destroys root and branch all secret or unrecorded claims whether executed or executory. Baker was adjudicated a bankrupt on April 12th. Suppose that on May 1st, 18 days thereafter, he had executed a mortgage on the land in the hands of the trustee in bankruptcy, does any one suppose for a moment that the holder of such a mortgage could establish any claim whatever thereunder against the trustee in the court of bankruptcy?

As I have tried to show in the preceding paragraph, there was no contract the court of bankruptcy could deal with; but, in order to analyze futher the majority opinion of the court, let us assume that at the time of the adjudication there existed a valid contract between Baker and Dunlop, whereby Baker was bound to sell and Dunlop was bound to buy the land described in the contract. What would have been Dunlop's remedy or remedies?

At the common law there was no method of enforcing the specific performance of a contract. For its breach there was one remedy

only, and that was damages. The theory of the common law was that one shilling or sovereign was as good as another. It was therefore thought that, if the injured party was compensated in damages, he could secure the equivalent elsewhere. This theory was not in fact true, for a particular piece of land may have a peculiar and special value to a particular person, and its loss could not be compensated for by having money damages. Hence one of the early creations of equity was the doctrine of specific performance of contracts where the party had no adequate remedy at law. It was necessary to allege in the bill that the complainant was without adequate remedy at law, and that method of pleading still obtains. When the subject of the contract is realty, specific performance has come to be granted as a matter of course; but the right to specific performance is not and never has been an absolute, unqualified, unlimited right. The true doctrine is that specific performance rests in the sound judicial discretion of the chancellor.

In Rison v. Newberry, 90 Va. 519, 18 S. E. 918, the court, quoting Chancellor Kent, says:

"Specific performance cannot be considered a matter of right in either party, but is a matter of discretion in the court; not, indeed, of arbitrary and capricious discretion, depending upon the mere pleasure of the judges, but of that sound and reasonable discretion which governs itself as far as it may by general rules and principles, but which at the same time withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties."

The court, speaking for itself, says:

"If specific performance would work injustice, or be unreasonable, a party will be left to his action for damages."

On page 521 of 90 Va., on page 919 of 18 S. E., the court says:

"Specific performance is an equitable remedy, which compels the performance of a contract in the precise terms agreed upon or such a substantial performance as will do justice between the parties under the circumstances of the case. 22 Amer. & Eng. Enc. Law, p. 909. Bouvier defines it as the 'actual accomplishment of a contract by a party bound to fulfill it.'"

Mr. Justice Washington, speaking for the Supreme Court of the United States in Hunt v. Rhodes, 26 U. S. (1 Pet.) 14, 7 L. Ed. 27, says:

"Equity may compel parties to perform their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same. The former is a legitimate branch of its jurisdiction, and in its exercise highly beneficial to society; the latter is without its authority and the exercise of it would not only be an usurpation of power, but would be highly mischievous in its consequences."

Equity cannot make or alter a contract for the parties and then execute it. It may be stated as a general rule that a court of equity will not decree the specific performance of a contract beyond the ability of the defendant to perform, nor will specific performance of a contract be decreed where in the nature of things the only effect of the de-

cree would be to imprison the defendant perpetually. Equity will not decree the conveyance of property to which the defendant has no title. Where since a contract for the conveyance of property was executed the party has conveyed the property to an innocent third person, the prospective vendee is left to his action for damages. Amer. & Eng. Enc. Law, vol. 26, p. 37; Pom. Eq. §§ 293, 294.

In the case of Ford v. Euker, 86 Va. 76, 9 S. E. 500, the court held:

"Specific performance cannot be considered as a matter of right in either party. It does not proceed ex debito justitiæ, but is a matter of sound and reasonable discretion, which governs itself by general rules and principles, but withholds or grants relief according to the circumstances of each particular case, where these general rules and principles will not furnish any exact measure of justice between the parties. All applications to the court to decree specific performance must depend upon the circumstances of the case, governed by the established principles of the court. The contract must be clear and distinct. It must be mutual. If specific performance would work injustice, the party will be left to his action for damages. * * * If A. J. Ford, Jr., was not bound to buy, was Euker bound to convey? Can there be an agreement between two parties, which binds one of them absolutely and the other only at his pleasure? * * * Indeed, as equity is never bound to give this relief, so it never will unless the justice of the case, as drawn from all its facts, demands it."

Pomeroy's Equity Jurisprudence, § 837, says:

"If the vendor has disabled himself from performing after making the contract, * * * a court of equity will award damages to the vendee plaintiff, provided he commenced his suit in good faith, without any knowledge of the disability, but will not in general grant damages if this plaintiff was aware of the disability at the time of bringing his suit." Conrad v. Effinger, 87 Va. 59, 12 S. E. 2, 24 Am. St. Rep. 646; Click v. Green, 77 Va. 835; Threlkeld v. Fitzhugh, 2 Leigh [Va.] 456.

"The absolute inability of a defendant to perform his contract at all when called upon by the court to do so prevents a decree for specific performance, even though the defendant intentionally rendered himself unable to perform." Jones v. Tunis, 99 Va. 220, 37 S. E. 841.

"A decree for specific performance will not be granted against a defendant who is unable to perform the decree even though the inability were brought about by the defendant himself." Langford v. Taylor, 99 Va. 577, 39 S. E. 223; Hudson v. Land Co., 99 Va. 537, 39 S. E. 215.

The appellant's bill for specific performance never had any standing in the court. Specific performance could not be enforced. Baker had parted with the title. The decree of the court could not operate upon him. The action would not lie against the trustees. They were innocent purchasers. The act of 1898 gave the trustees no other or higher rights than the bankrupt had and the authorities cited by the appellant were under this act. The amendment of June, 1910 (Act June 25, 1910, c. 412, 36 Stat. 838), did give the trustees rights higher than the bankrupt had. The optionee admits in his supplemental petition that he could not have specific performance upon the terms mentioned in his option. He asked the court to do the thing it had no right to do, namely, to make another contract for the parties and enforce it, although Baker was not in a position to make the title.

The District Court has exercised its discretion. Whether it considered the price so grossly inadequate as to amount to fraud or op-

pression, or whether it considered that the dower rights of the bankrupt's wife would not be protected, or whether it considered that the conditions had so changed as to make the enforcement of the contract unconscionable, the decree does not state; but it refused specific performance, as well it might, upon any one or all of the grounds suggested. Now another serious situation confronts the appellant. Even if it was ever possible, after Baker parted with the title, to have specific performance, that question has now become academic, because the appellant has not preserved the rem. Specific performance can mean nothing more nor less than the conveyance of the land described in the option or some part thereof. The land has been sold. The court has no control over it or its present owners. If appellant desired to preserve the rem, he should have proceeded under section 1007 of the Revised Statutes (Comp. St. 1913, § 1666); but, not having taken his appeal within the 60 days, nor given nor attempted to give the supersedeas bond, the property has been sold, and his effort to have the court require it conveyed to him becomes impossible, and a mere moot question.

In the case of Wingert v. First National Bank of Hagerstown, 223 U. S. 670, 32 Sup. Ct. 391, 56 L. Ed. 605, where the effort was to enjoin the erection of a new building and while the case was pending in the court the building was erected, no supersedeas bond having been given, Mr. Justice Holmes delivered the opinion of the court, saying:

"It is enough to say that the whole case is disposed of by the erection of the new bank."

Mr. Justice Lurton, in the case of Richardson v. McChesney, 218 U. S. 487, 31 Sup. Ct. 43, 54 L. Ed. 1121, said:

"The thing sought to be prevented has been done, and cannot be undone by any judicial action. Under such circumstances, there is nothing but a moot case."

In the case of Mills v. Green, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293, Mr. Justice Gray discussed at length the results which follow when, pending an appeal from the judgment of the lower court, an event occurs which precludes the relief prayed for in an appeal, and the conclusion of that case is that such an appeal will be dismissed. In the case of Title Guaranty & Surety Co. v. United States, 222 U. S. 401, 32 Sup. Ct. 168, 56 L. Ed. 248, Chief Justice White said:

"Although the writ of error was allowed, and was lodged in the office of the clerk more than 6 months after the entry of the judgment, the bond was approved to operate as a supersedeas. Under these circumstances it is apparent that the order for supersedeas was improvidently granted. No other conclusion is possible in view of paragraph 1007, Rev. Stat., making the allowance of a writ and the lodgment of the same in the office of the clerk within 60 days after the date of a judgment an essential prerequisite to the granting of a supersedeas."

It is said in the majority opinion that, although the land has been sold, the fund is in court, and that the fund takes the place of the land. Liens on land or property may be and often are transferred from the property to the proceeds thereof, for the purpose of the lien is to se-

cure the payment of the debt, and the debt can be paid and is paid in money; but it is idle to talk about a man's right to specific performance being transferred from a tract of land to the proceeds arising therefrom. That ignores the basic principle upon which the courts of equity invented the doctrine of specific performance, namely, that the old common-law doctrine of paying money did not afford adequate relief. The majority opinion goes further, and says that under the law of subrogation the appellant is entitled to the surplus after the payment of Baker's debts. This is not subrogation. The Court of Appeals of Virginia in Gatewood v. Gatewood, 75 Va. 411, said:

"Subrogation is * * * a very different thing from assignment. It is the act of the law and the creature of a court of equity, depending not upon contract, but upon the principles of equity and justice."

Subrogation is in fact the substitution of a new for an old creditor, and the court of equity keeps alive the lien or debt for the benefit of the party who made the payment. Subrogation provides reimbursement for the new creditor. The doctrine of subrogation has no application to the facts of this case. It is not claimed that Dunlop has paid any liens and is entitled to stand in the shoes of the former lienees. To say that Dunlop shall take the surplus fund after Baker's debts are paid is nothing less than giving the option all the force and effect of a legal title. An option is neither an assignment nor a conveyance. The purchase money not having been paid, it is not an equitable title. The breach of an option never gave but two remedies: One is an action for specific performance, and when specific performance becomes impossible, the court can do no more than give damages.

It is suggested in this case that once a court of equity has assumed jurisdiction, if it cannot grant him the relief he asked for, it will grant the complainant the relief he is entitled to. That is sound doctrine. It means only that a court of equity, having assumed jurisdiction of an action for specific performance and finding specific performance impossible, in order to prevent multiplicity of suits, will retain the suit and award such damages as complainant is entitled to. If Dunlop is given money, it must be as damages. The court cannot specifically perform, except by having the land conveyed to the vendee. Dunlop is not entitled to money as a creditor, nor in any capacity whatever, except by way of damages. The equity court, in ascertaining his damages, is governed by the same principles of law that a law court would be if the action had been brought at law for damages. Dunlop can secure nothing but sovereigns or shillings as damages for the breach of the contract.

This raises the very important question as to what is the measure of damages. In Stuart v. Pennis, 100 Va. 612, 42 S. E. 667, we find this syllabus:

"Growing trees are regarded in this state as real estate, and, in an action by a vendee against the vendor to recover damages for the breach of a contract for the sale and delivery of such trees, the measure of damages, according to the Virginia doctrine, is, as a general rule, the purchase money actually

paid, and interest thereon, and not the difference between the contract price and the market value at the time of the breach."

The court says:

"In Thompson v. Guthrie, 9 Leigh [Va.] 101 [33 Am. Dec. 225], following Stout v. Jackson, 2 Rand. [Va.] 132, Threlkeld v. Fitzhugh, 2 Leigh [Va.] 451, Mills v. Bell [3 Call (Va.)] 320, and the leading English case of Flureau v. Thornhill, 2 Blacks. 1078, it is shown that the rule is as applicable to executory contracts as to those executed, and that the vendee is not entitled to more damages than the purchase money he has actually paid and interest thereon."

In Thompson's Ex'r v. Guthrie's Adm'r, 9 Leigh (Va.) 107, 33 Am. Dec. 225, the court said:

"In the case of actual eviction from land for which the purchaser has a conveyance, he can only recover the purchase money, with interest for such time as he is liable to be called on for rents and profits, and the costs of defending the title. This is the settled rule by which the damages are measured in cases of eviction under an executed contract, 'whether they be claimed in an action upon a warranty, or covenant of seisin, or of power to convey, or for quiet enjoyment.' See Stout v. Jackson, and Threlkeld's Adm'r v. Fitzhugh's Ex'x. The same rule applies, at least with equal force, to executory contracts for land. In Mills v. Bell, President Pendleton, who delivered the opinion of the court, seemed to think it applied a fortiori: for whilst he inclined to the opinion that, if a conveyance was made with warranty, the purchaser upon eviction was entitled on the covenant to the increased value of the estate, he declared that, as in that case the contract was executory, a court of equity would adjust the damages upon equitable principles, and accordingly he decreed the value at the time of the agreement. So in Flureau v. Thornhill, on covenant to convey a tract of land at a future time, which had increased in value, and the vendor had no clear title, the vendee was only allowed the purchase money and interest, for that was his real loss. And Judge Green, in Stout v. Jackson, says that 'in all cases of executory contracts, the compensation in case of failure, when the property sold has in the meantime increased in value, should be the same as in case of an executed contract with warranty, and an eviction; for the real loss to the purchaser is the same.' Judge Cabell, too, in the case of Threlkeld's Adm'r v. Fitzhugh's Ex'x, draws the distinction between contracts to deliver personal property and contracts to convey lands at a future period in these words: 'In all executory contracts for the delivery of personal property at a future day, the established standard of damages is the value of the property at the time and place when and where it ought to be delivered. In all executory contracts for the conveyance of land at a future time, the established measure of damages is the purchase money.' On a covenant to make a good title, where there is no fraud on the part of the vendor, and he sells believing his title to be a good one, or that it can be made so, the rule must be the same. The vendee's loss, in case of failure, is the purchase money; the profits, as long as he receives them, standing in lieu of interest, unless so far as they are recovered. For this loss he ought to be compensated, if the land falls in value; and no more than compensated, if it rises."

Wilson v. Spencer, 11 Leigh, 261, lays down the only exception to this well-established rule in Virginia:

"Though in general, for the breach of an executory contract to convey land, the vendee is not entitled to more damages than the purchase money he has actually paid, and interest thereon, * * * yet this rule will not be applied where the fraudulent conduct of the vendor makes it unreasonable to limit the vendee to that measure of damages. If, for example, a vendor who has the title in him at the time of sale shall, after his contract disable him-

self to perform it by conveying the land to another, he will be held liable for the value at the time of the breach."

This court certainly would not hold that a person by going into bankruptcy committed a fraud upon anybody. In this Baker had prepared his petition and schedules in voluntary bankruptcy, had signed them and sworn to them, and left them in the hands of his attorney for filing before the option was executed, and Dunlop was advised of that fact. There is nothing to take this case out of the general rule. Wherefore it follows that the real consideration for the option becomes an important question, as such consideration constitutes the whole measure of damages Dunlop is entitled to, as it is conceded that he has paid no part of the purchase money and all he is out is what he paid, if anything, for the option. It is not difficult to understand why Dunlop is not willing to establish his damages at law or under section 63b of the Bankruptcy Act. If damages are assessed under the general rule, the amount paid for the option, with interest thereon, will be the measure of damages.

The option ought to be declared void because it was made in violation of the law designed to prevent the desecration of the Lord's Day. Section 3799 of the Code of Virginia is as follows:

"If a person on the Sabbath day be found laboring at any trade or calling, or employ his apprentices or servants in labor or other business except in household or other work of necessity or charity, he shall be deemed guilty of a misdemeanor. * * *"

Section 3800:

"The forfeiture, declared by the preceding section, shall not be incurred by any person who conscientiously believes that the seventh day of the week ought to be observed as a Sabbath, and actually refrains from all secular business and labor on that day, provided he does not compel an apprentice or servant, not of his belief, to do secular work or business on a Sunday, and does not on that day disturb any other person."

The statute of 29 Charles II, chapter 7, section 3, enacts:

"No tradesman, artificer, workman, laborer, or other person whatsoever shall do or exercise any worldly labor, business or work of their ordinary calling upon the Lord's Day or any part thereof, works of necessity and charity only excepted."

Under this statute it has been held that a contract made on Sunday was not void, unless it was within the calling or trade of one of the parties. The Virginia statute is more comprehensive. The Virginia statute applies if the work is done in any trade or calling, whether one's own or another's, and whether the work is ordinary or extraordinary. Buying and selling real estate is a business or calling, and is as much a desecration of the Sabbath as the buying and selling of merchandise. The only evidence in this record as to the calling of the optionee is that, during April and May, 1915, he was securing options of land in the vicinity in which Baker lived. The Court of Appeals of Virginia has never had occasion to decide whether or not a contract made on Sunday is void, but that court in the case of Camp v. Bruce, 96 Va. 521, 31 S. E. 901, 43 L. R. A. 146, 70 Am. St. Rep. 873, said:

"The law refuses to enforce illegal contracts as a rule, not out of regard for the party objecting, nor for any wish to protect his interests, but from reasons of public policy. Whenever, therefore, the illegality of the contract appears, whether alleged in the pleadings or made known for the first time in the evidence, it is fatal to the case. That defect cannot be gotten rid of either by a failure to plead it or by agreeing to waive it in the most solemn manner. The law will not enforce contracts founded in its violation."

In the case of Levy v. Davis, 115 Va. 814, 80 S. E. 791, the court said:

"It is a well-settled principle of law that the courts will not aid a party to enforce an agreement for the furtherance of objects forbidden by the statute, or by common law, or general policy of law, or to recover damages for its breach, or when the agreement has been executed in whole or in part by payment of money to recover it back."

And again:

"If the parties are equally at fault, the law will leave them where it finds them. The rule is the same in equity."

To hold that contracts made on Sunday are in violation of the statutes of Virginia and are void is to respect the Christianity and the civilization and the wise public policy underlying the statute. The court should so hold.

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WISE et al. v. WATTS et al.

(Circuit Court of Appeals, Ninth Circuit. January 8, 1917. Rehearing Denied February 13, 1917.)

No. 2719.

1. DEEDS ⟸93—CONSTRUCTION—GENERAL RULES.

The paramount object in the construction of a deed is to give effect to the intention of the parties which is to be gathered from a consideration of the entire instrument, read in the light of the facts and circumstances under which it was executed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232.]

2. DEEDS ⟸115—CONSTRUCTION—INTENTION OF PARTIES—PROPERTY CONVEYED.

By Act June 21, 1860, c. 167, 12 Stat. 71, the heirs of the claimant of a Mexican grant in New Mexico (now in Arizona) were authorized in lieu of a tract claimed by them to select an equal quantity of vacant land in square bodies not exceeding five in number. In 1863 tract No. 3 was selected, described by courses and distances from a named corner, and the selection was approved by the Commissioner of the General Land Office as authorized by the Act in 1864. In 1866, a grantee of the tract claiming that through mistake the description did not embrace the land intended, the Surveyor General was authorized by the Commissioner to change the boundaries, which was done. This change was afterward held without authority and void by the Supreme Court. In 1870, the same grantee executed a deed in which the land was described: (1) By naming the grant and the conveyance to him by the heirs; (2) by the boundaries, which were those given in the void relocation of 1866, but which had not at that time been held invalid; and (3) by stating that the land was

that known as location No. 3, under the grant. This deed was executed pursuant to and in execution of a contract of sale made before tract No. 3 was located, and while it was still a float. *Held*, that it was the evident intention of the parties that the deed should convey all the grantor's interest in such tract, and that it should be so construed; that the two parts of the description which were in accordance with such intention should be given effect while the description by metes and bounds should be rejected, and the deed held to convey the land in accordance with the original and true boundaries.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 325.]

3. DEEDS ⟸116—CONSTRUCTION—INTENTION OF PARTIES—QUITCLAIM.
Such deed, while in form one of "remise, release and quitclaim," purported to quitclaim the land, "to have and to hold all and singular the above-described premises * * * unto the party of the second part, his heirs and assigns forever." *Held*, that it was the intention of the parties to convey, not only the then interest of the grantor, but the land itself; that the deed was one of bargain and sale under which a subsequent conveyance to the grantor of then outstanding interests of certain heirs inured by the benefit of his grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 330.]

4. PUBLIC LANDS ⟸205—CONFIRMATION OF MEXICAN GRANT—BENEFICIARIES.
Land in New Mexico was claimed under two conflicting Mexican grants, the claimants in one case being named in their petition and designated as heirs of Luis Maria Baca, the original grantee. On investigation both claims were sustained as valid, and in consideration of the waiver of their claim to the disputed land "the heirs of Luis Maria Baca who make claim to the same tract of land as is claimed by the town of Las Vegas" were authorized to select other lands, which on confirmation of their selection by the Land Department were granted to them. *Held* that, under the law governing confirmation of foreign grants, such grant was to be construed as in favor of the claimant heirs alone, and that no interest therein passed to other heirs who did not join in the claim.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 638, 650.]

Appeals from the District Court of the United States for the District of Arizona; William H. Sawtille, Judge.

Suit in equity by Cornelius C. Watts and Dabney C. T. Davis, Jr., against Joseph E. Wise, Margaret W. Wise, Lucia J. Wise, James E. Bouldin, Jennie N. Bouldin, David W. Bouldin, Helen Lee Bouldin, and the Santa Cruz Development Company. Decree for complainants and certain of the defendants, and the remaining defendants appeal. Modified.

Samuel L. Kingan, of Tucson, Ariz., and Hartwell P. Heath, of New York City (Herbert Noble, of New York City, of counsel), for plaintiffs.

Selim M. Franklin, of Tucson, Ariz., for defendants Wise.

James W. Vroom and G. H. Brevillier, both of New York City, for defendant Santa Cruz Development Co.

Joseph W. Bailey and Weldon M. Bailey, both of Washington, D. C., and John H. Campbell, of Tucson, Ariz., for defendants Bouldin.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

ROSS, Circuit Judge. This suit was commenced in the court below on the 23d day of June, 1914, by Cornelius C. Watts and Dabney C T. Davis, Jr., to quiet title to a tract of land containing 99,289.39 acres, situate in what was formerly the territory of New Mexico, but what is now Santa Cruz county in the state of Arizona. The defendants answered, and it was stipulated by and between the respective parties, among other things, "that the pleadings by way of answer of each and every defendant herein, heretofore or hereafter duly served upon the solicitors for the plaintiffs or upon the solicitors for the defendants affected thereby, shall be taken not only as a pleading by way of answer, but also as a cross-bill duly filed, served, controverted and at issue, asking affirmative relief against the plaintiffs and against each and every other defendant in the action," and it was further stipulated "that each and every paper was duly served by each of said parties upon each of the other parties or upon the solicitor or solicitors of such other parties."

The trial resulted in a decree of the court adjudging the title to the land in controversy in the following named parties, and in the proportions stated, that is to say: (1) In the defendant Joseph E. Wise, an undivided $^{1}/_{38}$ interest in the whole tract; (2) in the defendant Margaret W. Wise, an undivided $^{1}/_{38}$ interest in the whole tract; (3) in the complainants Watts and Davis an undivided $^{18}/_{19}$ interest in the south half of the tract; (4) in the defendant Jennie N. Bouldin an undivided $^{18}/_{38}$ interest, in the defendant David W. Bouldin an undivided $^{18}/_{76}$ interest, and in the defendant Helen Lee Bouldin an undivided $^{18}/_{76}$ interest, making a total of $^{18}/_{19}$ interest, in the north half of the tract.

The land is known as "Baca Float No. 3," and the title thereto rests upon the grant made by Congress June 21, 1860, by an act entitled "An act to confirm certain private land claims in the territory of New Mexico" (12 Stats. 71, c. 167), section 6 of which is as follows:

"That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the Surveyor General of New Mexico, to make survey and location of the land so selected by said heirs of Baca when thereunto required by them; provided, however, that the right hereby granted * * * shall continue in force [for] three years from the passage of this act, and no longer."

The case shows that on June 17, 1863, one John S. Watts, as attorney for the heirs of Luis Maria Baca, selected the land here in controversy as the third of the 5 tracts of land which were granted by the above-quoted section of the statute, the application therefor being in the words and figures following:

"Santa Fe, New Mexico, June 17, 1863.

"John A. Clark, Surveyor General, Santa Fé, New Mexico: I, John S. Watts, the attorney of the heirs of Don Luis Maria Cabeza de Baca, have this day selected as one of the five locations confirmed to said heirs under the sixth section of the act of Congress approved June 21, 1860, the following

tract, to wit: Commencing at a point one mile and a half from the base of the Salero Mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles thirty-six chains and forty-four links, thence south twelve miles thirty-six chains and forty-four links, thence east twelve miles thirty-six chains and forty-four links, thence north twelve miles thirty-six chains and forty-four links to the place of beginning, the same being situate in that portion of New Mexico now included by act of Congress approved February 24, 1863 [12 Stat. 664, c. 56] in the Territory of Arizona. Said tract of land is entirely vacant, unclaimed by any one, and is not mineral to my knowledge.

"John S. Watts,
"Attorney for the Heirs of Luis Maria Cabeza de Baca."

The selection so made on behalf of the heirs of Baca was approved by the Surveyor General of New Mexico on June 17, 1863, and on April 9, 1864, the Commissioner of the General Land Office approved that selection and ordered a survey thereof, and directed that the plat and field notes of such survey be returned to the General Land Office and filed therein. Thereafter, and on April 13, 1866, John S. Watts, as attorney for the heirs of Baca, made application to the Surveyor General of New Mexico to be allowed to change the boundaries of Baca Float No. 3 as so selected and approved, in and by the following letter:

"Washington City, April 30, 1866.

"Hon. J. M. Edmunds, Commissioner of Land Office—Sir: You will find by reference to the papers in file in your office, that on the 17th of June, 1863, I filed with the Surveyor General of New Mexico an application for the location of one of the five locations confirmed to the heirs of Luis Maria Cabeza de Baca under the sixth section of the act of Congress approved June 21, 1860. I further state that the existence of war in that part of the territory of Arizona and the hostility of the Indians prevented a personal examination of the locality prior to the location, and not having a clear idea as to the direction of the different points of the compass, when the subsequent examination of the location was being made by Mr. Wrightson, in order to have the location surveyed, it was found that the mistake made would result in leaving out most of the land designed or intended to be included in said location. Mr. Wrightson was killed by the Indians, and no survey has been made because of said mistake in this initial point of location. Under these circumstances I beg leave to ask that the Surveyor General of New Mexico be authorized to change the initial point so as to commence at a point 3 miles west by south from the building known as the Hacienda de Santa Rita, running thence from said beginning point north 12 miles 36 chains and 44 links, thence east 12 miles 36 chains and 44 links, thence south 12 miles 36 chains and 44 links, thence west 12 miles 36 chains and 44 links to the place of beginning. I beg leave further to state that this land which will be embraced in this change of the initial point is of the same character of unsurveyed vacant public land as that which would have been set apart by the location as first solicited, but is not the land intended to have been covered by said location, but the land to be included within the boundaries above designated is the land that was intended to be located and was believed to have been located upon until preparations were made to survey said location. Under this state of the case it is hoped that directions will be given to the Surveyor General to correct the mistake.

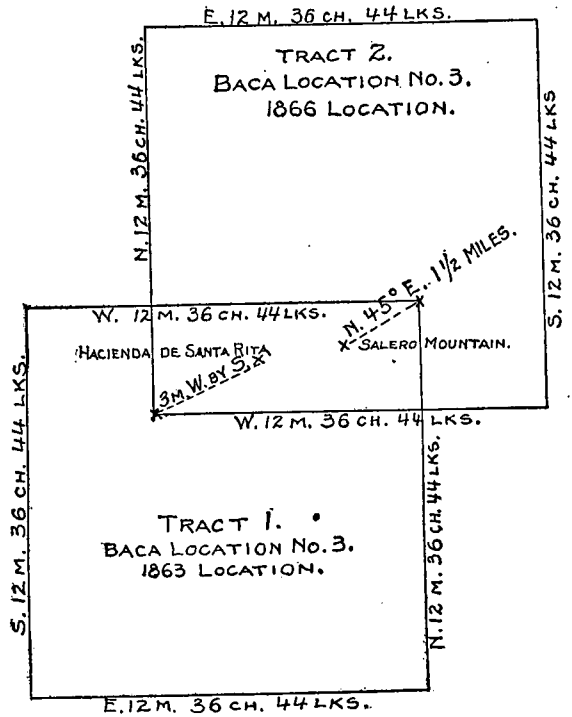
"Yours respectfully, John S. Watts,
"Attorney for Heirs of Luis Maria Cabeza de Baca."

The commissioner thereupon directed the Surveyor General of New Mexico to permit the change in the location so requested to be made,

and from that time until July 25, 1899, the metes and bounds described in that letter were treated by the claimants and by the Land Office as the proper description by metes and bounds of the Baca Float No. 3, although at no time was any survey thereof made by the United States.

The following diagram illustrates the location of 1863 and the change of location attempted in 1866:

DIAGRAM OF 1863 AND 1866 LOCATIONS.
BACA LOCATION No. 3.




Subsequently, to wit, July 25, 1899, the Land Department held that the amendment attempted in 1866 was in reality a new location; that the Department was without authority to permit such a location after the expiration of the three years limited by the act making the grant, and, accordingly, remitted the claimants, to the original location of 1863. That location was surveyed by Philip Contzen under the direction of the Surveyor General of Arizona, which survey was duly approved and thereafter filed in the General Land Office, as stated by the Supreme Court in the case of Lane v. Watts, hereinafter referred to.

In the view we take of the case it will be unnecessary to make much, if any, further reference to the application made on behalf of the heirs of Baca in 1866 for a change in the boundaries of the tract ap-

plied for on their behalf in 1863, and which application met with the approval of the Commissioner of the General Land Office in 1864, because of the decision of the Supreme Court in the case of Lane v. Watts, 234 U. S. 525, 34 Sup. Ct. 965, 58 L. Ed. 1440, in which case, and in the explanatory opinion in the same case on motion for leave to file an application for a rehearing of it (reported in 235 U. S. 17, 35 Sup. Ct. 3, 59 L. Ed. 104) that court distinctly adjudged that the title to the specific tract applied for by the heirs of Baca in 1863 passed to them when on April 9, 1864, the Commissioner of the General Land Office approved that selection and ordered a survey thereof, the court saying (234 U. S. at page 540, 34 Sup. Ct. 972, 58 L. Ed. 1440):

"The title having passed by the location of the grant and the approval of it, the title could not be subsequently divested by the officers of the Land Department. Ballinger v. United States ex rel. Frost, 216 U. S. 240 [30 Sup. Ct. 338, 54 L. Ed. 464]. In other words, and specifically, the action of the Commissioner in approving the location of the grant cannot be revoked by his successor in office, and an attempt to do so can be enjoined. Noble v. Union River Logging R. Co., 147 U. S. 165 [13 Sup. Ct. 271, 37 L. Ed. 123]; Philadelphia Company v. Stimson, 223 U. S. 605 [32 Sup. Ct. 340, 56 L. Ed. 570]."

In explaining that decision the same court subsequently, in denying leave to file an application for a rehearing, said:

"The opinion is explicit as to the main elements of decision. It decides that the title to the lands involved passed to the heirs of Baca by the location of the float and its approval by the officers of the Land Department and order for survey in 1864 in pursuance of the act of June 21, 1860, c. 167, 12 Stat. 71, 72. * * * A few words of explanation will make certain the extent of our decision. In adjustment of the conflict between the Baca grant and the grant to the town of Las Vegas, the act of 1860 was passed. * * * The land was to be located in square bodies and be 'vacant land, not mineral, in the territory of New Mexico,' and it was made the duty of the Surveyor General of New Mexico to survey and locate the lands when selected by the heirs of Baca. There were no other conditions, and these were fulfilled in 1864."

Again, in speaking of the contention there made that certain Mexican grants called respectively the Tumacacori and Calabazas grant and the San Jose de Sonoita grant, conflicted with the approved selection of the Baca Float No. 3, the Supreme Court further said:

"The Tumacacori and Calabazas grant was not presented to the Surveyor General until June 9, 1864, and his report was not laid before Congress until May 24, 1880. A petition for confirmation of the San Jose de Sonoita grant was not presented to the Surveyor General until December, 1879. It will be seen, therefore, that there was no disclosure of these claims until after the selection of the Baca grant and its location by the Land Department, the consummation of which was accomplished by the approval of the location April 9, 1864."

We think this decision of the Supreme Court leaves no ground for the contention that there was any validity in the subsequent attempted change in the boundaries of the Baca Float No. 3 grant, either on behalf of the grantees or on the part of any official of the Land Department. The title to the specific tract embraced by the location made on behalf of the heirs June 17, 1863, and approved by the Commissioner of the General Land Office April 9, 1864, had passed to the heirs,

and there was therefore no authority in any officer of the Land Department to make or permit to be made any change in the location or boundaries of what had theretofore been Baca Float No. 3. Such being the express decision of the Supreme Court in the case of Lane v. Watts, above cited, it is needless to comment any further upon that question.

In so deciding the court evidently proceeded upon the view that the specific description contained in the application of June 17, 1863, identified the land applied for, and that the approval of that selection by the Commissioner of the General Land Office attached the title granted by Congress to that specific tract, and that no patent was required. In its previous decision of the case of Shaw v. Kellogg, 170 U. S. 341, 18 Sup. Ct. 632, 42 L. Ed. 1050, the court had said:

"In this case the Land Department refused to issue a patent; decided that it had no power to do so, and that the title was complete without one. It would seem strange to hold that the lack of a patent left the question of mineral an open one when there was no authority for the issue of a patent, when it was in fact refused and when the title passed the same as though a patent had issued. There was not at the time of these transactions, and has not since been, any statute specifically authorizing a patent for this land. Section 2447, Rev. Stat. [Comp. St. 1913, § 5097], taken from the act of December 22, 1854, c. 10, 10 Stat. 599 [Comp. St. 1913, § 5097] applies only to the case of a claim to land 'which has heretofore been confirmed by law.' And the same may be said as to the special act of March 3, 1869, c. 152, 15 Stat. 342. Here there had been no claim confirmed to any tract of land, but only the grant of a right to locate. In that respect it was like a land warrant, subject to location anywhere within the specified territory. As to land warrants, however, there is a specific provision for the issue of patents. Rev. Stat. § 2423 [Comp. St. 1913, § 4835]. The Land Department was therefore technically right when it said that the statute did not order the issue of a patent, and that the case was one in which the granting act with the approved survey and location made a full transfer of title. Very likely if a patent had been issued the courts would not have declared it void, but have sustained it as the customary instrument used by government to make a transfer of the legal title. Carter v. Ruddy, 166 U. S. 493 [17 Sup. Ct. 640, 41 L. Ed. 1090]. But as there was no statute in terms authorizing a patent, it was not within the power of the locators to compel the issue of one. No court would by mandamus order such issue in the absence of a specific and direct statute requiring it. So when the department refused to issue one, the locators had no alternative but to accept that which the statute had provided as the means of acquiring and the evidence of title, and that must be treated as having all the efficacy of a patent."

The record shows that subsequent to the passing of the title of the United States to the specific tract covered by the location of June 17, 1863, and confirmed by the Commissioner of the General Land Office April 9, 1864, there was executed to John S. Watts by and on behalf of the parties therein named as grantors, the following deed:

"Know all men by these presents: That we, Luis Baca, Prudencia Baca, Jesus Baca, and Domingo, sons of Luis Maria Baca, residents of Pena Blanca, territory of New Mexico; that we, Josefa Baca y Lucero, wife of Luis de Lao, and Altagracia Baca, wife of Francisco Martine, daughters of Luis Maria Baca, residents of Pena Blanca, New Mexico, in our own proper persons, and we, either in our own person or by our attorney in fact Tomas Baca, to wit: Jesus Baca, Tomas Baca, Encarnacion Baca, wife of Manuel Viscano, Josefa Baca, wife of Demetrio de Lao, Jose Baca, Tomas Baca 2nd, Trinidad Baca, wife of Fernando Delgado, Altagracia Baca, wife of Patricio Silva, children

of Juan Antonio Baca, deceased, son of Luis Maria Baca; we, Francisco Silva, Isabel Silva, wife of Vicente Amijo, Jesus Maria Silva, Benito Silva, Valentine Silva and Manuel Silva, children of Cesaria Baca, deceased, who was a daughter of Juan Antonio Baca, deceased; we Isabel Baca, wife of Jose Decetio Leno, David Baca, Santiago Baca, Maria Baca, wife of Luis Maria Ortiz, and Adeliete Baca, children of Domingo Baca, deceased; son of Juan Antonio Baca; we, Antonio Baca, Felipe Baca, wife of Jose Baca, Jesus Maria Baca, Fernando Baca, Josefa Baca, wife of Jesus Baca, Polonia Baca, wife of Pedro Archleque, and Francisco Baca, children of Jose Baca, deceased, son of Luis Maria Baca; we, Quesciro Baca, Diego Baca, Quadalupe Baca, wife of Jesus Maria Leiva, Romaldo Baca, Martina Baca, and Pauline Baca, children of Miguel Baca, deceased; son of Luis Maria Baca; we, Luis Maria Baca, Alejandro Baca, Juan de Dios Baca, and Martino Baca, children of Matio Baca, deceased, son of Luis Mari Baca, deceased; we Antonio Trujillo, Maria Josefa Trujillo, wife of Cesario Ramirez, Andres Trujillo, Juano Trujillo, children of Guadalupe Baca, daughter of Luis Maria Baca, and wife of Santiago Trujillo; and we, Josefa Lopez, wife of Nicolas Amijo, and daughter of Filiciana Trujillo, deceased, daughter of Guadalupe Baca, deceased, Marto Lopez, son of said Filiciana Trujillo, Altagracia Lopez, wife of Francisco Ramirez, and daughter of said Feliciana Trujillo, Jesus Matio Trujillo, son of Guadalupe Trujillo, deceased, who was the daughter of Guadalupe Baca, deceased; we Josefa Sales, wife of Jose Martini, and daughter of Rosa Baca, deceased, daughter of Luis Maria Baca, Dolores Baca, daughter of Rosa Baca, deceased; we Esperidon Baca, and Refugio Baca, children of Francisco Baca, deceased, son of Rosa Baca; we Josefa Baca y Sanchez, daughter of Luis Maria Baca, and wife of Juan Luis Montoya; we Antonio Garcia, Francisco Garcia, Maria Enes Garcia, Juana Maria Garcia, and Maria de Los Angeles Garcia, children of Juana Baca, deceased daughter of Luis Maria Baca, and wife of Jose Garcia; we, Josefa Baca y Lucero, daughter of Luis Maria Baca, and wife of Luis de Lao; we, Altagracia Baca, daughter of Luis Maria Baca, and wife of Francisco Martini; I, Tomas Cabeza de Baca, owner of the interest and claim of Manuel Baca, son of Luis Maria Baca, to his interest as heir of Luis Maria Baca as appears by deed of conveyance executed the 17th day of June, 1861, and duly recorded in the Record Book of the Register of Deeds for Santa Ana County, Letter D, pages 6–7, and I, Thomas Cabeza de Baca, owner of the interest of Ignacio Baca, only son and heir of Ramon Baca, deceased, son of Luis Maria Baca, as appears by deed of said Ignacio Baca and Maria Guadalupe Hurtado to said Tomas Cabeza de Baca, executed on the 1st day of June, 1861, and duly recorded in Record Book D of Deeds for Santa Ana County, pages 5–6; I, Jesus Maria Cabeza de Baca, owner by purchase of the interest of Jesus Baca y Lucero 1st and the son of Luis Maria Baca, as appears by deed of said Jesus Baca y Lucero, and Maria Rafaela Amijo, his wife, executed the 20th day of August, 1861, and recorded in the Record Book Letter D, page 12–13 of the Register of Deeds for Santa Ana County; and I, Francisco Baca, owner by purchase of the interest of Domingo Baca, son of Luis Maria Baca, for and in consideration of the services of John S. Watts, for many years, in and about the business of said heirs of Luis Maria Baca, as the attorney of said heirs, and for the further consideration of three thousand dollars, paid by the said John S. Watts, to Tomas Cabeza de Baca, our attorney in fact, have bargained, sold and conveyed, and by these presents do bargain, sell and convey to the said John S. Watts, of Santa Fé, New Mexico, and to his heirs and assigns forever, all our right, title and interest and demand in and to the following lands located upon by us as the heirs of Luis Maria Baca, under the 6th section of an act of Congress approved June 21st, 1860, to wit: * * *

"And also Location No. 3. Situate in the territory of Arizona, formerly in Don Ana County, New Mexico, and described as follows, to-wit: Commencing at a point one and one-half miles from the base of the Salero Mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles thirty-six chains and forty-four links; thence south twelve miles, thirty-six chains and forty-

four links; thence east twelve miles, thirty-six chains and forty-four links; thence north twelve miles, thirty-six chains and forty-four links to the place of beginning containing ninety-nine thousand, two hundred and eighty-nine acres and thirty-nine one hundredths acres, more or less. * * *

"To have and to hold the lands aforesaid with all of the appurtenances and privileges to the same belonging to the said John S. Watts, and his heirs forever, in fee simple, and the said heirs of Luis Maria Baca, in person, and by their attorney in fact, Tomas Cabeza de Baca, covenant with the said John S. Watts and his heirs, for themselves and their heirs, as follows, to wit:

"1st. That they are seised in fee of the lands aforesaid and have good right and title to the same.

"2nd. That the said lands are free from incumbrances, and that they have full power to sell and convey the same.

"3rd. That the said John S. Watts and his heirs and assigns shall quietly enjoy said lands forever, free from all claim or demand of the said heirs of Luis Maria Baca, their heirs, executors and administrators.

"4th. That they will defend and protect the title aforesaid against all claim or claims of title arising from or under us as heirs of Luis Maria Baca, or under our heirs and executors and administrators.

"5th. That the said John S. Watts and his heirs and assigns shall forever enjoy the lands aforesaid in as full and ample a manner as the heirs of Luis Maria Baca held and enjoyed the said lands, just before the execution of this conveyance.

"In witness whereof we have hereunto set out hands and seals this 1st day of May, 1864."

On the same day, to wit, May 1, 1864, Quirina Baca, Guadalupe Baca, and Jesus Leyva, her husband, Paulina Baca, Martina C. de Baca, and Romalda Baca, according to the record, executed a deed to John S. Watts conveying all their interest in the same land described in the last-mentioned deed.

January 8, 1870, the grantee in the foregoing deeds, namely, John S. Watts, executed, for valuable considerations, to one Christopher E. Hawley, a deed by which he—

"remised, released and quitclaimed, and by these presents do (es) remise, release and quitclaim unto the said party of the second part, and to his heirs and assigns, forever, all that certain tract, piece or parcel of land lying and being in the Santa Rita Mountains in the territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D. 1864, bounded and described as follows: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north twelve miles thirty-six chains and forty-four links, running thence east twelve miles thirty-six chains and forty-four links, thence south twelve miles thirty-six chains and forty-four links, thence west twelve miles, thirty-six chains and forty-four links, to the point or place of beginning: The said tract of land being known as Location No. 3 of the Baca Series, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above-described premises, and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the above-mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

"In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

"John S. Watts. [Seal]"

Subsequently, and on May 30, 1871, all of the heirs of Luis Maria Baca except Antonio (also called in the record Jose Antonio) Baca (if he was an heir) executed to the said John S. Watts a deed in words and figures as follows:

"All of us for and in consideration of the sum of six thousand and eight hundred dollars, paid by John S. Watts to Tomas Cabeza de Baca, agent and attorney in fact of the heirs of Luis Maria Baca, deceased, have bargained, sold, and conveyed, and do by these presents bargain, sell, and convey to John S. Watts, his heirs and assigns forever, the following described tract of land, situate in the territory of Arizona and bounded as follows"

—giving a description of a tract of land of large acreage not here involved, and which description is therefore here omitted, the deed proceeding as follows:

"To have and to hold the said lands to the said John S. Watts, his heirs and assigns forever, free from all claims of ourselves as heirs of Luis Maria Baca, deceased, and of all persons claiming by, through, or under us, together with all the privileges and appurtenances to the said land belonging, and the said heirs of the said Luis Maria Baca, and the said Tomas Cabeza de Baca as owner and as the attorney in fact of the said heirs of Luis Maria Baca, deceased, now covenant and agree with the said John S. Watts, his heirs and assigns, as follows:

"First. That they are the sole lawful heirs of Luis Maria Baca; that they are seised in fee of said land and have good right and title to the same and authority to sell and dispose of the same; that said land is free from all incumbrances resulting from them.

"Second. That the said John S. Watts, his heirs and assigns, shall quietly enjoy the possession of said land free from all claim or demands of the said heirs of Luis Maria Baca, their heirs, executors, administrators, and assigns.

"Third. That we will defend and protect the title of the said John S. Watts, his heirs and assigns, to the said lands against all claims and demands arising through or under us as heirs of the said Luis Maria Baca, deceased, or under persons claiming to be heirs of Luis Ma. Baca, deceased; and that the said John S. Watts, his heirs and assigns shall have and hold said lands in as full, perfect and ample a manner as the said heirs of Luis Ma. Baca, deceased, had and held said lands just before the execution of said conveyance; and the said heirs of Luis Ma. Baca, above mentioned, now ratify and confirm the title made by us by our attorney, Tomas Cabeza de Baca, to John S. Watts, his heirs and assigns, on the 1st day of May, 1864, for the lands described in Location Number Two, situate on the Canadian river in San Miguel county, New Mexico, and Location Number Four situate in Saguatch county, Colorado Territory, and Location Number Three, situate in Arizona Territory, containing each 99,289 39/100 acres, the boundaries of which are set forth and described in said deed; and the said heirs of the said Luis Maria Baca, deceased, executing this deed as herein set forth, relinquish and quitclaim to said John S. Watts, his heirs and assigns, all their right, title and interest in all the lands in said deed of May 1st, 1864, mentioned and described."

It is undisputed that Luis Maria Baca had 18 sons and daughters, but a material issue in the case was whether Antonio Baca, under whom Joseph E. Wise and Margaret W. Wise claim title, was also an heir, and whether, if such heir, he was one of the grantees under the act of Congress of June 21, 1860.

The court below found from the evidence that Antonio Baca was a son of Luis Maria Baca, and died before the latter, and that his heirs inherited $^1/_{19}$ of the land in controversy, and that the appellant

Joseph E. Wise and the defendant to the suit Margaret W. Wise (who took no appeal) through various mesne conveyances acquired in equal shares all of the interest of the heirs of Antonio Baca. That question of heirship and right of inheritance from him of any interest in the land in controversy and that finding and decision of the court will be considered further on.

Passing for the present the rights claimed under Antonio Baca, it appears from the record, and is undisputed, that John S. Watts died in 1876, leaving surviving him a widow, two sons, and two daughters, having made no other deed than that to Hawley, purporting to convey any interest in either the 1863 location or the 1866 attempted location of the Baca Float No. 3 grant.

The complainants and appellants Watts and Davis, and the defendants, appellants, and appellees Bouldin, deraign their alleged titles under mesne conveyances from the aforesaid deed to Hawley from John S. Watts of date January 8, 1870, the former to the south half and the latter to the north half of the tract in controversy, to wit, the specifically described tract as located in 1863.

The defendant and appellant Santa Cruz Development Company deraigns its alleged interest, and the defendant and appellant Joseph E. Wise deraigns some alleged interest, under mesne conveyances from the widow and heirs of John S. Watts. Therefore it is clear that if the deeds to Watts of May 1, 1864, conveyed the interest of all of the heirs of Luis Maria Baca in and to the tract specifically located in 1863, or if the confirmatory deed to Watts of May 30, 1871, had that effect and inured to the benefit of Hawley, his heirs and assigns, nothing remained in John S. Watts subsequent to the execution of his deed to Hawley, and therefore his heirs inherited no interest in the property in controversy upon his death, and of course could convey none to any one.

It does not seem to admit of question that such of the heirs of Luis Maria Baca as personally or through a duly authorized representative executed the deeds of May 1, 1864, to John S. Watts, thereby conveyed to him all of their interest in the tract of land in controversy, for in those deeds the land described included Baca Tract No. 3, declared to have been located by the grantors "as the heirs of Luis Maria Baca under the 6th section of an act of Congress approved June 21, 1860," and which tract was also therein described by the exact specific description given in the location thereof made in 1863 and confirmed by the Commissioner of the General Land Office April 8, 1864. The subsequent deed from the grantee in the last-mentioned deeds, John S. Watts, however, to Christopher E. Hawley, remised, released, and quitclaimed to him—

"and to his heirs and assigns, forever, all that certain tract, piece or parcel of land lying and being in the Santa Rita Mountains in the territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D. 1864, bounded and described as follows: Beginning at a point three miles west by south from the building known as the Hacienda de Santa Rita, running thence north twelve miles thirty-six chains and forty-

four links, running thence east twelve miles, thirty-six chains and forty-four links, thence south twelve miles, thirty-six chains and forty-four links, thence west twelve miles, thirty-six chains and forty-four links, to the point or place of beginning: The said tract of land being known as Location No. 3 of the Baca Series, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above-described premises, and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever."

It will be at once seen that the specific description in this deed is that of the attempted location of 1866, adjudged void by the Supreme Court in the case of Lane v. Watts, supra, and as to which specifically described tract the grantor had no title except to a narrow strip thereof covered also by the 1863 location of the grant.

It is insisted that the deed last mentioned was a quitclaim deed only, and that the subsequent confirmatory deed from the heirs of Luis Maria Baca of date May 30, 1871, to John S. Watts, did not inure to the benefit of Hawley, and that all that the latter got by his deed from John S. Watts was the narrow strip of land included in both the approved location of 1863 and the attempted, but void, location of 1866.

[1] It almost goes without saying that the paramount object in the construction of a deed is to give effect to the intention of the parties to it. Authorities to that effect might readily be cited by the hundreds, but it is needless to consume space for that purpose. Such intention, of course, is to be gathered from a consideration of the entire instrument read in the light of the facts and circumstances under which it was executed.

[2] Taking up the deed from Watts to Hawley, the first thing to be noted is that it does not purport to convey more than one tract of land, although it undertakes to apply to it three descriptions. The first and third of those descriptions sufficiently describe the tract of land in controversy, while the second describes it by the metes and bounds given in the void location attempted to be made in 1866. In substance the first describes it as that certain tract of land lying in the Santa Rita Mountains territory of Arizona, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the grantor Watts by deed dated May 1, 1864, containing 100,000 acres more or less. The land thus described is not only susceptible of identification by reference to the grant made by Congress to the Baca heirs, but also by the deeds of May 1, 1864, from those heirs to Watts, in which deeds, as has been shown, the land in question was described by reference to the congressional grant, and also by the specific boundaries thereof given in the only valid location of the grant made in 1863 and confirmed by the Commissioner of the General Land Office in 1864. The second description given in the Hawley deed consisted of the metes and bounds given in the attempted and void location of 1866, which, except as to the narrow strip em-

braced by the valid location of 1863, covered a tract of land in which the grantor had no interest. Reading the deed without any reference to the facts and circumstances under which it was executed, it does not seem that there should be any doubt that the false description should be rejected and effect given to the two true descriptions given in the deed of the land undertaken to be conveyed by the grantor. In referring to the maxim "Falsa demonstratio non nocet," it is said, in Broom's Legal Maxims, p. 629, et seq.:

"Falsa demonstratio may be defined to be an erroneous description of a person or thing in a written instrument; and the above rule respecting it may be thus stated and qualified: As soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by the particular instrument, a subsequent erroneous addition will not vitiate it. 'Quicquid demonstratæ rei additur satis demonstratæ frustra est.' The characteristic of cases within the principal maxim being that 'the description so far as it is false applies to no object at all, and so far as it is true applies to one only.'"

And, after referring to the application of the maxim by various judges to wills, it is further said:

"The foregoing observations are, in the main, applicable not only to wills, but to other instruments; so that the characteristic of cases strictly within the above rule is this, that the description, so far as it is false, applies to no subject, and, so far as it is true, it applies to one subject only; and the court, in these cases, rejects no words but those which are shown to have no application to any subject."

Looking to the circumstances of the case as disclosed by the record, we find them strongly confirmatory of the view we take of the deed itself. John S. Watts, it appears, was at one time a Justice of the Supreme Court of New Mexico, had represented that territory as a delegate to Congress, and was employed to present the claim of the heirs of Luis Maria Baca to the Las Vegas grant to the United States tribunal for confirmation, and did so, as we shall presently see. As early as March 2, 1863, which was after the making of the grant by Congress of June 21, 1860, but before any location of the grant made by the sixth section of that act, John S. Watts executed to one William Wrightson, of Cincinnati, Ohio, an instrument reciting that he, Watts, was "the owner of one of the unlocated floats containing about one hundred thousand acres of land granted to the heirs of Luis Maria Baca" by the sixth section of the act of Congress of June 21, 1860, and reciting that he, Watts, then had "full power and authority to make the location for said heirs under said act, and cause to be made a title in fee of the same after such proper location and survey," and then proceeded to declare in and by the said instrument as follows:

"Now, therefore, be it further known that I, John S. Watts, have this day sold to William Wrightson, of the city of Cincinnati, state of Ohio, the said unlocated tract with all of its privileges, for and in consideration of the sum of one hundred and ten thousand dollars, the receipt whereof is hereby acknowledged, and I hereby bind myself, my heirs, executors or administrators, to make a full and complete title in fee simple of said land to said William Wrightson, his assigns or legal representatives, whenever thereunto required. And I, the said John S. Watts, hereby authorize and empower the

said W. Wrightson to make the location under the said act in as full and ample manner as the said heirs could do the same."

The record shows that subsequent to the selection on June 17, 1863, of the land in controversy, by John S. Watts, as the third of the tracts granted to the heirs of Luis Maria Baca by Congress, Wrightson, to whom Watts had for a large consideration agreed to convey in advance of its location the float then claimed by him, found upon examination that most of the land intended to be included in the location made by Watts in 1863 had been left out by mistake, which discovery was the basis of the abortive attempt to change the boundaries of the grant initiated in 1866 by Watts through his application to the Commissioner of the General Land Office of date April 30, 1866, the specific description of which latter attempted location was, as has been seen, inserted in the deed from Watts to Hawley, the assignee through various mesne conveyances of the interests of Wrightson. So far as the acts of the respective parties to the Hawley deed are concerned, it is therefore difficult to see what clearer indications could be shown of the intent of both the grantor and grantee of that deed, that it should convey all of the interest of Watts in Baca Tract No. 3, than the descriptions inserted in the deed already set out, and which therefore need not be repeated.

We have examined with care the cases of Prentice v. Northern Pacific Railroad, 154 U. S. 163, 14 Sup. Ct. 997, 38 L. Ed. 947, and Prentice v. Stearns, 113 U. S. 435, 5 Sup. Ct. 547, 28 L. Ed. 1059, so much relied upon by some of the counsel in the case. The deed under consideration in those cases first described the land by metes and bounds, and then added "and being the land set off to the Indian chief Buffalo by the Indian Treaty of September 30, A. D. 1854, and was afterwards disposed of by said Buffalo to said Armstrong and is now recorded with the government documents." The court held that the added words were intended to describe generally what was first described specifically, and, if otherwise sufficient, could not be regarded as an independent description. In other words, a disregard of the specific description would have left the deed without any description by which the land granted could be identified, which is, as has been shown, essentially different from the case here.

But it is further contended that at the time of the execution of the deed from Watts to Hawley the former had not acquired the interests of all of the heirs of Luis Maria Baca other than Antonio, and that that deed was a quitclaim deed only, and therefore that the interests of all of the other heirs of Luis Maria Baca that passed by the confirmatory deed to Watts executed May 30, 1871, did not inure to the benefit of Hawley or his assigns.

[3] We are therefore next to determine the true character of the Hawley deed. It is to be remembered that an ordinary deed of release and quitclaim is a conveyance only of the grantor's right, title, and interest in the land described in the deed, and is not a conveyance, quitclaim, or release of the land itself. A deed of this character, said the Supreme Court in Van Rensselaer v. Kearney et al., 11 How. 297, 322 (13 L. Ed. 703)—

"purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seised or possessed at the time, and does not operate to pass or bind an interest not then in existence. The bargain between the parties proceeds upon this view, and the consideration is regulated in conformity with it. If otherwise, and the vendee has contracted for a particular estate, or for an estate in fee, he must take the precaution to secure himself by the proper covenants of title. But this principle is applicable to a deed of bargain and sale by release or quitclaim, in the strict and proper sense of that species of conveyance. And therefore, if the deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted; at least, so far as to estop them from ever afterwards denying that he was seised of the particular estate at the time of the conveyance."

See, also, note to the case of Mosier v. Carter, 35 L. R. A. (N. S.) 1182, where the foregoing observations are quoted and many other cases to the same effect cited.

Does not the deed from Watts to Hawley bear upon its face evidence that the grantor intended to convey, and the grantee expected to become invested with, the one tract of land therein undertaken to be conveyed? In our opinion, undoubtedly so. It is true that the words "remise, release, and quitclaim" are used in the granting clause, but it is also true that so far from the deed purporting to remise, release, and quitclaim only all the right, title, and interest of the grantor, it plainly manifests, we think, the intent of the grantor to convey, and of the grantee to receive and forever, by himself and his heirs and assigns, hold the property itself. Not purporting to convey only all the right, title, and interest of the grantor, the deed in terms remised, released, and quitclaimed to the party of the second part thereto, and to his heirs and assigns forever, all of that certain tract of land described: First, as the land granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part thereto by a deed dated May 1, 1864; second, according to the courses and distances given in the attempted location of 1866; and, lastly, as the tract of land known as "Location No. 3" of the Baca Float Series, the deed proceeding as follows:

"And also the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part of, in or to the above described premises. * * * To have and to hold all and singular the above mentioned and described premises together with the appurtenances, unto the said party of the second part, his heirs and assigns forever."

In speaking of the difference between a deed in which the grantor only quitclaimed all of his interest in the land described in it and one in the form of a grant, bargain, and sale, the Supreme Court said, in the case of Moelle v. Sherwood, 148 U. S. 21, 29, 13 Sup. Ct. 426, 429 (37 L. Ed. 350):

"If the grantor in either case at the time of the execution of his deed possesses any claim to or interest in the property, it passes to the grantee.

In the one case, that of bargain and sale, he impliedly asserts the possession of a claim to or interest in the property, for it is the property itself which he sells and undertakes to convey. In the other case, that of quitclaim, the grantor affirms nothing as to the ownership, and undertakes only a release of any claim to or interest in the premises which he may possess without asserting the ownership of either."

[4] As has been seen, the deed from Watts to Hawley did not undertake to quitclaim only the interest of the grantor in the land described therein, but, on the contrary, and for the reasons stated, undertook, as we think, to convey the land itself. That being so, that such title as Watts afterwards acquired to the tract in controversy by the confirmatory deed executed to him by all of the heirs of Luis Maria Baca except Antonio (assuming him to have been an heir) inured to the benefit of Hawley and his assigns is clear upon well-settled principles. That confirmatory deed contains, as has been seen, an express covenant that its grantors constitute all of the lawful heirs of Luis Maria Baca, and in terms ratified and confirmed the preceding deeds of May, 1864, purporting to have been executed on behalf of all of such heirs to him, and to have conveyed all of their interest in the land in controversy, and expressly confirming the same to the grantee Watts and his assigns. We are of the opinion that the court below was right in holding that the assignees of Watts thereby acquired the interests of all of the grantors in those deeds. That court, however, found as a fact that Antonio Baca (also called in the record Jose Antonio Baca) was a son of Luis Maria Baca, and that the heirs of Antonio inherited an undivided $^1/_{19}$ of the land in controversy, which $^1/_{19}$ interest had been acquired through various mesne conveyances by Joseph E. Wise and Margaret W. Wise in equal shares, who still hold the same. Against that finding and conclusion it is strenuously contended that there was no competent proof that Antonio was a son of Luis Maria Baca, and that if there was that neither Antonio nor any of his heirs ever inherited any interest in the land in controversy, and as a consequence that his heirs had no interest therein to convey.

The principal witness introduced to show that Antonio Baca was a son of Luis Maria Baca was Marcos C. de Baca, who was a grantor in one of the deeds executed to Watts May 1, 1864, and he, over the objections of adverse parties to the interests claimed under Antonio, was permitted to testify, among other things, that long subsequent to the execution of the deeds of 1864 and 1871 above referred to, Prudencio, Manuel, and Domingo Baca (who were also grantors in those deeds) had told him that there was a son of Luis Maria Baca named Antonio Baca, who died before his father, and which son left heirs (being the heirs through whom Joseph E. Wise and Margaret W. Wise claim the interests that were awarded to them by the decree below). The grounds of the objections were, in substance, that they were not statements ante litam motam, that they were statements made by grantors after they had parted with their title and in disparagement of the title of their grantees, and that Joseph E. Wise claimed some interest under the Hawley and confirmatory deeds, and is therefore bound by all of the recitals thereof. In the view we take of the grant in question, we do not find it necessary to pass upon the action of the trial

court in overruling the objections, nor upon the sufficiency of the evidence to sustain the finding made by it that Antonio Baca was a son of Luis Maria Baca. We assume that Luis Maria Baca had a son named Antonio Baca, who died before his father. The latter died in 1827, leaving a will, and we find in the proceedings upon his estate, introduced in evidence in the present case, evidence of the fact that there was a son who had died before his father, leaving a widow. The record shows that it was that Antonio Baca under whom the appellees Joseph E. Wise and Margaret W. Wise claim, and were awarded by the judgment of the court below, in equal parts, an undivided 1/10 interest in the land in controversy. It is important to make that fact plain because of the further fact that Luis Maria Baca left among his 18 surviving children a son named Juan Antonio Baca, as appears from the petition filed by John S. Watts with the Surveyor General of the Territory of New Mexico on behalf of the surviving heirs at law of Luis Maria Cabeza de Baca, deceased, for the confirmation of a Mexican grant called Ojo del Espiritu Sant, in which petition he expressly alleged, among other things, that the said Luis Maria Cabeza de Baca—

"left him surviving, as his heirs, the following children, to wit: Luis Baca, Prudencio Baca, Jesus Baca, Sr., Jesus Baca, Jr., Felipe Baca, Domingo Baca, Manuel Baca, Josefa Baca y Salae, Josefa Baca y Sanchez, Juan Antonio Baca, Jose Baca, Jose Miguel Baca, Ramon Baca, Matia Baca, Guadalupa Baca, Altagracie Baca, Rosa Baca, Juan Paula Baca."

"This statement," said the attorney for the appellees Joseph E. Wise and Margaret W. Wise in his brief, "on the part of John S. Watts as attorney for the heirs, made in 1860, is that the said Luis Maria Baca left 18 children surviving him. As the will of Baca showed that Luis Maria Baca had one son who died before he died, he must have had 19 children, of whom, as stated in the petition of Watts, 18 survived him, and, as stated in the will, one died before he died. The question of fact was then presented upon the trial as to who the nineteenth son was who died before his father, leaving a widow by the name of Francisca Garveso."

The grant made by section 6 of the act of June 21, 1860, had its origin in two conflicting Mexican grants to a large body of land in and around Las Vegas, N. M., one having been made to Luis Maria Baca (also called, as has been said, Luis Maria Cabeza de Baca), and the other to the town of Las Vegas. The history of those grants is given in the cases of Shaw v. Kellogg, 170 U. S. 312, 18 Sup. Ct. 632, 42 L. Ed. 1050, Maese v. Herman, 183 U. S. 572, 22 Sup. Ct. 91, 46 L. Ed. 335, Priest v. Las Vegas, 232 U. S. 604, 34 Sup. Ct. 443, 58 L. Ed. 751, and Lane v. Watts, 234 U. S. 525, 34 Sup. Ct. 965, 58 L. Ed. 1440.

The legislation of Congress for the adjustment of grants of Spanish or Mexican origin in New Mexico was essentially different from that in respect to those of like origin in California; the latter being provided for by the act of Congress of March 3, 1851 (9 Stats. 631, c. 41), and the former by the act of July 22, 1854 (10 Stats. 308, c. 103). No jurisdiction over such claims in New Mexico was conferred upon

the courts; final action in each case after the prescribed action by officers of the Land Department being reserved to Congress. Tameling v. U. S. Freehold, etc., Company, 93 U. S. 644, 30 L. Ed. 949. In exercise of the power so reserved Congress made the grant of June 21, 1860, not only of the lands embraced by section 6 thereof, but various other extensive tracts of land. It is with section 6 only that we have to deal in this case. It has been seen that it embraced the specific tract described in the location made in 1863, and confirmed by the Commissioner of the General Land Office April 9, 1864, and none other. To whom was that grant made? To determine that question the statute and all of the facts and circumstances of the case must be considered. The statute says, as has been seen, "to the heirs of Luis Maria Baca, who make claim to the same tract of land as is claimed by the town of Las Vegas." The record and the history of the grant, as well as the statute itself, show that Congress recognized that both the town of Las Vegas and the heirs of Baca claimed that their respective grants covered that tract, and that, in consideration of the waiver by the Baca heirs of their claim to it, the grant contained in section 6 of the act of June 21, 1860, was made. We insert the petition for the confirmation of the Las Vegas grant:

"Territory of New Mexico, County of Santa Fé.

"To the Hon. Wm. Pelham, Surveyor General of the Territory of New Mexico, under the act of Congress approved 22d June (July), A. D. 1854:

"Your petitioners the surviving heirs at law of one Luis Cabeza de Baca, deceased, would respectfully state that on the 16th day of January, 1821, the Provincial Deputation of the state of Durango granted to the ancestor of your petitioners, Luis Cabeza de Baca, a tract of land called 'Las Vegas Grandes.' * * * Your petitioners further state that it will appear by reference to said grant that it was made to the said Luis Maria Cabeza de Baca and his male children and vested him and his male children with an absolute title to said lands. * * * Your petitioners further state that Luis Maria Cabeza de Baca has long since departed this life, and the only male children of the said Luis Maria Cabeza de Baca now living are the following, to wit: Luis Baca, Prudencio Baca, Jesus Baca the 1st, Felipe Baca, Jesus Baca the 2d, Domingo Baca and Manuel Baca. Your petitioners further state that the following sons of Luis Maria Cabeza de Baca are dead, to wit: Juan Antonio Baca, Jose Baca, Jose Miguel Baca, Ramon Baca, and Mateo Baca, and at the time of their decease they left the following children and heirs at law them surviving, to wit: Juan Antonio Baca left him surviving the following children, Jesus Maria Baca, Francisco Tomas Baca, Incarnacion Baca, Jose Baca, Josefa Baca, Guadalupe Baca, Altagracie Baca, Nicholasa Baca, Tomas Baca & Trinidad Baca. Jose Baca left him surviving the following children: Antonio Baca, Felipe Baca, Jose Maria Baca, Francisco Baca, Fernando Baca & Polonio Baca. Jose Miguel Baca left him surviving the following children, to wit: Diego Baca, Quirina Baca, Rumaldo Baca, Guadalupe Baca, Paulina Baca & Martina Baca. Ramon Baca left him surviving the following child, to wit: Ignacio Baca. Mateo Baca left him surviving the following children, to wit: Luis Baca, Alejandro Baca, Juan Dios Baca and Martin Baca. Your petitioners further state that the foregoing list contains all the surviving heirs of the said Luis Cabeza de Baca, deceased, known to your petitioners, and they are all residents of the territory of New Mexico. * * *

"All of which is respectfully submitted.

"John S. Watts, Atty. for Petitioners."

It will be seen that Antonio Baca was not one of the claimants of the land covered by the Las Vegas grant. And there is nothing in the

record in this case tending to show that John S. Watts ever heard of him, or that any of the other 18 children of Luis Maria Baca ever recognized in Antonio or any of his heirs any interest in either the Las Vegas grant or in the grant made to them by the act of Congress of June 21, 1860. Indeed, as has been seen by the confirmatory deed of 1871 to Watts, all of them then surviving, as well as the heirs of those who had died, expressly covenanted that they were the only heirs of Luis Maria Baca.

That Congress had full power to prescribe the mode of ascertaining the validity of claims of title to lands under Spanish and Mexican grants, and to provide for the forfeiture of such grants in the event the mode prescribed was not complied with, is well settled. Barker v. Harvey, 181 U. S. 481, 486, 487, 21 Sup. Ct. 690, 45 L. Ed. 963; Ainsa v. United States, 161 U. S. 208, 222, 16 Sup. Ct. 544, 40 L. Ed. 673; Astiazaran v. Mining Co., 148 U. S. 80, 13 Sup. Ct. 457, 37 L. Ed. 376; Botiller v. Dominguez, 130 U. S. 238, 9 Sup. Ct. 525, 32 L. Ed. 926; Tameling v. U. S. Freehold, etc., Co., supra. In the exercise of its duty and power in regard to such lands in the then territory of New Mexico, Congress passed the act of July 22, 1854, that has been referred to, by section 8 of which it made it the duty of the Surveyor General of that territory, under such instructions as should be given him by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands situated in that territory, under the laws, usages, and customs of Spain and Mexico; and for that purpose to issue notices, examine witnesses, administer oaths, and perform all other necessary acts in the premises; to make a full report of all such claims as originated before the cession of the territory to the United States by the Treaty of Guadalupe Hidalgo, defining the various kinds of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States, and to make a report in regard to all the pueblos existing in the territory, showing the extent and locality of each, the number of their inhabitants respectively, and the nature of their title to the land—such report to be made in the form required by the Secretary of the Interior and to be laid before Congress for such action thereon as should be deemed just and proper, with a view to the confirmation of bona fide grants. By section 9 of the act the Secretary of the Interior was given authority to issue all needful rules and regulations for the full carrying into effect of the several provisions of the act, pursuant to which provisions the Secretary issued regulations August 25, 1854 (Public Domain, 394–398), which read in part as follows:

"Your first session will be held at Santa Fé. * * * You will commence your session by giving proper public notice of the same, in a newspaper of the largest circulation, in the English and Spanish languages, will make known your readiness to receive notices and testimony in support of the land claims of individuals derived before the change of government. You will require the claimant in every case—and give public notice to that effect—to file a written notice setting forth the name of the present claimant; name of the original claimant; nature of the claim, whether inchoate or perfect; its date; from what authority the original title was derived, with a reference to the evi-

dence of the power and authority under which the granting officer may have acted; quantity claimed, locality, notice and extent of conflicting claims, if any, with a reference to the documentary evidence and testimony relied upon to establish the claims, and to show a transfer of right from the original grantee to the present claimant."

In accordance with such instructions due notice was given requiring claimants to present their claims, stating, among other things, the source and claim of their title (Public Domain, p. 404), in accordance with which notice the petition above set out was filed by John S. Watts on behalf of the heirs of Luis Maria Baca therein named. In the report of the Surveyor General on that petition returned to Congress, that officer reported that the Las Vegas grant made to Luis Maria Baca was valid and prior to a grant of the same land to the town of Las Vegas, which he also found to be valid. Subsequently the Senate Committee on Private Land Claims reported, May 19, 1860 (Rep. Com. No. 228, Sen. 36th Cong. 1st Sess.), that the grant to Baca "was in fee and is a genuine and valid title"; that the heirs of Baca had expressed a willingness to waive their prior title in favor of the settlers under the grant to the town of Las Vegas, and recommended that Congress so legislate as to accomplish that purpose. The grant made by Congress June 21, 1860, followed, embracing by its sixth section, among other lands, the tract of land here in controversy, "to the heirs of Luis Maria Baca, who make claim to the same tract of land as is claimed by the town of Las Vegas." In Maese v. Herman, 183 U. S. 572, 580, 581, 22 Sup. Ct. 91, 95 (46 L. Ed. 335), the Supreme Court, in speaking of the contest before the Surveyor General over the same tract of land, between the town of Las Vegas and those who made claim thereto under the Las Vegas grant, said:

"The petition of the Surveyor General of New Mexico describes the petitioners as 'residents of the town of Las Vegas and its vicinity,' and he manifestly regarded it a claim on behalf of the town, stated it from that standpoint, and reported it to Congress as a claim by the town of Las Vegas. The claim was confirmed by reference to the report, and the town was especially designated the claimant in section 6 of the confirmatory act. That it received confirmation at all may be because it was a claim by a town. Its legality might have been questioned. The claimants in their petition stated that their claim was disputed by Thomas Cabeza de Baca, and, reporting on that dispute, the Surveyor General said that testimony was introduced to show that the heirs of Baca protested in 1837 against the occupancy of the land by the claimants under the grant to Juan de Dios Maese, and that the claimants 'went upon the land knowing the existence of a prior grant' the Baca grant. The Surveyor General, however, did not assume to decide the dispute between the parties, but referred it to 'the proper tribunals of the country' and to Congress. Congress accommodated the dispute by a magnificent donation of lands to the heirs of Baca, and confirmed the original land to the town."

The dispute was between the respective claimants to the same piece of land, claimed to be covered by each grant, both of which grants were found to be valid, and that to Luis Maria Baca to be the prior one. Those who claimed under that prior grant waived their priority in favor of the town of Las Vegas, in consideration of which waiver Congress made to them a grant of other lands not covered by any Mexican grant, one of which tracts is that here in controversy. It is

obvious, we think, that the tract of government land so granted was to the claimants who waived their prior claim to the land granted by the Mexican government, and to none other, and such is, in effect, the express language of the act of Congress making the grant. Neither Antonio Baca nor any of his heirs ever having made any claim to any land granted by the Mexican government, they had no claim to waive, and manifestly waived none. It may be added that in cases of this character it seems to be the settled law that the confirmation of such foreign grants is to be deemed to be in favor of the person or persons claiming them. Connoyer v. Schaeffer, 22 Wall. 254, 22 L. Ed. 837; Bissel v. Penrose, 8 How. 317, 12 L. Ed. 1095; Strother v. Lucas, 12 Pet. 458, 9 L. Ed. 1137.

The other points made by counsel have been carefully considered, but we do not think they require special mention.

It results from what has been said that Joseph E. Wise and Margaret W. Wise acquired no interest in the land in controversy through the heirs of Antonio Baca, who had no interest therein to convey.

The cause is remanded, with directions to the court below to modify the decree in accordance with the views above indicated, and as so modified it will stand affirmed; the appellants Watts, Davis, and Bouldins to recover their costs.

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## UNITED STATES FIDELITY & GUARANTY CO. v. FIRST NAT. BANK OF McALESTER, OKL.

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

No. 4612.

1. COURTS ⟸493(3)—FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION.
A state court, which by the issuance and levy of an attachment obtained actual possession of property of a defendant, retains jurisdiction over such property to the exclusion of a federal court, which in a suit subsequently commenced appointed receivers for the property of such defendant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1349–1352; Dec. Dig. ⟸493(3).]

2. RECEIVERS ⟸89—POWERS—AUTHORITY TO EXECUTE—REDELIVERY BOND FOR ATTACHED PROPERTY.
Under an order of a federal court appointing receivers for a defendant corporation, which directed them to take possession of all of its property and to carry on its business, and authorized them to appear and conduct the defense of any suits against it affecting its property or business, where a part of defendant's property necessary to the conduct of its business was then in the possession of a state court under attachments levied thereon, the receivers had authority to become defendants in the suit and to join with the corporation in the execution of a forthcoming bond necessary for the release of the property, conditioned as required by the state statute for the return of the property, if required, or the payment of its appraised value, and on their failure to return the property in compliance with the judgment of the state court the signers became liable on the bond.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 163; Dec. Dig. ⟸89.]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action at law by the First National Bank of McAlester, Okl., against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. E. Ball, of Kansas City, Mo. (Ball & Ryland, of Kansas City, Mo., on the brief), for plaintiff in error.

James H. Gordon, of McAlester, Okl. (Gordon & McInnis, of McAlester, Okl., on the brief), for defendant in error.

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

SMITH, Circuit Judge. For several years prior to any of the litigation here important the Bolen-Darnall Coal Company, hereafter called the Coal Company, was a Missouri corporation engaged in business in Oklahoma and holding and operating coal mines in that and other states. On March 1, 1904, the Coal Company executed to the Fidelity Trust Company, hereafter called the Trust Company, a mortgage upon its real estate in Missouri, Kansas, Arkansas, and Indian Territory, now a part of Oklahoma, "including herein all coal, leased lands and other lands, shafts, mine equipment, machinery, and all other or different species of property now owned or that may be hereafter acquired by the Coal Company," to secure an issue of bonds to the amount of $400,000. This instrument was acknowledged and recorded at South McAlester on June 25, 1904, at 8 o'clock a. m., in Record 28, at page 113. On October 7, 1912, the First National Bank of McAlester, Okl., hereafter called the Bank, brought an attachment suit against the Coal Company upon a note for $10,000 and interest at 10 per cent. from maturity and attorney's fees, in the district court of Pittsburg county, Okl. The writ of attachment was levied that day upon a stock of goods, wares, and merchandise and fixtures of the defendant at North McAlester, and other property there, and the next day was levied upon a stock of goods, wares, and merchandise and fixtures in a store at Craig, Okl., and other property. October 11, 1912, the United States District Court for the Eastern District of Oklahoma, in a suit entitled Russell Hardware Company v. Bolen-Darnell Coal Company, ordered:

"(1) That W. E. Beatty, of McAlester, Okl., and L. S. Mohr, of Kansas City, Mo., be and they hereby are appointed joint receivers of the defendant, Bolen-Darnell Coal Company, and of all the property of said defendant, real, personal, and mixed, of whatever kind and description and wherever situated, including all property owned, leased, or operated by said defendant, and all buildings and appurtenances of every kind, and all equipment, utensils, and tools, machinery, furniture, fixtures, materials, and supplies, and all books of account, records, and other books, papers, and accounts cash in bank or on deposit in hand money, debts, things in action, and all muniments of title, bills receivable, rents, issues, profits, and income accrued, accruing, or to accrue as well as all privileges and franchises, and all assets of every kind and description, belonging to or used by the defendant in its business; that said receivers be and they hereby are authorized and instructed immediately to take possession of said property and business of the defendant, and run, manage, and operate the mines and properties of said defendant in such manner as will, in their judgment, produce most satisfactory results, so that the op-

eration of said defendant's business shall be continued without interruption. * * *

"(3) That said receivers be authorized to institute and prosecute all such suits as may be necessary in their judgment for the proper protection of the property and trust hereby imposed upon them, and likewise to defend all actions instituted against them as receivers, and also to appear in and conduct the prosecution or defense of any suit or suits now pending in any court against the defendant where the interests and rights of such business or the creditors of the defendant are involved."

On October 14, 1912, the receivers voluntarily appeared in the state court in the case of the Bank against the Coal Company, stated they appeared as receivers, that they were authorized to appear and conduct the defense of any suit or suits pending in any court against the Coal Company, that they were necessary parties to said suit, and asked that they be made parties defendant, and be permitted to plead as though parties to the original suit. Later in the same day a forthcoming bond for $30,000 was executed for the benefit of the Bank and delivered to the sheriff in said state court case. In this bond the Coal Company and Beatty and Mohr, its receivers, all principals, and the plaintiff in error, United States Fidelity & Guaranty Company, hereafter called the Guaranty Company, was surety. This bond recited the commencement of the suit by the Bank, the attachment, a stipulation between the parties that the appraised value of the property was $15,000, that upon the application of the receivers of the Coal Company they had that day been made parties defendant in said suit of the Bank against the Coal Company, and the following:

"Whereas, the Bolen-Darnall Coal Company, and the receivers of said company, desire to retain possession of said property until the same shall be required for the purpose of satisfying the judgment in this action: Now, therefore, if the property or its appraised value in money shall be forthcoming to answer the judgment of the court in this action, then this obligation shall be void; otherwise, to remain in full force and effect."

Thereupon the attached property was in fact taken possession of by the receivers. December 14, 1912, the Coal Company and Beatty and Mohr, receivers, filed answer in the state court in the suit by the Bank. On February 19th this cause was tried in the state court to a jury. At the close of the testimony the court directed a verdict for the plaintiff. The jury having returned such verdict, the court rendered judgment against both the Coal Company and its receivers for the amount of the note in suit, attorney's fees, and costs. The court by its judgment found the issuance and levy of the attachment and the giving of the forthcoming bond, and made the following entry:

"It is by the court considered, ordered, and adjudged that the attachment sued out herein be and the same is hereby sustained. It is further ordered and adjudged that the defendants herein redeliver the property so attached to the sheriff of Pittsburg county, Oklahoma, and the said sheriff of Pittsburg county, Oklahoma, is hereby ordered to repossess himself of the said property, or so much thereof as may be found, and to sell the same as provided by law, returning the proceeds of said sale into this court."

On April 8, 1913, the Trust Company brought suit in the United States District Court for the Eastern District of Oklahoma against the Coal Company and its receivers, the Bank and the Russell Hard-

ware Company et al., in equity to foreclose its mortgage heretofore referred to. The bill contained the following allegations:

"(6) Heretofore, upon the 14th of February, 1913, in the district court of Pittsburg county, Okl., the First National Bank of McAlester, Okl., recovered a judgment against the Coal Company for $11,442 and costs; and upon March 11, 1913, the Kincannon Bros., likewise in the same court, obtained a judgment against said Coal Company for $1,700. Each of said judgments is a lien upon the mortgaged property in Oklahoma, but inferior to the lien of said mortgage."

On the same day the suit in which the receivers had been appointed was consolidated with this foreclosure suit and will hereafter be called the consolidated suit. April 28, 1913, having been duly served with a subpœna, the Bank filed an answer in that suit. Many matters were set up in this answer, among others that the defendants in the state court case, because they had sold and disposed of all of the merchandise taken under the writ and a large portion of the other personal property so taken, could return none of the property taken under attachment, and that none of it was subject to the mortgage. There was no cross-petition, and no prayer, except that the defendant be discharged, with its costs. July 15, 1913, the Bank and the sheriff of Pittsburg county, Okl., made first an oral demand upon the receivers to turn over the attached property, and subsequently on the same day served a written demand to the same effect. The receivers refused to comply with either demand. July 22, 1913, this suit was brought in the district court of Pittsburg county, Okl., by the Bank against the Guaranty Company on the forthcoming bond. August 12, 1913, the Guaranty Company filed its petition and bond for removal of the case to the United States District Court for the Eastern District of Oklahoma and on August 19, 1913, it was ordered so removed by the state district court. February 27, 1914, the federal court heard the foreclosure suit and took it under advisement until July 30, 1914, when it entered a decree by which it rendered judgment for the Trust Company for $126,074.50, with interest from March 1, 1914, and

"The court further finds that attachments were levied upon certain of the personal property of said Coal Company in the state of Oklahoma in favor of the First National Bank of McAlester, Okl., R. L. Kincannon and J. R. Kincannon, partners as Kincannon Bros., Griffin Grocery Company, and McAlester Grocery Company, as set up by the pleadings in this cause, and that the lien of the plaintiff Fidelity Trust Company is paramount to the lien of all said attachments as to all the property included in said mortgage or deed of trust, excepting the stocks of goods, wares, and merchandise kept for sale in the stores or commissaries of said Coal Company attached as aforesaid. The court further finds that said deed of trust is void as to said stocks of goods, wares, and merchandise so kept for sale in said stores or commissaries of the said defendant Coal Company in Oklahoma, as against the claim of said attaching creditors who have levied attachments thereon, and that as to said stocks of goods, wares, and merchandise the claims of said attaching creditors are paramount, and as to this finding the plaintiff Fidelity Trust Company duly reserves an exception."

The court further decreed that, if the Coal Company failed to pay the amount of the judgment, the mortgaged property should be sold by special masters free of any liens or claims of any of the parties to this suit. The decree further provided:

"There is also reserved for further consideration and decision the right of the attaching creditors to participate in the distribution of said funds, to the extent that the rights of the attaching creditors are not herein ascertained and decided. It is further ordered and decreed that this cause is held up for further orders and decrees not herein mentioned as may seem proper to be made, either before or after such sales, and whether in term or in vacation, as may seem proper to this court or the judge thereof."

For aught that appears nothing more was done in that case at the time of the trial of this one. On June 28, 1915, the defendant Guaranty Company filed its second amended answer in this case, in which it pleaded the decree in the consolidated case. The remaining allegations of this answer will not now be referred to, because they will be considered later in the opinion. June 29, 1915, this case having been tried to a jury, both sides moved for a directed verdict, and the court overruled the defendant's motion and sustained the plaintiff's, and thereupon the jury returned a verdict for the Bank for $14,280.51. Judgment was rendered on the verdict, and the Guaranty Company sued out this writ of error.

There is no conflicting evidence, and, both sides having moved for a directed verdict, the sole question is: Whose motion should have been sustained? The Revised Laws of Oklahoma provide:

"4821. The sheriff shall deliver the property attached to the person in whose possession it was found, upon the execution, by such person, in the presence of the sheriff, of an undertaking to the plaintiff, with one or more sufficient sureties, resident in the county, to the effect that the parties to the same are bound, in double the appraised value thereof, that the property, or its appraised value in money, shall be forthcoming to answer the judgment of the court in the action."

Section 1344 of the Revised Laws of Oklahoma, 1910, provides for a corporate surety in cases which provide for bonds with one or more sureties. It is stated in the brief of the Guaranty Company that:

"The questions are: (1) Was it competent for the receivers to voluntarily contract away the supervision and control of the federal court over them, and effectually bind themselves to do with this property only as the state court might direct? (2) Could the defendant in error and the sheriff turn over this property to the receivers of the Coal Company estate, of which it was a part, without necessarily consigning it to the jurisdiction of the court charged with administering that estate? (3) Did the federal court in its decree in the consolidated cause have no authority to order the sale of this property by its special masters, instead of ordering that it all be turned over to the sheriff, and was the defendant in error, on the record offered, unaffected by the disposition directed to be made by that court?"

[1] It must be borne in mind that the attachment suit was started when the federal court had acquired no jurisdiction whatever in relation to the property. No application for a receiver had been made, and no foreclosure suit had been brought. The jurisdiction of the state court over the attached property was then clear. By its levy of the attachment the Bank acquired, under the subsequent holding of the federal court, a first lien upon the two stocks of merchandise and a junior lien upon the balance of the property seized. In Wabash Railroad v. Adelbert College, 208 U. S. 38, 53, 28 Sup. Ct. 182, 187 (52 L. Ed. 379), the court, by Mr. Justice Moody, said:

"We may now consider the question whether the state court had the jurisdiction to render the judgment in the case at bar, as and when it was rendered. When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession, or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application, and not peculiar to the relations of the courts of the United States to the courts of the states; they are, however, of special importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons, and controversies; they are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice, and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the states and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the states of the Union. Hagan v. Lucas, 10 Pet. 400 [9 L. Ed. 470]; Williams v. Benedict, 8 How. 107 [12 L. Ed. 1007]; Wiswall v. Sampson, 14 How. 52 [14 L. Ed. 322]; Peale v. Phipps, 14 How. 368 [14 L. Ed. 459]; Pulliam v. Osborne, 17 How. 471 [15 L. Ed. 154]; Taylor v. Carryl, 20 How. 583 [15 L. Ed. 1028]; Freeman v. Howe, 24 How. 450 [16 L. Ed. 749]; Buck v. Colbath, 3 Wall. 334 [18 L. Ed. 257]; Yonley v. Lavender, 21 Wall. 276 [22 L. Ed. 536]; People's Bank v. Calhoun, 102 U. S. 256 [26 L. Ed. 101]; Barton v. Barbour, 104 U. S. 126 [26 L. Ed. 672]; Krippendorf v. Hyde, 110 U. S. 276 [4 Sup. Ct. 27, 28 L. Ed. 145]; Pacific R. R. of Missouri v. Missouri Pacific Railway, 111 U. S. 505 [4 Sup. Ct. 583, 28 L. Ed. 498]; Covell v. Heyman, 111 U. S. 176 [4 Sup. Ct. 355, 28 L. Ed. 390]; Heidritter v. Elizabeth Oil Cloth Company, 112 U. S. 294 [5 Sup. Ct. 135, 28 L. Ed. 729]; Gumbel v. Pitkin, 124 U. S. 131 [8 Sup. Ct. 379, 31 L. Ed. 374]; Johnson v. Christian, 125 U. S. 642 [8 Sup. Ct. 989, 1135, 31 L. Ed. 820]; Morgan's Co. v. Texas Central Railway, 137 U. S. 171 [11 Sup. Ct. 61, 34 L. Ed. 625]; Porter v. Sabin, 149 U. S. 473 [13 Sup. Ct. 1008, 37 L. Ed. 815]."

In Palmer v. Texas, 212 U. S. 118, 125, 29 Sup. Ct. 230 (53 L. Ed. 435), the court said:

"If a court of competent jurisdiction, federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property has been entirely removed to the territory of another sovereignty. Wabash Railroad v. Adelbert College, 208 U. S. 38, and previous cases in this court cited therein at page 54 [28 Sup. Ct. 182, 52 L. Ed. 379]."

This court has distinctly affirmed the correctness of this doctrine in Western Union Telegraph Co. v. United States & Mexican Trust Co. et al., 137 C. C. A. 113, 121, 221 Fed. 545, 553, and cases there cited.

The state court, having taken actual physical possession of the property levied upon, could hold it even as against the United States District Court. While the property was thus in the custody of the state court, the defendant in the action and its receivers, who had been ex-

pressly authorized by the federal court to appear in and conduct the defense of any suit or suits now pending in any court against the defendant, having appeared in the state court, tendered the bond in suit with the Guaranty Company as surety, and the bond was accepted by the officers of the state court, and the property, which could not have otherwise been obtained by the officers of the federal court until after the decision of the state court case, was turned over to the receivers of the federal court.

[2] It is now contended that the federal court receivers had no authority to give the bond as receivers. It must not be forgotten that this bond was given in the name of the Coal Company as well as its receivers, and the sheriff simply released the property, and the receivers under the authority of the federal court took possession. The first subdivision of the order appointing receivers directed them to take possession of all the attached property as clearly as if it had been specifically described; but we have seen it was in the hands of the state court, and there was only a single way in which the order of the federal court could be complied with, and there is no doubt that an order to take possession of specific property is the equivalent of an order to do all things necessary to obtain possession thereof. The attached property was in the possession of the state court, and it could not be obtained by the federal court until the state court had disposed of the case in which it was held, except by giving a forthcoming bond, which the receivers did.

The federal court having ordered its receivers to take possession of all equipment, tools, material, supplies, and fixtures, and to run, manage, and operate the same in such manner as would be most satisfactory, so that the defendant's business be continued without interruption, and the receivers finding the stocks of goods and merchandise and much of the machinery in the possession of the sheriff, so that no part of the business could be conducted unless the possession could be obtained by the receivers, they were as much authorized to give this bond when it became the only method by which they could take possession as they were to take possession.

Again, that the Coal Company had authority to give the bond cannot be questioned under the Oklahoma statute. The condition of the bond is that:

"If the property or its appraised value in money shall be forthcoming to answer the judgment of the court in this action, then this obligation shall be void; otherwise, to remain in full force and effect."

This bond was expressly a joint and several one. The authority of the receivers to defend this particular suit in the state court was clearly conferred by the third subdivision of their order of appointment, and the authority to defend necessarily includes the authority to give this bond; but, even if the court should be mistaken in this, the bond did not provide that the Coal Company and the receivers would return the property, but that it would be returned by some one to answer the judgment. The bond was in substantial compliance with the Oklahoma statute, and that is all that is necessary to make of it a valid statutory

bond. 4 Cyc. 680. But, if for any reason it was not valid as a statutory bond, it was valid as a common-law obligation. Id. 681.

The whole contention that the Coal Company and its receivers tendered to the sheriff a bond with the Guaranty Company as surety that the property would be returned under a penalty of $30,000, and now say that the bank must have known the receivers must obey the federal court, and the surety is not liable for the penalty, savors of fraud, and cannot be sustained by this court. The receivers obtained the stocks of merchandise upon which the attachment was a first lien, and have disposed of them. They obtained a considerable quantity of other property, including machinery and live stock, necessary to run the mine, and upon which the Bank had a junior lien, and none of it has been returned.

There is no doubt that the judgment of the court below was correct, and it is affirmed.

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## AMERICAN LOCOMOTIVE CO. v. HARRIS.

(Circuit Court of Appeals, First Circuit. December 7, 1916. On Petition for Rehearing, January 12, 1917.)

No. 1194.

1. APPEAL AND ERROR ⟸853—INSTRUCTIONS—EXCEPTIONS—NECESSITY.
An instruction not excepted to stands as the law of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1524, 3405; Dec. Dig. ⟸853.]

2. BROKERS ⟸86(3)—COMMISSIONS—RIGHT TO.
In assumpsit for commissions claimed under a contract for the sale of auto trucks, evidence *held* insufficient to show that plaintiff had completely consummated the contract, so as to be entitled to commission as such, although warranting a finding that, but for defendant's improper interference, he would have effected the sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 117; Dec. Dig. ⟸86(3).]

3. BROKERS ⟸79—COMMISSIONS—RIGHT TO.
Defendant, a manufacturer of motor cars, desiring to go out of business, contracted with plaintiff for the disposal of its cars at reduced prices. Plaintiff began negotiations with third persons for the sale of a number of motor trucks, which sale would have been consummated, but for the interference of defendant, who disposed of the cars directly to the customer. Plaintiff brought assumpsit to recover compensation claimed, the case being finally submitted on the common counts. *Held* that, as the contract was not completed, plaintiff could not on the common counts recover commissions as a debt, recovery in that manner being allowable only when the contract is at an end, and nothing remains but the payment of the sum due; and hence, being restricted to recovery of damages by specially declaring on the contract, an instruction allowing plaintiff to recover the commissions provided in the contract was erroneous.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. ⟸79.]

4. APPEAL AND ERROR ⊂⊃1064(1)—PREJUDICIAL ERROR—INSTRUCTIONS.
In such case, if an instruction, which became the law of the case, because not excepted to, could be interpreted as authorizing recovery for plaintiff, if he had carried on negotiations to a point where a sale would have been effected, but for defendant's interference, an instruction allowing plaintiff to recover the commissions provided in the contract amounted to reversible error, because it could not be determined whether the jury based their verdict on the instruction not excepted to, or the one allowing recovery as damages of the commissions provided in the contract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. ⊂⊃1064(1); Trial, Cent. Dig. §§ 525, 553.]

5. BROKERS ⊂⊃7—CONTRACTS—CONSTRUCTION.
In such case, though defendant reserved the right to make sales to customers in the territory given to the sales agent, it impliedly obligated itself not to interfere with the agent's pending negotiations.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 5–8; Dec. Dig. ⊂⊃7.]

On Petition for Rehearing.

6. APPEAL AND ERROR ⊂⊃888(2)—AMENDMENTS—ALLOWANCE.
In such case the agent should not be allowed to file on appeal as an amendment a declaration in special assumpsit, and have the judgment affirmed, for it could not be determined that the jury's verdict was based on the count in quantum meruit, and not the one of indebitatus assumpsit; the instructions allowing recovery on such count.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3619; Dec. Dig. ⊂⊃888(2).]

7. APPEAL AND ERROR ⊂⊃1178(6)—REMAND—LIMITATION OF REMAND.
Where it did not appear that the jury might not have found for plaintiff on an incorrect theory of liability, the new trial, after reversal on appeal, should not be limited to the question of damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4614, 4615; Dec. Dig. ⊂⊃1178(6).]

In Error to the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Action by William A. Harris against the American Locomotive Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

Francis B. Keeney, of Providence, R. I. (Frank H. Swan and Swan & Keeney, all of Providence, R. I., on the brief), for plaintiff in error.

Arthur M. Allen, of Providence, R. I. (Abbott Phillips, Rush Sturges, and Green, Hinckley & Allen, all of Providence, R. I., on the brief), for defendant in error.

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

BINGHAM, Circuit Judge. This is an action of assumpsit, brought by William A. Harris, of Providence, against the American Locomotive Company, a corporation organized under the laws of the state

of New York, to recover compensation claimed to be due him under a contract in procuring the sale of a number of auto trucks.

The declaration, as originally drawn, contained various counts, but the case was finally submitted to the jury only upon the common counts; the right to go to the jury on the others having been denied for failure of proof.

The defendant was a manufacturer of automobiles and auto trucks, but, having concluded to go out of the automobile business, and desiring to close out the balance of its trucks and pleasure cars, on August 21, 1913, it revised its schedule of prices, with a view of accomplishing this purpose without delay, and, on August 26, 1913, entered into a contract with the plaintiff to act as its agent at Providence, R. I., in the disposal of these cars.

The claim in controversy arises out of the sale of 27 trucks to Messrs. Norton and Draper, on which sale the plaintiff claimed the right to a commission in the sum of $13,500, and the jury found a verdict for him in the sum of $11,793.75. The case is here on the defendant's writ of error and bill of exceptions. Among the errors assigned are the following:

(1) The court erred in refusing to grant defendant's motion, at the conclusion of all the evidence, to direct a verdict in its favor, upon the ground that the plaintiff had failed to prove his case.

(5) The court erred in instructing the jury as follows:

"If you find that he [plaintiff] was the moving party, then you will come to the question of damages, and you may find either that Mr. Harris is entitled to damages according to the provisions of the contract, that is, according to the provisions of the schedule of August 21, 1913, in which he was entitled to the difference between the dealer's prices and the sales prices, and your damages would be based upon 27 trucks and these prices. * * *"

The contract of August 26, 1913, was embodied in a letter written by the defendant, the American Locomotive Company, through its assistant sales manager, R. B. Van Dyke, to the plaintiff, Harris, the terms of which were accepted by him, and in a writing containing a revised schedule of prices attached to the letter. The letter and revised schedule of prices read as follows:

"American Locomotive Company,

"Automobile Department, 1886 Broadway, New York.

"August 26, 1913.

"Mr. William A. Harris, American Locomotive Company, Providence, R. I.—Dear Sir: This will confirm our conversation today to the effect that on Alco trucks and pleasure cars you may sell in the state of Rhode Island, you are to receive the dealer's price mentioned in revised schedule of prices dated August 21st, copy of which is attached hereto; you to make your profit by selling cars and trucks to customers at the sales price named in the same schedule. It is understood you will take care of the necessary financing; that only standard product with standard equipment can be sold; that all jobs are to be sold for the earliest possible delivery, the trucks without bodies or special equipment. This arrangement does not give you the exclusive right of sale in Providence, as we reserve the right to deal direct with customers there, and the arrangement will continue only until our present product is disposed of, or is subject to cancellation by either party giving the other ten

days' notice. It is also understood that any existing commission arrangement covering the sale of our product is hereby canceled. If satisfactory, please note your acceptance on one copy of this letter and greatly oblige.

"Very truly yours, R. B. Van Dyke,
"Ass't General Sales Manager.

"Accepted. William A. Harris."

"American Locomotive Company,

"Automobile Department, 1886 Broadway, New York.

"August 21, 1913.

"Revised Schedule of Prices.

"Effective this date, the following prices will prevail, to close out the balance of our trucks and pleasure cars:

"Any regular dealer is entitled to the dealers' prices.

| | Dealers' Price. | Sales Price. |
|---|---|---|
| 2-ton chassis | $1,475.00 | $1,975.00 |
| 3½-ton chassis | 1,825.00 | 2,325.00 |
| 5-ton chassis | 2,375.00 | 3,000.00 |
| 6-cylinder touring car, complete, with Rushmore self-starter | 3,000.00 | 3,500.00 |

"A deposit of at least two hundred dollars ($200) will be required with each car or chassis ordered; the balance will be on sight draft with bill of lading attached f. o. b. Providence. Tire specifications will be followed as far as we are able, but we reserve the right to equip with any standard tires we may have on hand. No bodies will be furnished by us except for the touring cars. All truck chassis will be furnished in the lead as heretofore. The touring cars are complete in every way, including Rushmore electric self-starter, and are finished in standard colors. Orders will be filled and cars shipped in the order in which they are received. First come, first served. We anticipate an unusual demand at these prices and advise you to act quickly.

"Yours very truly, C. A. Benjamin,
"General Sales Manager."

The court instructed the jury on the main question in the case, as follows:

"Now, are you satisfied that he [Harris] had got the Draper-Norton syndicate up to such a point that that deal would have gone through even on the basis of the advertised [sales] prices; or are you of the opinion that the deal only went through because of this special reduction in prices? I have illustrated the situation, gentlemen, and the different aspects which the case may have bearing upon the question of damages. Of course if you are convinced, gentlemen, that Mr. Harris was not the moving party who caused the consummation of this contract, then under the present declaration he would not be entitled to recover, and your verdict would be for the defendant."

[1, 2] No exception was taken to this instruction, and, however it may be viewed, it stands as the law of the case. The question, therefore, presented by the first assignment of error is whether there was any evidence from which the jury would be warranted in finding that Harris, in his negotiations with Norton and Draper, had gotten them up to the point where they had assented to take the trucks at the sales prices. The plaintiff's evidence was that upon securing the contract in New York he returned to Providence, and immediately inserted a notice in the morning paper of August 27th, advertising the trucks of the American Locomotive Company, stating the former prices at which Alco trucks of the company had been sold and the present reduced

prices, the latter being the sales prices fixed in the schedule of August 21st; that on Sunday, August 31st, he inserted a like advertisement in the newspapers; that on Wednesday, August 27th, at noon, he called upon Mr. Norton, at his office in Providence, and outlined to him the new proposition regarding the sale of the trucks and the prices which had gone into effect, that he was in a position to sell him a number of trucks at these prices, and that he and Draper could hold the trucks until after the stock of the American Locomotive Company was disposed of, and then he, Harris, would help them sell them at an increased price, which he would be able to do owing to his acquaintance with possible customers in Rhode Island; that he followed up the matter with daily interviews and talks with Mr. Norton, who promised to take the matter up at once with Mr. Draper, and that on Saturday, August 30th, he talked with both Norton and Draper and went to luncheon with the latter; that he made an appointment with them for the following Monday night, at which time they were to give him an answer; that they failed to keep the appointment, but on Tuesday, September 2d, arranged to meet him that night, which they also failed to do; that he then learned they had gone to New York, and at once telephoned the defendant's general sales manager, notifying him that Norton and Draper were his customers and were apparently trying to go over his head and buy directly from the company, and asked the general manager to protect his interest; that this conversation over the telephone took place before Norton and Draper reached the company's office; and that he also wrote the company a letter on September 3d, confirming his telephone message, and claiming Norton and Draper as his customers.

[3] This is a statement of the plaintiff's evidence in the view most favorable to him, and which was not supplemented or aided in any material respect by the evidence introduced by the defendant. It is apparent that the most favorable inference which the jury could draw from it was that the plaintiff's negotiations with Norton and Draper had reached the point where they would have assented to the purchase of the trucks at the sales prices but for the interference of the defendant in selling to them at prices below the sales prices. It does not warrant a finding that the negotiations had proceeded to a stage where Norton and Draper had assented to take the trucks at the sales prices, and nothing remained to be done on the part of the plaintiff to carry out the sale, so that he would be entitled to his commission under the contract as a debt due him. It is only "when a contract is at an end, either by its provisions or by the wrongful act of the defendant, so that nothing remains to be done but to pay money [that] general assumpsit will lie." Carroll v. Giddings, 58 N. H. 333, and cases there cited. Had the plaintiff's proof warranted a finding that his negotiations with Norton and Draper had reached the point where they had assented to take the cars at the sales prices, so that nothing remained to be done but for the defendant to deliver the cars and for Norton and Draper to pay for them, the plaintiff would have earned his commission under the contract and would have been entitled to that sum as a debt due him, which he could recover under the com-

mon counts. But his proof shows that his negotiations with Norton and Draper had only reached the point where, but for the interference of the defendant, he would have consummated the trade with them at the sales prices. This does not disclose a consummation of the sale, so far as the plaintiff is concerned, but a failure by reason of the defendant's breach of its contract with the plaintiff. In this situation the plaintiff could not recover his commissions under the common counts, for he had not earned them, but would be entitled to recover them, if at all, as damages, by declaring specially on the contract.

If, however, it can be said that the fair meaning of the charge of the court to the jury is that they could find a verdict for the plaintiff, provided they were satisfied on the evidence that Harris, in his negotiations with Norton and Draper for the sale of the trucks, had gotten them to the point where he would have effected a sale with them at the sales prices, but for the interference of the defendant, and that this is the law of the case, as no exception was taken to this branch of the charge, nevertheless the verdict cannot be sustained, for the court charged the jury on the question of damages, to which the fifth assignment relates, as follows:

"If you find that he [plaintiff] was the moving party, then you will come to the question of damages, and you may find either that Mr. Harris is entitled to damages according to the provisions of the contract, that is, according to the provisions of the schedule of August 21, 1913, in which he was entitled to the difference between the dealer's prices and the sales prices, and your damages would be based upon 27 trucks and these prices. * * *"

This charge would be right, under a count in indebitatus assumpsit, only in case the evidence warranted the conclusion that the plaintiff had brought the negotiations with Norton and Draper to such a stage that they had assented to take the trucks at the sales prices, and nothing further remained for the plaintiff to do. But, as above stated, the plaintiff's proof did not warrant the jury in reaching such a conclusion and, under the state of the proof disclosed, he could recover his commissions as damages only in case he had declared in special assumpsit. This charge was therefore erroneous.

[4] While it could be found on the evidence that the defendant broke its contract by interfering with and preventing the sale which the plaintiff was undertaking to negotiate with his customer, and that under the common counts he could recover what his services were reasonably worth, and such a view of the case was presented to the jury, still, as it is impossible to say whether the jury based its verdict upon this theory or upon the one complained of in the fifth assignment of error, the verdict cannot stand.

[5] When the defendant agreed with the plaintiff that he should be its representative for the sale of these trucks in Providence, with the right to seek customers there, and, in case he did bring about a sale at the sales prices, he should receive the commission specified in the contract, it impliedly agreed with him, notwithstanding its reservation of the right to sell to customers in Providence, that it would not interfere with negotiations which he had under way with customers in that locality, by undertaking to sell to them at reduced prices or in any

other way, and, had his declaration contained a count in special assumpsit, assigning the defendant's interference with the consummation of his negotiations with Norton and Draper as a breach of its contract, there can be little doubt but that, on the present state of the proof, the jury would have been warranted in finding a verdict in his favor.

The verdict, however, must be set aside, and the case remanded to the District Court for a new trial. Slocum v. New York Life Insurance Company, 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029. Under the circumstances we do not think it is necessary to consider the questions raised by the other assignments, as they are not likely to arise on a subsequent trial of the case.

The judgment of the District Court is reversed, the verdict is set aside, the case is remanded to the District Court for further proceedings not inconsistent with this opinion, and the plaintiff in error recovers its costs.

On Petition for Rehearing.

[6] We do not think the plaintiff, under the facts presented in this case, should be allowed to file, as an amendment, a declaration in special assumpsit and have the judgment of the court below affirmed. As pointed out in our opinion of December 7, 1916, there was no evidence to warrant a verdict for the plaintiff upon the count in indebitatus assumpsit; and it cannot now be determined whether the jury rendered their verdict upon that count or upon the count in quantum meruit. On the count in indebitatus assumpsit, the court instructed the jury that they might find a verdict for the plaintiff on the evidence submitted to them, and, such being the case, it cannot be presumed that they did not do what the court told them they might do. If the jury rendered their verdict in the light of these instructions, they did not necessarily pass upon the questions involved under the count in quantum meruit; and, if they did not, they never passed upon the questions which would be raised under the count in special assumpsit. In any event, it is largely conjectural which course the jury pursued in rendering their verdict, and, this being so, we do not think this is a case in which the court can or should exercise its discretion and adopt the course suggested in the plaintiff's petition.

[7] The same line of reasoning is an answer to the further request in the plaintiff's petition that the new trial should be limited to the question of damages. To justify an appellate court in limiting the issues on a new trial to the question of damages, it should clearly appear that all questions in respect to liability have been considered and passed upon by the jury. This is not such a case.

Petition denied.

STANDARD WOOD CO. v. HALL, GARDNER & CO. et al.

(Circuit Court of Appeals, Third Circuit. January 9, 1917.)

No. 2135.

SALES ⊜98, 107—CONSTRUCTION—RIGHT OF RESCISSION FOR BREACH.

Defendant operated a sawmill, and had as a by-product slabs and edgings, which it desired to dispose of, and plaintiff was a manufacturer of kindling wood. The parties entered into a contract, without limitation as to time, by which plaintiff agreed to build a factory of stated capacity at a convenient point, and defendant agreed to deliver at the factory at an agreed price per cord slabs and edgings cut to proper lengths for plaintiff's use. The contract provided that, if the sawmill should be destroyed, it should be promptly rebuilt, and also that on 30 days' notice plaintiff might shut down its factory, and during the suspension of business it should not be required to take and pay for wood, but that, if such shutdown should continue for 90 days, defendant might terminate the contract. The parties had operated under the contract for a number of years, when plaintiff notified defendant that it found it necessary to ship "some of the wood" elsewhere, and requested that "for the present" it be shipped to a paper mill, which was done. Thereupon plaintiff dismantled and tore down its factory. It received from the paper mill a large advance on the price it paid defendant for the wood. After about seven months, learning of the destruction of the factory, defendant gave notice under the forfeiture clause of the contract of its termination and ceased shipments. *Held*, that the suspension and forfeiture provisions of the contract had no application to the situation, but contemplated only temporary suspension of business by plaintiff; that its destruction of its factory was a breach, which went to the whole consideration of the contract, and gave defendant the right to rescind, or to recover damages for the breach; and that its action in stopping shipment was in legal effect an election to rescind.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 263, 276; Dec. Dig. ⊜98, 107.]

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

Action at law by the Standard Wood Company against Hall, Gardner & Co., a partnership, and James K. Gardner, Jane Hyde Hall Liddell, and Susan E. Hall, surviving partners. Judgment for defendants, and plaintiff brings error. Affirmed.

William A. Stone, of Pittsburgh, Pa., Jones & Wick, of Bradford, Pa., and Stone & Stone, of Pittsburgh, Pa., for plaintiff in error.

J. Rodgers McCreery, of Pittsburgh, Pa., and Eugene H. Baird, of Ridgway, Pa., for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The plaintiff in error (plaintiff below) is a kindling wood company. The defendants in error (defendants below) compose a partnership doing business as a saw mill company. This action was brought by the kindling wood company for breach of a written contract between them. At the trial two questions were raised. The first, a question of fact, was whether the terms of the con-

tract had been changed by the parties; the second, a question of law, was the construction of the contract, either as changed or unchanged, according to the fact found. The verdict was for the saw mill company, and the kindling wood company brought this writ of error. The specifications of error, in number and scope, cover the whole case, and will therefore be considered under a general review.

The contract is in writing. In the main, there is neither ambiguity in its terms nor uncertainty in its meaning. It appears that in 1898, the year of its date, the saw mill company owned large tracts of land in the Counties of Elk and Forest, in the State of Pennsylvania, from which they proposed to cut hemlock timber and manufacture it at their mill at Hallton. In order to dispose of their slabs and edgings this contract was entered into, and by its terms the saw mill company agreed to sell and the kindling wood company to buy, without limit as to time, all their hemlock slabs and edgings cut in lengths suitable for kindling wood manufacture, delivered at a designated factory of the kindling wood company, at a price of about seventy-five cents per cord, graduated somewhat by varying market conditions. In order to take and consume the slabs and edgings to be delivered under the contract, the kindling wood company agreed to erect and did erect a kindling wood factory of a given capacity at Portland Mills, a suitable location for the economical shipping and handling of the product.

To insure uninterrupted deliveries to its factory and to avoid loss of its investment consequent upon stopping the timber operation, the kindling wood company required, and the saw mill company agreed, that if the saw mill should be destroyed by fire or otherwise, they would promptly rebuild or repair it.

Under the terms of the contract as originally drawn, the parties acted for many years, one satisfactorily disposing of a by-product of little value and the other manufacturing its finished product from a cheap raw material always at hand.

From the terms of the contract the parties seldom deviated and then only by agreement. In 1903, the kindling wood company, upon representations that it was necessary to divert "a certain quantity" of the wood from shipment to its factory at Portland Mills to another of its plants, secured the acquiescence of the saw mill company, and shipments were made elsewhere. After a brief period, the parties returned to the original contract and resumed shipments exclusively to the factory at Portland Mills. Again in 1907, in conversations between the parties and confirmatory correspondence, the parties agreed to depart from the contract with respect to shipments. It appears that an officer of the kindling wood company wrote the saw mill company that:

"We find it necessary to ship out *some of the wood* from Hallton [i. e. to ship wood elsewhere than to its factory at Portland Mills] as the conditions of trade will not permit us to manufacture this."

The conditions referred to were market conditions for kindling wood in the cities, and the fact that there were piled at the kindling wood factory about 5,000 cords of slabs, indicating a large supply on hand. The saw mill company replied by saying:

"Relative to changing the shipment of wood from Portland Mills to other points, would say that it will be entirely satisfactory to us, and we will take great pleasure in billing the stock wherever you designate."

The kindling wood company wrote the saw mill company:

"Referring to the writer's recent interview with Mr. Lockhart relative to shipping out the Hallton wood, we desire to ship this *for the present* to the Hartje Paper Mfg. Co., Steubenville, Ohio, via P. R. R. delivery, and if you will kindly issue the necessary instruction we will appreciate it very much."

Knowing, as it is testified, that the kindling wood company had on hand a large supply of wood, and that the conversations and the correspondence referred to a diversion of shipments not as to *all* but only with respect to *"some of the wood,"* not permanently, but only *"for the present,"* the saw mill company readily subscribed to the change in its temporary character, and made the shipments to the paper company as directed.

During this period, the kindling wood factory was not operated. This was known by all the parties and not objected to. It developed, however, that after about seven months, the saw mill company made inquiry as to when operations were to be resumed and found that the kindling wood plant had been dismantled, the machinery shipped away, and the larger part of the structure torn down. Thereupon, the saw mill company resorted to what is termed the "forfeiture clause" of the contract, and attempted by notice to terminate the contract pursuant to their understanding of its meaning. This clause is as follows:

"It is further understood and agreed that the party of the second part [kindling wood company] may at any time *shut down* its kindling wood factory, and during *such shut down* or *suspension of business*, the party of the second part shall not be required to take and pay for any slabs or edgings under the terms of this contract, provided, however, that *the party of the second part shall give thirty days' notice* in writing to the parties of the first part *of its intention* to shut down or suspend as aforesaid, and provided further, that if *such* shut down or suspension shall continue for *a period of ninety days*, the parties of the first part [saw mill company] may at their option declare this contract terminated."

With the notice given, shipments were stopped. It is pertinent here to note that so long as hemlock slabs had only a by-product value to one of the parties and only a cheap raw material value to the other, the two moved contentedly along under the contract, but when trade conditions in the paper industry gave hemlock slabs a raw material value for paper far greater than their value for kindling wood, the parties to this contract were subjected, one after the other, to a temptation which they could not withstand. The kindling wood company found that slabs for which it was paying seventy-five cents a cord could be sold to the paper company for three dollars a cord. It therefore stopped the manufacture of slabs into kindling wood, diverted shipments to the paper company, and under the influence of greatly increased profits, did the unwise thing of dismantling and demolishing its kindling wood factory. When the saw mill company found this out they attempted to terminate the contract under the forfeiture clause and did terminate shipments, thereby leaving the kindling wood company without wood with which to carry on its contract with the paper

company. Being similarly attracted by greater profits, the saw mill company availed themselves of the new demand for hemlock slabs, stepped into the place of the kindling wood company, contracted with the paper company for its needs, and reaped the increased profits for themselves. These the kindling wood company are endeavoring to recover by this suit.

Manifestly in this situation we are not concerned with business ethics or with hunting for and balancing equities between the parties. We are concerned only with the legal positions of the two parties, both of whom at different periods were keen to be relieved of their contract.

At the trial the court very properly left to the jury the question whether the parties by their correspondence and conduct had (permanently) changed the terms of their contract, when shipments were diverted from the kindling wood factory to the paper company. It then construed the contract as giving the kindling wood company a right of action or as terminated by the notice of the saw mill company under the forfeiture clause, according as the jury found that the contract had or had not been changed in its terms.

As the jury found for the defendant, they found that the contract had not been changed, and the case comes before us only for a construction of the contract as originally made in connection with three undisputed facts, namely, that the kindling wood company gave no notice of its intention to shut down; that the factory was shut down (in a sense) for a period of ninety days before the notice of the saw mill company terminating the contract, and that by that time, the kindling wood company had completely dismantled and partially demolished its factory. The question involved in the construction is, whether the contract was terminated, and if so, how and by which party was it terminated.

The kindling wood company maintains that the contract was not terminated, except by the breach of the saw mill company in stopping shipments, for which it brings this action. Its contention is, that the notice by the saw mill company to terminate the contract, given under the forfeiture clause, was ineffective because it was not given in the situation contemplated by that clause; that under a proper interpretation of that clause, the saw mill company's right to terminate the contract accrued only after a ninety day shut down *following* a thirty-day notice by the kindling wood company of its intention to shut down, when seeking to relieve itself of liability to take and pay for slabs, and that the kindling wood company could shut down at any time it chose for as long as it chose, if it gave no thirty-day notice of such intention, and if it continued to take the slabs and pay for them. As no such thirty-day notice of intention to shut down was given, it maintains that the saw mill company's notice to terminate the contract was improvidently made, and that the contract remained in force until breach by the saw mill company in refusing to continue shipments.

In determining whether the contract was terminated, and if terminated, then how and by whom, we must first construe the forfeiture clause. It is clear from the business of the parties, their reasons for

entering into the contract, its duration without limit, and the mutuality of its terms, that the kindling wood company demanded raw material for its kindling wood factory in a flow not to be ended even by the burning of the saw mill, and only to be interrupted while a new mill was being built; and that the saw mill company, to insure the consumption of a by-product, required that there be built at a point in touch with its timber operations a kindling wood factory of an agreed capacity to take the flow of its material in continuous movement, except when in the nature of things a shut down or suspension became necessary. Such a shut down is provided for in the forfeiture clause, and such a shut down is permitted without liability on the part of the kindling wood company to take and pay for the slabs if it theretofore gives a thirty-day notice of its intention to shut down, with a reciprocal right to the saw mill company to terminate the contract if the shut down lasts ninety days after notice. It is plain from its terms, that when the parties entered into the contract they contemplated nothing other than the shipment of slabs exclusively to the kindling wood factory at Portland Mills. This is shown by the way the parties themselves interpreted the contract, for in the two instances in which they deviated from its terms by making shipments elsewhere, they first agreed upon the change of shipment, in one instance returning to the contract and resuming operations under its original terms, and in the other, pursuing a practice which resulted in this suit and a finding by the jury that they did not permanently change its terms. As the contract did not contemplate shipments elsewhere than to the factory at Portland Mills, and therefore did not contemplate the loss of a consuming plant by sale and speculation in the slabs, the shut down provided for in the forfeiture clause clearly meant a temporary shut down or suspension, with certain rights moving to each party therefrom.

Such was the situation contemplated by the forfeiture clause, but such is not the situation we find in the evidence. It is conceded that it was known that the kindling wood factory was not being operated. Cessation of operation normally constitutes a shut down, or suspension of business. But the kindling wood company did more than this. It completely dismantled its factory and tore down a large part of it. This was not a shut down, or a suspension of operations, for in suspension is embodied the idea of resumption at some time. It was an end to operations and the closing of business, in that it was a destruction of the very instrumentality by which alone the kindling wood company could carry on its business and carry out its contract. It also prevented the saw mill company from thereafter performing the contract on their part by making impossible further shipments to the only factory to which by their own interpretation of the contract the parties intended shipments to be made; and it deprived them of the fixed means for the consumption of their product, which was the consideration that moved them to enter into the contract.

We are of opinion that the destruction of the factory was a breach by the kindling wood company going to the whole consideration of the contract, giving the saw mill company, the party injured, the right

to rescind the contract or to recover damages for the breach, Oscar Barnett Foundry Co. v. Crowe, 219 Fed. 450, 455, 135 C. C. A. 162; Kauffman v. Raeder, 108 Fed. 172, 47 C. C. A. 278, 54 L. R. A. 247; Howe v. Howe & Owen Ball Bearing Co., 154 Fed. 820, 83 C. C. A. 536; Neenan v. Otis Elevator Co. (C. C.) 180 Fed. 997, 1000, unless the forfeiture clause or some other clause of the contract provides otherwise.

Does the forfeiture clause, which (in the interpretation of the kindling wood company) provides that one party may terminate the contract only after notice by the other of its intention to shut down, contemplate a continuance of the contract after the factory has been torn down? If it does, then we have the singular construction of the clause, as applied to the facts, that the kindling wood company may "shut down" its factory after it has been torn down, and suspend business after business has been ended, and upon giving "thirty days' notice * * * of its *intention* to shut down" a torn down factory, the kindling wood company is relieved of its obligation to further receive and pay for slabs. Carrying this construction a step further to the reciprocal rights of the saw mill company, we would find that the right of that company to terminate the contract accrues only if the "shut down" continues for ninety days after a thirty day notice by the kindling wood company of its intention to shut down a plant already torn down, and to suspend a business already ended. It is scarcely necessary to pursue this further.

Does the contract make provision elsewhere for its continuance after such an act as the destruction of the factory by the kindling wood company? We find none. Thus we have a contract in which the parties did not agree to the thing done, and the case resolves itself into the usual question, under the familiar rule alluded to, whether the thing done is a breach of the contract as made, and, if so, whether it is a breach that justifies its termination. As the essential facts are undisputed, we must hold, that the destruction of the factory constituted a breach of the contract committed by the kindling wood company; that the breach went to the whole consideration; and that, although the saw mill company proceeded to terminate the contract under rights conceived to be theirs under the forfeiture clause, their action, nevertheless, was in legal effect an election to rescind upon a breach by the other party, and ended the contract.

The judgment below is affirmed.

COURTNEY v. CROXTON et al.
In re HURON IRON MINING CO.
(Circuit Court of Appeals, Sixth Circuit. February 6, 1917.)
No. 2931.

1. COURTS ⊜365—RULES OF DECISION—STATE DECISION—LIABILITY OF CORPORATE STOCKHOLDERS.
The liability of the stockholders of a Minnesota corporation for the difference between the par value of the stock issued to them as full paid and the amount they paid therefor, even if not controlled by statute, is a question of local law, on which the decisions of the courts of that state are controlling.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969-971; Dec. Dig. ⊜365.]

2. BANKRUPTCY ⊜145(2)—RIGHTS OF TRUSTEE—STOCKHOLDER'S LIABILITY.
Under the decisions of Minnesota, a stockholder, to whom a corporation has issued full-paid stock on payment of an agreed price less than the par value, is liable for the balance of the par value only to creditors of the corporation, who have given credit to the corporation on the faith of its capital stock, notwithstanding the provisions of Gen. St. Minn. 1913, § 6193, that no corporation shall issue any stock for a less amount to be actually paid in than the par value of those first issued, and such liability cannot be enforced by the trustee in bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 205; Dec. Dig. ⊜145(2).]

3. COURTS ⊜96(1)—COMITY—DECISIONS OF COURT CIRCUITS.
The decision of the Circuit Court of Appeals of another circuit that the trustee in bankruptcy of a corporation could not enforce the liability of a stockholder for the difference between the par value of his stock and the amount paid for it, which the Supreme Court refused to review on certiorari, will by comity be followed in the bankruptcy proceedings in determining the claims of some of the stockholders, including the defendant in the other suit.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 327, 334; Dec. Dig. ⊜96(1).]

4. BANKRUPTCY ⊜345—CLAIMS—PRIORITY—STOCKHOLDERS.
The claims of solvent stockholders of a bankrupt corporation, who are liable for the difference between the amount paid for the stock and the par value only to defrauded creditors, will not be postponed in the bankruptcy proceedings to the payment of other claims.
[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 Western District of Michigan; Clarence W. Sessions, Judge.

In the matter of the Huron Iron Mining Company, bankrupt. Claim by S. W. Croxton and others against Joseph S. Courtney, as trustee in bankruptcy. From an order allowing the claims, without deduction for indebtedness of the claimant to the bankrupt, the trustee appeals. Affirmed.

J. E. Tracy, of Marquette, Mich., for appellant.
H. B. McGraw, of Cleveland, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Appeal from an order allowing claims of stockholder creditors. The Huron Iron Mining Company was incorporated in 1906, under the laws of Minnesota, with a nominal capital stock of $1,500,000, consisting of 15,000 shares, of $100 each. Each of the claimants became a stockholder, and each paid for his stock $10 per share (10 per cent. of its par value), and by express agreement with the corporation received certificates of "full-paid and nonassessable" stock. The corporation later, being in need of money, attempted to borrow $75,000, and asked its stockholders to contribute to the loan in ratable proportions. Each of the claimants furnished his pro rata share of the loan, aggregating $39,000. To secure the loan the corporation gave a mortgage, on April 17, 1913 (due on or before one year), upon its mining lease, which was its only asset of substantial value. Upon its voluntary petition, the mining company was adjudged bankrupt December 19, 1913, by the District Court for the Western District of Michigan. Its mortgaged leasehold was later forfeited by the lessor for nonpayment of royalties and ground rent, and the mortgage security thus entirely failed. Uncontested claims were proved amounting to nearly $70,000. On these claims dividends amounting to 40 per cent. have been paid. The assets being manifestly insufficient to pay even the uncontested claims, the referee in bankruptcy ordered an assessment of $3 per share upon all outstanding stock in the mining company. With the exception of Georger, each of the claimants voluntarily paid his assessment to the trustee in bankruptcy.

In a suit brought by that trustee against Georger in the District Court for the Southern District of New York, to recover the assessment made against him, judgment was entered for defendant, and this judgment was affirmed by the Circuit Court of Appeals for the Second Circuit, upon the ground that the liability for the unpaid purchase price belonged, not to the corporation, but to its creditors, and that the trustee in bankruptcy had no authority to collect the same. Courtney v. Georger, 228 Fed. 859, 143 C. C. A. 257. After the judgment in the Georger Case, and before its affirmance by the Circuit Court of Appeals, the referee made an order allowing the claim of each of the claimants on account of the loan so made to the corporation in 1913. The order, however, provided that claimants be not allowed to share in any dividends until all other creditors should have been paid in full, and that no claimant be allowed to share in any dividends, derived from the stock assessments, nor to share in any dividends whatever until he himself should have paid all lawful assessments against his stock which might be ordered by the bankruptcy court; further assessments evidently being thought necessary. To provide for dividends to claimants when they should become entitled thereto, a fund of upwards of $5,000 was impounded in the hands of the trustee in bankruptcy. On review of the referee's order, the District Judge accepted the reasoning and conclusion of the Circuit Court of Appeals in the Georger Case, and affirmed the referee's order so far as it allowed the claims in question, and reversed it as to the provisions declaring claimants to be indebted to the corporation for the

unpaid portion of their stock and postponing the payment of their claims.

[1] The broad and meritorious question is whether the bankruptcy court had jurisdiction to make the assessments in question upon the stockholders of the bankrupt corporation, and, through its trustee in bankruptcy, authority to enforce the collection of such assessments. The answer to this question depends primarily upon whether the liability in question is a corporate asset or belongs to creditors only; and in determining this question we must look to the laws of Minnesota, including pertinent rules of decision as announced by the Supreme Court of that state. Converse v. Hamilton, 224 U. S. 243, 253, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292; Kiskadden v. Steinle (C. C. A. 6) 203 Fed. 375, 378, 121 C. C. A. 559; In re Jassoy Co. (C. C. A. 2) 178 Fed. 515, 101 C. C. A. 641.

[2] The statutes of Minnesota (G. S. 1913, § 6645 and following) contain elaborate provisions for enforcing the liability of corporate stockholders, through assessments made by the courts of Minnesota upon petition of corporate creditors, assignee or receiver. The Supreme Court of that state has held that the receiver of a corporation can recover *as assets of the corporation* only "what is or was at some previous time, and still is, as to creditors, the property or estate of the corporation"—as property conveyed in fraud of creditors or capital refunded without consideration to stockholders, or the right to recover the balance due on a subscription for stock. Minneapolis Baseball Co. v. City Bank, 66 Minn. 441, 444, 69 N. W. 331, 38 L. R. A. 415; Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310; Basting v. Ankeny, 64 Minn. 133, 66 N. W. 266. And it is settled that the double liability of stockholders under section 3 of article 10 of the Constitution of Minnesota is not to the corporation, but to the creditors collectively, and that the mode and means of the enforcement of such liability are subject to the regulations imposed by the Minnesota statutes. Converse v. Hamilton, supra, and cases cited at 224 U. S. 253, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292.[1]

It has been authoritatively decided that the Minnesota statute confers upon the receiver appointed under creditors' petition the authority, as quasi assignee and representative of the creditors, to maintain an action in other jurisdictions for the collection of the assessments ordered. Bernheimer v. Converse, 206 U. S. 516, 534, 27 Sup. Ct. 755, 51 L. Ed. 1163; Converse v. Hamilton, supra, at 224 U. S. 258, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292. It is also authoritatively settled that bankruptcy proceedings against a Minnesota corporation do not stand in the way of resorting to the statutory method of enforcing double liability of the stockholders under the Minnesota statute, and for the reason that such liability is not a cor-

[1] We have held, following the decisions of the Court of Appeals of Kentucky, that the stockholders' double liability imposed by the statute of that state is not an asset of the corporation, and that the right of action therefor is in the creditors. Alsop v. Conway, 188 Fed. 568, 573, 110 C. C. A. 366.

porate asset. Selig v. Hamilton, 234 U. S. 652, 661, 34 Sup. Ct. 926, 58 L. Ed. 1518.

Unless, then, the liability of petitioners and the other stockholders of the bankrupt corporation to assessment on account of the unpaid purchase price of their stock, to the extent necessary to meet the claims of creditors, differs in its nature from the double liability imposed by the Constitution of Minnesota, in that it is an asset of the corporation itself, it is clear that the Georger Case was rightly decided. Section 6193 of the Minnesota Statutes provides that:

"Save as otherwise specially limited or provided, no corporation shall issue any share of stock for a less amount to be actually paid in than the par value of those first issued."

The so-called "trust fund" doctrine was at an early date rejected by the Supreme Court of Minnesota, and the right of creditors to compel the holders of unpaid-for stock to pay for it, contrary to their actual agreement with the corporation, held to rest only on the ground of fraud, viz. in misrepresentation as to the actual amount of the corporate capital on the faith of which persons have dealt with the corporation and given it credit. In such case the corporation is held never to have had any cause of action against the stockholder, and as between the latter and the corporation, the agreement for the issue of the stock at less than its value was held valid. Therefore equity will enforce payment for such stock in favor of those creditors, and those only, who have relied on or can fairly be presumed to have relied on, the stock's representing actual capital; and in enforcing this principle it makes "no difference whether the stock issued as paid up is bonus stock, pure and simple, or whether it was sold for cash for less than its par value, or for property at a gross overvaluation." Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28, 33, 67 N. W. 652; Hospes v. Northwestern Mfg. & Car Co., 48 Minn. 174, 192, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637, and following; Northwestern Railroader v. Prior, 68 Minn. 95, 98, 70 N. W. 869; Wallace v. Carpenter, etc., Co., 70 Minn. 321, 327, 73 N. W. 189, 68 Am. St. Rep. 530, and following.[2]

The trustee in bankruptcy contends, however, that the liability of the stockholder claimants in the instant case was not created by statute, but depends upon the principles of general law, and that therefore the decisions of the Minnesota courts are not controlling. True, the opinions in the cases just cited have not usually referred to the statutes or Constitution as involved; but the equivalent of so much of section 6193 as we have quoted herein seems to have existed and to have been applicable to the situation, and it is to be presumed that the courts, in determining the questions involved, were not unmindful of it. Indeed, in the Hospes Case, 48 Minn. 196, 50 N. W. 1120 (15 L. R.

[2] There seems to be a presumption (rebuttable, however) that the creditor relied upon the subscription and the representation that the stock was fully paid. Hospes v. Northwestern Co., supra, 48 Minn. 197, 50 Minn. 1121 (15 L. R. A. 470, 31 Am. St. Rep. 637); Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 274, 139 N. W. 606, 43 L. R. A. (N. S.) 706.

A. 470, 31 Am. St. Rep. 637), the court referred to the law of 1873 (which has apparently the substance of the clause of section 6193 which we have quoted) as not of itself "sufficient to create an implied contract, contrary to the actual one, that the holder should pay for his stock"; and in Wallace v. Carpenter Co., supra, a different statute was construed as forbidding the issue of corporate stock "as fully paid for when such was not the fact." But if Randall Co. v. Sanitas Co., supra, is to be accepted as an adjudication that the doctrine of the Hospes and other cases cited did not involve a construction of statute or Constitution, it yet remains that the corporation in question is the creature of the Minnesota statute alone, and thus the question whether the stockholders therein are liable for the unpaid part of their stock is a local question, involving the public policy of the state, and so is governed by the pertinent rule of decision of the Supreme Court of Minnesota. Kiskadden v. Steinle, supra; In re Jassoy Co., supra. And see Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Royal Arcanum v. Green, 237 U. S. 531, 543, 35 Sup. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771.

[3] The decision of the Circuit Court of Appeals of the Second Circuit, in Courtney v. Georger, was made after full consideration of the question involved, including the Minnesota decisions. It was rendered upon the very concrete question involved here; it was between complainant and one of the defendants here, and became as to that defendant an adjudication. A petition for the review of that decision by certiorari was denied by the Supreme Court. 241 U. S. 660, 36 Sup. Ct. 448, 60 L. Ed. 1226. The case is peculiarly one for the application of the doctrine of comity. We are therefore of opinion that the bankruptcy court rightly held that the stockholder claimants were not liable to the bankrupt corporation, or to its trustee in bankruptcy, for the unpaid portions of their stock. The order affirming the allowance of the claims was therefore right, for claimants concededly loaned to the corporation the moneys for which the claims are made.

[4] If the trustee in bankruptcy had the right to collect present or future stock assessments, we should probably deem it our duty to make some provision, as was done in Kiskadden v. Steinle, for postponing payment of the claims in question. But neither the bankruptcy court nor the trustee can have anything to do with such collection; and there is no suggestion that claimants are not financially responsible. There thus seems no occasion for postponing the payment of appellees' claims, or for impounding any part of the funds distributable to creditors. It is conceded that appellees are not entitled to share in the moneys derived from the stock assessments.

The order of the District Court will be construed, in connection with the opinion, as so intended, and, as thus construed, is affirmed, with costs.

## KALLOCH v. HOAGLAND.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1917.)

No. 2844.

1. APPEAL AND ERROR ⊂=237(5), 268(1), 694(1), 719(10)—PRESENTING QUESTIONS BELOW—WANT OF EVIDENCE.

Where there was no request to direct a verdict, the charge is not contained in the record, and no exception was taken, nor error assigned to the ruling on a motion for new trial, defendant cannot urge the insufficiency of the evidence to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1302, 1596, 1604, 2910, 2915, 2979, 2982, 3490; Dec. Dig. ⊂=237(5), 268(1), 694(1), 719(10).]

2. PHYSICIANS AND SURGEONS ⊂=18(9)—ACTION FOR MALPRACTICE—EVIDENCE—SUFFICIENCY.

In an action against a physician for malpractice in the treatment of a broken leg, evidence *held* sufficient to take to the jury the question whether defendant failed to exercise proper care and skill in the treatment.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 44; Dec. Dig. ⊂=18(9).]

3. PHYSICIANS AND SURGEONS ⊂=14(4)—DEGREE OF SKILL REQUIRED.

A physician is liable for negligently failing to exercise the care and skill ordinarily possessed by surgeons practicing in that locality and under the circumstances, in the light of modern advancements and learning.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 26, 27; Dec. Dig. ⊂=14(4).]

4. ACCORD AND SATISFACTION ⊂=25(1)—JUDGMENT ⊂=948(1)—PAYMENT ⊂=59—RELEASE ⊂=45—ADMISSIBILITY OF EVIDENCE—PLEADING—DEFENSES.

Under Shannon's Code Tenn. § 4627, providing that the plea shall state the facts relied on as a defense, except as thereafter provided, and section 4636, providing that, whenever a general plea is filed, defendant shall give notice of his real defenses, and no matter of defense of which notice is not given shall be given in evidence or relied on, evidence that plaintiff, who was suing a physician for malpractice, had settled with his employer for the injuries received, which was offered to show accord and satisfaction, payment, release, or former recovery, is inadmissible, where those defenses were not pleaded.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 151, 153; Dec. Dig. ⊂=25(1); Judgment, Cent. Dig. §§ 1787, 1789, 1791, 1792; Dec. Dig. ⊂=948(1); Payment, Cent. Dig. § 143½; Dec. Dig. ⊂=59; Release, Cent. Dig. § 87; Dec. Dig. ⊂=45.]

5. COURTS ⊂=347—RULES OF DECISION—STATE STATUTE—ADMISSIBILITY OF EVIDENCE.

Under the Conformity Act (Act June 1, 1872, c. 255, § 5, 17 Stat. 197 [Comp. St. 1913, § 1537]), Shannon's Code Tenn. §§ 4627, 4636, regulating pleas and the evidence admissible thereunder, is controlling in the federal courts.

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

6. EVIDENCE ⊂=162(2)—BEST EVIDENCE—JUDGMENT.

The judgment itself and the judgment record is the best evidence of a judgment, and parol evidence concerning it is incompetent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 537; Dec. Dig. ⊂=162(2).]

7. APPEAL AND ERROR ⊜854(4)—REVERSAL—WRONG REASON FOR COURT'S RULING.

A judgment will not be reversed for the exclusion of evidence which was inadmissible, though the reason assigned by the trial court was inaccurate or incomplete.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3413–3416; Dec. Dig. ⊜854(4).]

8. PHYSICIANS AND SURGEONS ⊜18(7)—ACTION FOR MALPRACTICE—EVIDENCE —ADMISSIBILITY.

In an action against a physician for malpractice, the admission of testimony as to a deformity which was not specifically alleged in the declaration was not reversible error, where it was admitted to show lack of skill and care, for which it was competent, and it appeared that the deformity had been corrected by subsequent operations, so that no recovery was asked therefor.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 40, 41; Dec. Dig. ⊜18(7).]

9. APPEAL AND ERROR ⊜1051(3)—HARMLESS ERROR—ADMISSION OF EVIDENCE —FACT OTHERWISE ESTABLISHED.

The admission of evidence as to a fact not alleged in the declaration is harmless, where similar evidence had been more than once introduced without objection, and defendant admitted that he knew the condition existed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4164, 4167; Dec. Dig. ⊜1051(3).]

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

Action by F. G. Hoagland against P. C. Kalloch. Judgment for plaintiff, and defendant brings error. Affirmed.

W. D. Kyser, Asst. U. S. Atty., of Memphis, Tenn., for plaintiff in error.

W. P. Armstrong, of Memphis, Tenn., for defendant in error.

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

KNAPPEN, Circuit Judge. The defendant in error (who was plaintiff below and will be so styled here) suffered a fracture of the femur, about four inches above the knee, and was taken to the Marine Hospital at Memphis, Tenn., where the care and treatment of the fracture were undertaken by plaintiff in error, whom we shall call defendant. Plaintiff brought suit for damages occasioned by defendant's alleged negligent treatment of the fracture, whereby the injured leg was materially shortened and deformed, necessitating further operation, and entailing expense, suffering, and loss of time. There was a trial by jury, resulting in verdict and judgment for plaintiff. Defendant's motion for a new trial was overruled. But three of the errors assigned are relied upon.

[1, 2] 1. It is urged that there was no evidence to support the verdict. There was no request to direct verdict; the charge to the jury is not in the record, no exception was taken thereto, and presumably defendant was satisfied with it; error is not assigned upon the denial

of motion for new trial. In these circumstances, defendant is not entitled to have the evidence reviewed under this writ. But for the purposes of this opinion, treating the motion for new trial as raising the question of entire lack of basis for judgment, and, under our rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii), disregarding the lack of assignment, we may say that, in our opinion, the record was such as to require the submission of the case to the jury.

By the undisputed testimony the fracture was simple, as distinguished from compound; it was not oblique, but was transverse, with "a slight ripping off on the outside of the upper fragment." The fracture was never reduced, the two ends of the bone being allowed to lap by in the neighborhood of two inches and to unite in that position. At the end of seven weeks plaintiff left the hospital, with the leg materially shortened and the foot turned inward.

The burden was, of course, upon plaintiff of showing defendant's want of reasonable care, skill, and diligence in his treatment of the case, and that the injuries complained of proximately resulted from a failure to exercise such care, skill, and diligence; and no presumption of such failure arises from the fact that the treatment was not successful. But the evidence given tended to sustain the burden resting on plaintiff.

In the treatment of the fracture Buck's extension method was used. While it was conceded that Buck's treatment was recognized and accepted by the profession as suitable and proper in the treatment of fractures of this nature, and while there was competent testimony that by reason of the admittedly swollen and bruised condition of the muscles it was not feasible to reduce the fracture at once, that there was no recognized treatment for reducing the swelling, that the fact that the fracture was not reduced could not be determined without an X-ray picture, that the apparatus at the hospital was out of order, that defendant's treatment was proper under the circumstances existing, and that in the normal case there is some shortening of the leg, there was, on the other hand, testimony on the part of competent witnesses that a fracture of this nature should be reduced immediately if possible (otherwise, as soon as possible), that such swelling as would interfere with reducing the fracture usually ends in about two weeks, that local treatment (by ice packs or otherwise) is recognized and feasible for the purpose of reducing swelling, that in fact the swelling in this case did leave in about two weeks, that the object of the Buck's extension treatment is to reduce the fracture, that the weights used by defendant were insufficient, that bone fragments should not be allowed to lap by, that the foot should not normally have been turned inwards, that the extent of shortening shown here was abnormal, that an X-ray would have shown that the fracture was not reduced, and that when plaintiff was discharged an external examination would show that the ends of the fractured bone had lapped by. Defendant admitted that he could have had, within a week's time, authority to get an X-ray picture by asking for it.

[3] There was express and competent medical testimony that the Buck treatment employed was not properly used. There was substan-

tial evidence tending to show that defendant did not exercise the care and skill ordinarily possessed by surgeons practicing in that locality and under the circumstances in question, in the light of modern advancement and learning on the subject; and such negligent failure is actionable. Harris v. Fall (C. C. A. 7) 177 Fed. 79, 100 C. C. A. 497, 27 L. R. A. (N. S.) 1174; Whitesell v. Hill, 101 Iowa, 629, 70 N. W. 750, 37 L. R. A. 830. It seems that the Marine Hospital in question was a government institution; but not only is the record not such as to permit us to consider whether this fact alters the rule of liability, even if defense on this ground had been made, as it was not, but upon the argument here such defense was disclaimed.

2. It appeared that after plaintiff had left the Marine Hospital he underwent further operations to repair the results of defendant's alleged negligent treatment. These new operations included an incision to the bone at the place of fracture, a breaking of the false joint, the reduction of the fracture, the putting on of metal plates to hold the bone in position until it should knit, another surgical operation to remove the plates, and still another to relieve from the pus formation incident to infection. Upon the trial plaintiff was asked by defendant's counsel if he did not "institute suit to recover from the company, for whom he was working, for the pain and suffering." The question was excluded upon the assigned ground that plaintiff could recover from defendant for "such pain and suffering as the doctor's negligence or inattention caused." Defendant's counsel then stated that he wished to "offer the proof that such suit was instituted, and a recovery had for the various operations, and a settlement was made."

[4] Defendant's contention is that, if plaintiff settled with his employers for the pain and suffering caused by the various operations resulting from defendant's negligent treatment, defendant was released to that extent. We may assume that, had there been offer of competent evidence, admissible under the pleadings, to show such recovery and settlement, it should have been admitted. But defendant is not in position to complain of the ruling. Treating the offer as one of accord and satisfaction, or of payment, release, or former recovery, the proposed testimony was inadmissible, because not pleaded. Shannon's Code, §§ 4627 and 4636; Stanley v. McKinzer, 7 Lea (Tenn.) 456, 457; Harvey v. Sweasy, 4 Humph. (Tenn.) 450; Gossett v. Railroad, 115 Tenn. 378, 391, 89 S. W. 737, 1 L. R. A. (N. S.) 97, 112 Am. St. Rep. 846.

[5, 6] Under the Conformity Act (Act June 1, 1872, c. 255, § 5, 17 Stat. 197 [Comp. St. 1913, § 1537]) the state practice in this respect is controlling in the federal courts. Knight v. Illinois Central R. R. Co. (C. C. A. 6) 180 Fed. 368, 103 C. C. A. 514. If the offer can be construed as including an actual judgment, the best evidence thereof, and of what the recovery included, would be the judgment itself and whatever judgment record there was. There was no offer of that nature; and as the record stood the parol evidence offered was incompetent.

[7] The evidence being inadmissible, reversal will not be had, even if the reason assigned by the trial court was inaccurate or incomplete.

[8, 9] 3. Complaint is made of the admission of the testimony of plaintiff's wife that plaintiff's foot was turned inward at the time of his discharge from the Marine Hospital, and against an objection that such condition was not charged in the declaration. We think this refusal worked no reversible error. True, this particular deformity was not specifically alleged in the declaration; but it was competent evidence as showing lack of skill or care, and such purpose was stated by plaintiff's counsel when the objection was made. No permanent injury was claimed to result from it, as the resetting of the fractured femur seems to have corrected the deformity in question. Moreover, proof that the foot was left in the condition stated had already been more than once introduced, and without objection. Defendant admitted that he knew the condition existed.

The judgment of the District Court is affirmed, with costs.

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## PENNSYLVANIA R. CO. v. GLAS.

(Circuit Court of Appeals, Third Circuit. January 4, 1917. Rehearing Denied February 17, 1917.)

No. 2171.

1. APPEAL AND ERROR ⊜909(1)—PRESUMPTIONS—MATTERS NOT IN RECORD.
Where the position of an old crack in a railroad truck, the breaking of which derailed the train and killed a brakeman, was indicated to the jury by a witness, and the record does not show whether the crack was where it could be seen or not, but does show that there was something before the jury, with respect to its location, not in the record, it will be presumed that such matter, not in the record, was sufficient to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675; Dec. Dig. ⊜909(1).]

2. TRIAL ⊜296(3)—INJURIES TO SERVANT—INSTRUCTIONS—NEGLIGENCE.
Where the court began its charge with a clear statement that the action was based on negligence, and that plaintiff could not recover unless he showed negligence which was the proximate cause of the injury, that the action was brought under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657-8665]), which gave an action for injuries resulting from the negligence of the officers or employés of the carrier, or by reason of any defect due to its negligence in its cars, a sentence following thereafter, that to entitle plaintiff to recover the jury must find negligence on the part of the defendant, either negligence on the part of its officers or employés in the operation of the train, or some defect in the cars, manifestly meant that there must be found either negligence of employés or negligence resulting in a defect in the car, and therefore was not misleading, as permitting a recovery for the death of a brakeman caused by a defect in the car not due to negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. ⊜296(3).]

3. TRIAL ⊜234(7)—INJURIES TO SERVANT—CHARGE—PRESUMPTION OF NEGLIGENCE.
Where the attorney for plaintiff in an action for the death of a railroad brakeman had argued to the jury on the presumption of negligence aris-

ing in the case between the carrier and the passenger from a derailment of the train, a portion of the charge stating that this was not a case where plaintiff's case rested exclusively on such a presumption, that the plaintiff did not ask that the presumption exactly be raised in his favor, but undertook to furnish testimony from which he asked the jury to infer that as a matter of fact there was negligence, was not erroneous, as misleading the jury to believe that the case might rest partially on the presumption, the first part referring to the argument of the attorney and being held surplusage, and the latter part, though not clear in the expression "exactly raised," being clear that testimony was submitted from which the jury was asked to infer negligence as a matter of fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 537; Dec. Dig. ⟸ 234(7).]

4. TRIAL ⟸252(11)—INJURIES TO SERVANT—CHARGE—APPLICABILITY TO EVIDENCE.

In an action for the death of a brakeman, caused by the derailing of a train on which he was riding, evidence that the arch-bar on a truck which broke had a crack large enough to weaken it, that the condition of the crack indicated that it had existed three or four weeks, and that the position of the crack on the bar was shown to the jury, so that they could determine whether it could have been discovered by proper inspection, was sufficient to warrant a charge submitting the issue whether reasonable inspection of the cars would have discovered the defect in the arch-bar and whether defendant was negligent in that respect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 603; Dec. Dig. ⟸ 252(11).]

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Action by Stella Glas, administratrix of the estate of Clarence Glas, deceased, against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John Heron, of Pittsburgh, Pa., for plaintiff in error.

D. F. Anderson, of Youngstown, Ohio, for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an action under the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, against the defendant railroad company for negligently causing the death of the plaintiff's intestate. The verdict was for the plaintiff, and on judgment the defendant brought this writ of error.

The plaintiff charged the defendant with negligence, (1) in permitting the derailment of a train, (2) in operating a car with a truck in a defective condition, and (3) in failing to inspect the arch-bar of the truck. Being without evidence upon the matter of inspection, and failing to induce the court in this case between master and servant to charge the presumption of negligence arising from the fact of derailment as in a case between passenger and carrier, the case was mainly tried and submitted upon the remaining allegation of the defendant's negligence in operating a car with a defective truck after it had time and opportunity to learn of it.

It was conceded that the intestate was injured while a brakeman on one of the defendant's freight trains; that at the time of his injury he was employed in interstate commerce; and that his death was caused by the derailment of a portion of the train upon which he was riding. The evidence tended to show that the derailment was due to the breaking of an arch-bar of one of the trucks; that the arch-bar was defective; that the defect had existed for a long time and should have been known to the defendant; and that its negligence in operating a car with such defective arch-bar was the proximate cause of the injury.

[1] An arch-bar is a steel bar or truss several feet long, about five inches wide and one inch thick. It is connected with the truck and supports the car. A broken arch-bar, alleged to be the one that caused the derailment, was found after the accident. It was discovered, that at the point at which it broke, there was an old break or crack, extending across its entire breadth and one-half of its depth, showing by its rusted condition that it had been there three or four weeks. It does not appear in the record whether the crack was on the outside or the inside of the arch-bar when in position upon the truck, and therefore, the record does not show whether, upon inspection, it could be seen. The arch-bar, however, was described to the jury and the position of the crack was indicated to them by the witness who discovered it. In the course of his testimony, he said:

"Right where it came up like this (indicating), and then it went out over the box; it was cracked right in the end *there*, in the short bend."

Just how much was before the jury that is not before us with respect to the exposed or hidden location of the break, the record leaves in doubt, but that there was something before the jury that is not before us, there is no doubt. We must therefore assume, that the matter indicated to the jury, though not disclosed by the record, was such as to support the verdict. Wagner v. Standard Sanitary Mfg. Co., 244 Pa. 310, 91 Atl. 353.

Although the assignments of error are addressed solely to the charge, the plaintiff in error urges as error the refusal of its motion for a directed verdict. Such a motion was made and refused, but to the court's action neither exception was noted nor error assigned. We are therefore not inclined to review the matter except as it incidentally arises in connection with one of the assignments specifying error in the charge.

While of course the question raised by the assignments of error is primarily whether the court erred in what was said to the jury upon the law, the real question arising out of this peculiar record, is not so much whether the law was erroneously stated, as it is whether from the law as stated, though correctly stated, the jury nevertheless drew an erroneous impression.

The assignments of error are directed to isolated passages in the charge, some of which, when standing alone, appear to be erroneous, but when read with the context and considered with reference to what transpired at the trial, are not, in our opinion, affected by error.

[2] The first error assigned is to that part of the charge in which the court said:

"Now then, you must find, in order that the plaintiff should recover, that there was negligence on the part of the defendant company, either negligence on the part of its servants or employees in the operation of the train, *or some defect in the cars, rails or appliances connected with the transportation of the train which resulted in the accident and death.*"

It is the last phrase of this sentence that is specified as error. If separated from the rest of the charge and permitted to stand by itself, then certainly it is an erroneous statement of the law, for the defendant railroad company was not liable to the plaintiff's intestate for a defect in the cars, *unless* that defect was due to its negligence. But what was said in the rest of the charge? The court began with a very clear statement of the law by saying:

This is "an action of trespass. An action of trespass is based on negligence and *negligence alone*, and in order for the plaintiff to recover *it is the duty of the plaintiff to show* that two elements exist and co-exist; that is, *that the defendant company was negligent* and that *the injury complained of resulted from that negligence*, because there may be negligence without injury, and, on the other hand, there may be injury that was not caused by negligence. So that *these two elements of negligence and the injury* as the proximate resulting cause from the negligence *must exist together* in order to entitle the plaintiff to recover."

The court then stated that the action was brought under the Federal Employers' Liability Act, giving the substance of the act and showing in the language of the act that an action is afforded for "injury or death resulting in whole or in part from the *negligence* of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, *due to its negligence in its cars*," engines, etc. The court then reviewed the testimony upon which the plaintiff's negligence was based, and continued with the offending paragraph:

"Now then you must find, in order that the plaintiff should recover, that *there was negligence* on the part of the defendant company, *either* negligence on the part of its servants or employees in the operation of the train, *or* some defect in the cars, rails or appliances connected with the transportation of the train which resulted in the accident or death,"

manifestly meaning, if not clearly saying, that the jury must find that there was negligence on the part of the defendant company, that is, "*either* negligence on the part of its servants or employees in the operation of the train, *or* (negligence in relation to) some defect in the cars, rails or appliances," as previously stated in the words of the act. Considering this expression in connection with the preceding instruction upon negligence as the ground of the plaintiff's action and the plaintiff's duty to prove it, and also in connection with the precision and particularity with which the court subsequently submitted the question of negligence to the jury, we are of opinion, after an adequate examination of the testimony and the charge, that this phrase cannot be construed alone, and when construed with the context, does not constitute an erroneous statement of the law, or such a statement of the law, though inaptly expressed, as would mislead the jury.

[3] The second assignment of error likewise refers to selected sentences of the charge. These sentences are as follows:

"*This is not a case where the plaintiff's case rests exclusively on the presumption that might arise from the mere fact that a train of loaded cars was derailed.* There might arise a presumption under the Act of Congress that the defendant was negligent, and thus shift upon the defendant the burden of disproving negligence and showing that as a matter of fact at the time of the accident, the defendant was exercising ordinary care or such a high degree of care as was necessary in order to protect the train. The plaintiff does not ask that that assumption *exactly* be raised in its favor, but *undertakes to furnish certain testimony* from which they ask you to infer that, *as a matter of fact* there was negligence as shown in the testimony adduced, and *that* I submit to you as a question of fact."

The defendant urges that the expression, "This is not a case where the plaintiff's case rests *exclusively* on the presumption that might arise from the mere fact that a train of loaded cars was derailed," led the jury to believe that while the case does not rest *exclusively* on the presumption arising from derailment, yet it rests *partially* upon such a presumption, and maintains that as this is a case between master and servant and not between passenger and carrier, no such presumption exists in any degree, and therefore there is error in the instruction. Such an interpretation might readily be put upon the expression, if no reason for its presence were known beyond what is disclosed by its words, but the fact is that just preceding the charge, counsel for the plaintiff had made an elaborate argument in an endeavor to raise in this case between master and servant the presumption or an approach to the presumption of negligence arising from a derailment in a case between passenger and carrier. That law was evidently denied the plaintiff, and in the course of his charge the trial judge, having the argument in mind, excluded it from the case by saying:

"This is not a case where the plaintiff's case rests exclusively on the presumption that might arise from the mere fact that a train of loaded cars was derailed,"

clearly meaning that this is not a case that rests upon such a presumption as had just been argued, and such as prevails in a case between passenger and carrier. After saying that this is *not* such a case in which the plaintiff might rely exclusively upon such a presumption, the trial judge proceeded to tell the jury what then the plaintiff must rely upon, by saying:

"The plaintiff does not ask that that presumption *exactly* be raised in its favor, but undertakes to furnish certain testimony from which they ask you to infer that, as a matter of fact, there was negligence as shown by the testimony adduced."

Just what the learned judge meant by saying that the plaintiff does not ask that that presumption *exactly* be raised in its favor, we do not know, and it is fair to say that the jury did not know, and, not knowing, we may assume they were not misled. But we know that in the same sentence the judge left no doubt as to what he submitted to the jury, namely "certain testimony" from which the jury were allowed to infer as a matter of fact that there was negligence. He then cautioned the jury that unless they found negligence on the part of the defendant and that the derailment of the train causing the death was due to that negligence, the plaintiff could not recover, concluding with the

customary instructions with respect to burden of proof, preponderance of evidence and proximate cause. We are of opinion, that of these two isolated phrases, one was surplusage, and the other was inaptly expressed, and that neither conveyed to the jury an erroneous impression of the law.

[4] The remaining part of the charge excepted to is that in which the court, referring to the evidence of the position, size and duration of the break in the arch-bar, submitted to the jury the question "whether or not reasonable inspection of the cars and the means of transportation would have discovered such defect, and whether or not, if that condition existed, not having discovered it and not having remedied it, you would say that the defendant was negligent in that respect."

The complaint of the defendant is that there was no testimony upon which that instruction could be based, and that, therefore, the court erred in giving the instruction and in not withdrawing the case from the jury, upon authority of Pennsylvania R. R. Co. v. Knox, 218 Fed. 748, 134 C. C. A. 426. The very substantial difference in point of fact between the case cited and the case at bar is, that in the former, though the alleged defect was similarly an old crack at the point at which a break occurred in an appliance, there was no evidence that the crack constituted a defect contributing to the accident, that it was large enough to be discovered by inspection, or that it was old enough to have afforded an opportunity of discovery, that is, there was no evidence of negligence; while in the case before us, there was evidence of the size of the crack, from which the jury might find a defect that weakened the arch-bar; a condition of the crack indicating that it had existed for three or four weeks, a sufficient time for discovery; the position of the crack upon the arch-bar indicated to the jury, from which they might determine the opportunity and therefore the duty of the Railroad Company to learn of the defect during the time afforded. As negligence of this character was charged in the pleadings and as there was sufficient evidence, if believed by the jury, from which negligence of this character might be found, we are of opinion that the instruction was not error.

After a very careful examination of the entire charge, we find nothing in it giving rise to a clear conviction on our part that error was committed, nor are we at all convinced that from certain of its doubtful expressions erroneous impressions of the law were conveyed to the jury.

The judgment below is affirmed.

In re MOSSLER CO.

CHICAGO TITLE & TRUST CO. v. CENTRAL TRUST CO. OF ILLINOIS.

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

No. 2343.

1. BANKRUPTCY ⊂=198—LANDLORD'S LIEN—DISSOLUTION.

The lien obtained within four months of bankruptcy, under a general distress warrant levied by the landlord pursuant to an express grant of such right in the lease, is not one obtained through legal proceedings made solely by virtue of the statutory right to distrain, and so is not dissolved, under Bankr. Act July 1, 1898, c. 541, §§ 67d, 67f, 30 Stat. 564 (Comp. St. 1913, § 9651), respectively, declaring that liens given or accepted in good faith, and not in fraud of the act, and for a present consideration, which shall have been recorded, if necessary, shall not be affected by the act, and that all levies, judgments, and attachments obtained through legal proceedings against an insolvent at any time within four months prior to the filing of the petition in bankruptcy shall be deemed null and void in event of adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 289, 296–318; Dec. Dig. ⊂=198.]

2. LANDLORD AND TENANT ⊂=2—LEASES—LIEN RESERVED—WHAT LAW GOVERNS.

The right created by the distress and lien clauses in a lease is governed by the law of the state in which is located the demised property.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. ⊂=2.]

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS ⊂=184—EXECUTORS AND ADMINISTRATORS ⊂=264(1)—RIGHTS OF—INSOLVENCY—ASSIGNEE—RIGHTS OF.

Under the Illinois Law, neither an administrator nor an assignee in insolvency stands in any better position than the decedent or assignor with respect to one holding a lien, legal or equitable, and a mortgage or vendor's lien good against one is equally valid against the other.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 555–571; Dec. Dig. ⊂=184; Executors and Administrators, Cent. Dig. §§ 997, 1001–1009, 1011; Dec. Dig. ⊂=264(1).]

4. LANDLORD AND TENANT ⊂=246(5)—LEASES—LIEN.

Where an Illinois lease declared that the lessor should have the right at all times to distrain for rent due, and a first and valid lien on all property of the lessee, including after-acquired property, whether exempt or not, the lease is without efficacy as a chattel mortgage or equitable lien until possession is taken, because of the indefiniteness of the description of the property sought to be covered.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 998; Dec. Dig. ⊂=246(5).]

5. FRAUDULENT CONVEYANCES ⊂=138—LIENS—VALIDITY.

Where an Illinois lease reserved a lien to the landlord on all the property of the lessee, including a stock in trade, which the lessee impliedly has the right to dispose of as he pleases, the lien must be deemed fraudulent and invalid.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 438, 443, 448–452; Dec. Dig. ⊂=138.]

6. LANDLORD AND TENANT ⊂=265(1)—LIENS—SEIZURE—VALIDITY.

As an express power to take possession of the property covered by a fraudulent mortgage will, under the Illinois Law, protect a mortgagee

who has actually seized the property, a lessor, having an express right under the lease to distrain upon all of the property of the lessee, is protected after distress, though the lien reserved by the lease is fraudulent and invalid.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1062, 1064–1066, 1070–1074; Dec. Dig. ⊂⊃265(1).]

7. BANKRUPTCY ⊂⊃165(3)—LIENS—PREFERENCES.

Whether a debt secured by a lien created within four months of bankruptcy was pre-existing, within Bankr. Act, § 60b (Comp. St. 1913, § 9644), providing for the avoiding of such liens where the creditor had reasonable cause to believe a preference was effected, must be determined as of the date of the creation of the lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260; Dec. Dig. ⊂⊃165(3).]

8. BANKRUPTCY ⊂⊃165(3)—LIENS—DEBT.

Where a lease reserved to the lessor the right to distrain for rent due, declaring that the lessor should have a lien on all property of the lessee, rent for which the levy was made was a pre-existing debt under the Bankruptcy Act; the lease giving only a contractual right, and the lien not being created until the levy of a distress warrant.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260; Dec. Dig. ⊂⊃165(3).]

9. BANKRUPTCY ⊂⊃303(1)—LIEN—VACATION.

Under Bankr. Act, § 60b, declaring that where a bankrupt, while insolvent, shall have procured or suffered judgment to be entered against him, or have made a transfer of any of his property, within four months of the filing of the petition, or after the filing thereof and before adjudication, and the judgment or transfer operates as a preference, and the person receiving it or to be benefited thereby shall have reasonable cause to believe that the enforcement of the judgment or transfer will effect a preference, it shall be voidable by the trustee, the lien of a lessor, perfected by the levy of a distress warrant within four months of the filing of a petition in bankruptcy, cannot, though the debt was a pre-existing one and the lessee was insolvent at the time of levy, be set aside, in the absence of evidence showing that the lessor had reasonable cause to believe a preference was being given; the burden of proof being upon the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 453, 459; Dec. Dig. ⊂⊃303(1).]

10. TRIAL ⊂⊃368—POWER OF COURT—AMENDMENT.

Though a case was heard on stipulated facts, the trial judge may, in his discretion, permit additional proof, and amendment of the pleadings in conformity therewith.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 880; Dec. Dig. ⊂⊃368.]

11. BANKRUPTCY ⊂⊃468—APPEAL—DETERMINATION—REMAND.

A few days before the filing of a petition in bankruptcy, the lessor of the bankrupt levied a distress warrant on the bankrupt's goods, and after bankruptcy filed a petition for payment in full out of the proceeds. The petition was opposed by the trustee, and the matter was heard on stipulated facts. The trustee's motion for leave to introduce evidence as to the lessor's knowledge that the transfer operated as a preference was denied, evidently because the court which denied the petition of the lessor on other grounds deemed such proof unnecessary. *Held* that, as the court might, in its discretion, permit additional proof, and amendment of the pleadings in conformity therewith, the lessor is not entitled on appeal, though the decree was erroneous, to a decision directing payment in full

of its claim out of the proceeds, but the cause should be remanded, with leave to the trustee to renew its motion to amend the answer and offer additional proof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 930; Dec. Dig. ⊜468.]

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

In the matter of the bankruptcy of the Mossler Company. Petition by the Chicago Title & Trust Company, a corporation, as trustee, opposed by the Central Trust Company of Illinois, a corporation, trustee in bankruptcy. From a decree affirming an order of the referee denying the petition, petitioner appeals. Reversed and remanded, with directions.

Julius Moses, of Chicago, Ill., for appellant.

Clarence J. Silber, of Chicago, Ill., for appellee.

Before MACK, ALSCHULER, and EVANS, Circuit Judges.

MACK, Circuit Judge. Appellant, assignee of a lessor, levied a distress warrant four days before a petition in bankruptcy was filed against the lessee which was insolvent at and after the levy. The lease contained the following provision:

"Said party of the second part further covenants and agrees that said party of the first part, or the representatives or assigns of said party, shall have, at all times, the right to distrain for rent due, and shall have a first and valid lien upon all personal property of said party of the second part, which they now have or own or may hereafter acquire or have an interest in, whether exempt by law or not, as security for the payment of the rent herein reserved."

Subsequently by agreement the goods were sold and lien, if any, transferred to the proceeds. Thereupon appellant filed its petition for payment in full out of the proceeds. The answer denied that appellant was entitled thereto.

The matter was heard on a stipulation of facts; the order of the referee, denying payment in full and allowing only a general claim, was affirmed by the District Judge.

[1] 1. In Re Robinson and Smith, 154 Fed. 343, 83 C. C. A. 121, this court held that the lien obtained within four months of bankruptcy under a distress warrant, levied pursuant to an express grant of such a right in and by the lease, was not obtained through legal proceedings, and, unlike the levy made solely by virtue of the statutory right to distrain, as in United Motors Chicago Company, 220 Fed. 772, 136 C. C. A. 378, was not to be dissolved under Bankruptcy Act, §§ 67d and 67f. We adhere to that decision for the reasons therein stated.

[2, 3] 2. The nature of the right created by the distress and lien clauses of this lease is governed by Illinois law. In Illinois neither an administrator (Sumner v. McKee, 89 Ill. 127), nor an assignee in insolvency (Hooven v. Burdette, 153 Ill. 672, 39 N. E. 1107), stands in any better position than the decedent or assignor respectively, as against one holding a lien, legal or equitable, vested or inchoate; a mortgage or vendor's reserved title, good as against the one, is held to be equally

valid as against the other. In re Sturtevant, 188 Fed. 196, 110 C. C. A. 68.

[4] If, then, in such a lease, the distress or lien clause of itself created any lien or equity, vested or inchoate, it would be enforceable as against the lessee's administrator in possession of the property. But the decision in Borden v. Croak, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23, in favor of the administrator necessarily determines that in Illinois, unlike Georgia (Henderson v. Mayer, 225 U. S. 631, 32 Sup. Ct. 699, 56 L. Ed. 1233), no such lien or equity is thereby created. The clauses in the Borden lease were similar to those involved in this case, except that here after-acquired property was expressly included. Under that decision, it is clear that, until possession was taken, the lease, as a chattel mortgage or equitable lien, was without efficacy because of the indefiniteness of the property sought to be covered thereby.

[5, 6] 3. Furthermore, as such a lease, by including all property, covers stock in trade, which the lessee impliedly has the right to dispose of as it pleases, it must be deemed fraudulent and invalid. Read v. Wilson, 22 Ill. 377, 74 Am. Dec. 159. In Illinois, however, contrary to the great weight of authority, an express power to take possession of the property covered even by a fraudulent mortgage will protect the mortgagee who has actually seized the property. Read v. Wilson, supra. And in the instant case the express right to distrain confers such a power upon the lessor. His lien, however, is created, not by the lease, but by the levy; prior thereto, he has but a contractual right to take unspecified property.

[7, 8] 4. Liens created within four months of the bankruptcy to secure pre-existing debts may be avoided by the trustee under section 60b, if the creditor had reasonable cause to believe that a preference was thereby effected. Whether or not the debt secured is pre-existing must be determined as of the date of the creation of the lien. Clearly here where even as between the parties the lease gave only a contractual right, and where the lien was not created until the distress warrant was levied, the rent for which the levy was made was then a pre-existing debt. See, too, In re Caslon Press, 229 Fed. 133, 143 C. C. A. 409.

[9] 5. At the time of levy, the debtor was admittedly insolvent; inasmuch, however, as the record is devoid of any evidence tending to show that the landlord then had reasonable cause to believe that a preference was thereby given, and as the burden of proof is on the trustee, the order of the District Court must be reversed.

[10] 6. Appellant urges, especially in view of the action of the District Court in denying appellee's motion for leave to introduce evidence as to the lessor's knowledge of the preference, that the proper order on the record before us is that the decree be reversed and the landlord's claim to payment in full out of the proceeds of the sale be allowed. While the case was heard on a stipulation of facts, the trial judge was clearly empowered, in his discretion, to permit additional proof and amendment of the pleadings in conformity therewith.

[11] Appellee's motion was denied, evidently because the court, in view of the conclusions reached on other grounds, deemed this proof

unnecessary. Under these circumstances, justice requires that the cause be remanded to the District Court, with leave to the appellee to renew therein its motion to amend the answer and to offer the additional evidence and for further proceedings in conformity herewith. Essley Machinery Co. v. Belsley, 235 Fed. 285, — C. C. A. —.

And it is so ordered.

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MAHON et al. v. GUARANTY TRUST & SAFE DEPOSIT CO.

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

No. 2252.

1. COURTS ⇐317—JURISDICTION OF FEDERAL COURTS—ALIGNMENT OF PARTIES.
In a suit by a mortgagee against the mortgagor and its employés to enjoin the latter from violating their contract of employment, in which no grounds for relief are stated and no relief is asked against the mortgagor, it should be aligned as a complainant for the purpose of determining the jurisdiction of a federal court.

2. INJUNCTION ⇐114(1)—INDISPENSABLE PARTIES—SUIT BASED ON CONTRACT.
To a suit by a mortgagee based upon a contract of the mortgagor with its employés, the mortgagor is an indispensable party.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 202.]

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

Suit in equity by the Guaranty Trust & Safe Deposit Company against the Indianapolis Traction & Terminal Company and others. From an order granting a preliminary injunction, defendants William D. Mahon and others appeal. Reversed.

Appellants appeal from an order of the District Court granting a preliminary injunction restraining them from violating or causing others to violate a certain contract governing the conditions of employment of a large number of men operating the street railway lines of the defendant the Indianapolis Traction & Terminal Company, and also restraining the employés of the traction company from going on a strike or quitting in a body in violation of the express provisions of that agreement.

Appellee, a citizen of Pennsylvania, is the trustee named in a certain mortgage given by the defendant the Indianapolis Traction & Terminal Company, a citizen of Indiana, hereinafter referred to as the traction company, to secure the payment of a loan of $5,000,000. The traction company owns certain franchises, real estate, and street car lines, and leases another line from the Indianapolis Street Railway Company, all of which it operates in the city of Indianapolis. A large number of the other defendants are its employés, while other defendants are officers and representatives of labor unions. None of these defendants are citizens of Pennsylvania, nearly all of them being citizens of Indiana.

In October, 1913, the employés of the traction company went out on a strike which continued until November, 1913, when an agreement was reached; some of the more important features being: That the employés should return to their work without prejudice and with full seniority rights recognized; that all grievances as to wages and conditions should be presented by the employés to the company and unless satisfactorily adjusted should be referred to the Public Service Commission for the State of Indiana for final determination, the award of said commission to be binding upon all parties for

a period of three years; that the agreement thus to arbitrate was not only to be signed by the traction company and by a committee of the employés, but also by the Governor of the State of Indiana and an official representative of the United States government.

Pursuant to the agreement to arbitrate, the men returned to their work and the Public Service Commission of Indiana filed its award in February, 1914. It consisted of 19 findings and covered questions of wages as well as hours and conditions of work. It also provided for a permanent court of arbitration to hear complaints during the life of the award, to wit, during the three years covered by the agreement.

While most of the findings of the commissioners were acceptable to and accepted by the parties to the agreement without question, there were certain provisions which the traction company contended were both impracticable and unreasonable, and individual employés were induced to sign agreements differing somewhat from those provided in the award as to hours of employment. The traction company claimed these agreements to be in harmony with the award and in no way imposing hardships upon the employés. This claim was disputed by certain of defendants.

Appellee alleges that the officers of the union known as the Amalgamated Association of Street and Electrical Employés of America desired to force the so-called "closed shop" on the traction company and were threatening to call a strike and to cause the traction company's employés to break their contract with the company and to violate the provisions of the award, and that the officers and certain employés conspired together to force upon the traction company the adoption of the so-called "closed shop" and to violate the contract hereinbefore referred to, and the bill particularly alleged that as a part of the conspiracy the defendants secured shares of the stock of the Indianapolis Street Railway Company and brought the suit in the state court of Indiana for the avowed purpose of securing the cancellation of the lease between the Indianapolis Street Railway Company and the Indianapolis Traction & Terminal Company but for the real purpose of securing the appointment of a receiver during the pendency of a strike upon the ostensible ground that such traction company failed to operate its cars and therefore forfeited its lease. Appropriate allegations of resulting damage to plaintiff's security also appeared.

Various defendants answered separately, while a larger group answered jointly and severally. While many of the allegations in the bill were disputed, defendants' chief defense was that the traction company constantly violated the award made pursuant to the agreement referred to in the complaint and charged that it was the common practice of the traction company to take individual employés into its office and coerce such employé to sign an agreement, in terms differing from the conditions fixed by the award; that thereby the traction company operated its working schedule contrary to the provisions of the award. It is unnecessary to give a more detailed statement of the various issues raised in the District Court in view of our conclusion on the question of jurisdiction. These issues, without further details, are stated only because they bear upon this question of jurisdiction.

The prayer for relief in the bill was as follows:

"Wherefore plaintiff prays * * * that upon the final hearing of this cause, the defendants and each of them and all persons associated or connected with them in the combination and conspiracy aforesaid, or who are parties to said award, or who are parties to said agreement, and all officers, agents, employés or other persons acting in the interest of any of said defendants or associations be perpetually enjoined and restrained from calling or enforcing a strike of the employés or any of them of the defendant the Indianapolis Traction & Terminal Company, engaged in the operation of its system of street railroads in the city of Indianapolis, or by threats or other intimidation or violence or by the advice, solicitation, influence or pressure of the various organizations to which they belong, the same being the labor unions or associations located in the city of Indianapolis or any other organizations or associations outside of the employés of the defendant Indianapolis Traction & Terminal Company, to strike or desist by other concert action from their

service as employés of the defendant the Indianapolis Traction & Terminal Company, in violation of said award, or in violation of said agreement, or from preventing by threats or violence other persons from entering the service of the defendant the Indianapolis Traction & Terminal Company, in the operation of its said system, or by such means inducing or compelling any of the employés now or hereafter in the service of said company to become members of said Amalgamated Association against their wills or without their free consent, or by such means compelling the defendant Indianapolis Traction & Terminal Company, to operate its system of street railroads by union labor exclusively, or from injuring or destroying any of the property of the said defendant Indianapolis Traction & Terminal Company, or from interrupting said defendant in the operation of its said system of street railroads in the city of Indianapolis, or by persuasion, threats or any other means whatever procuring or influencing any of the employés of said defendant Indianapolis Traction & Terminal Company, who are parties to said agreement mentioned in the eighth section of this bill of complaint, to go upon a strike or to suspend the operation of said defendant's property, or from interfering with or in any other way interrupting any other employé of said defendant traction company in the performance of the duties of his employment to said company, or otherwise interrupting the said defendant's service upon its road, or in any other way or manner violating the terms of said award or the terms of said agreement. And that the said defendants and all persons associated or connected with them in the said combination or conspiracy aforesaid be perpetually enjoined and restrained from the further prosecution of the said action brought in the name of said Dobson in the Marion circuit court, or from harassing and embarrassing said Indianapolis Traction & Terminal Company by pressing for a receiver on the pretended ground that it is violating its said lease or its said franchise by failing to operate its said property by reason of said strike, or otherwise from obtaining or seeking to obtain any legal or technical advantage in law from the interruption of said company's service and be caused by the said strike or by any other act or connivance, conspiracy or combination caused, produced or concurred in by the said defendants, and that there be issued out of this court immediately a restraining order, whereby the defendants and each of them and all persons associated or connected with them be restrained from doing or assisting in the doing of any of the acts or things which are above prayed to be perpetually enjoined, until there can be a hearing upon a motion for a temporary injunction, and that a time be fixed for the hearing of a motion for a temporary injunction, and the defendants notified thereof, and that upon such hearing a temporary injunction be granted, enjoining and restraining the defendants and each of them and their agents and all persons associated or connected with them or any of them from doing any of the acts and things herein prayed to be perpetually enjoined until the final hearing of this cause or until the further order of this court, and the plaintiff asks all other proper relief."

Elias D. Salsbury, of Indianapolis, Ind., for appellants.

Wm. H. Latta, of Indianapolis, Ind., for appellee.

Before KOHLSAAT, MACK, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). [1] The question of the court's jurisdiction, while not presented to the learned District Judge, is squarely raised in this court.

The bill disclosed a situation where all of the defendants were citizens of states other than Pennsylvania, the home of the plaintiff, and therefore it was the appellee's claim that the necessary diversity of citizenship existed to confer jurisdiction upon the federal court.

Defendants contend that the traction company should be aligned with the plaintiff for the purpose of determining whether the federal court has jurisdiction of the action.

In support of their contention, they cite In re Removal Cases, 100 U. S. 457, 25 L. Ed. 593, from which Foster draws the following rule:

"In determining between whom the controversy exists, the court is not bound by the title of the case or the form of the proceedings, but should examine the record, ascertain the matters in dispute, and arrange the parties on opposite sides of the same according to the facts, no matter what their technical place as plaintiffs or defendants may be."

See Foster on Federal Practice, vol. 1, § 40.

One of the tests by which the court may determine whether a defendant should be aligned with the plaintiff is the prayer for relief. If no relief is sought against a defendant, such defendant should ordinarily be treated as a plaintiff. Dawson v. Columbia Avenue Trust Co., 197 U. S. 178, 180, 25 Sup. Ct. 420, 49 L. Ed. 713; Steele v. Culver, 211 U. S. 26, 29, 29 Sup. Ct. 9, 53 L. Ed. 74. Whether we examine the entire bill or merely the prayer for relief, we must reach the same conclusion, viz. that the traction company and the plaintiff are on the same side of this controversy. We fail to find any collision of interest between them. Both are interested in obtaining the same relief.

[2] But it is insisted that, even though the traction company be aligned with the appellee, the court should retain jurisdiction of the suit. For, it is pointed out, the traction company is at best not a necessary party and could be properly dismissed.

In support of this contention that the mortgagor is not a necessary party, the following cases are cited: Carter v. Fortney (C. C.) 170 Fed. 463; same case in the Circuit Court of Appeals, 203 Fed. 454, 121 C. C. A. 514; Knickerbocker Trust Co. v. City of Kalamazoo (C. C.) 182 Fed. 865; City of Denver v. New York Trust Co., 187 Fed. 890, 110 C. C. A. 24; same case in the Supreme Court, 229 U. S. 123, 33 Sup. Ct. 657, 57 L. Ed. 1101; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Mercantile Trust Co. v. Texas & Pacific Co. (C. C.) 51 Fed. 529; Ex parte Haggerty (C. C.) 124 Fed. 441–446; Guardian Trust Co. v. White Cliffs Portland Cement Co. (C. C.) 109 Fed. 523; Old Colony Trust Co. v. City of Wichita (C. C.) 123 Fed. 762; City of Denver v. Mercantile Trust Co., 201 Fed. 790, 120 C. C. A. 100.

Appellants, in support of their claim that the traction company is an indispensable party, cite the following authorities: Dawson v. Columbia Avenue Trust Co., 197 U. S. 177, 25 Sup. Ct. 420, 49 L. Ed. 713; Consolidated Water Co. v. Babcock (C. C.) 76 Fed. 243; Consolidated Water Co. v. City of San Diego (C. C.) 84 Fed. 369; Consolidated Water Co. v. Babcock (C. C.) 76 Fed. 246; Consolidated Water Co. v. City of San Diego, 93 Fed. 849, 35 C. C. A. 631; Williams v. City Bank & Trust Co., 186 Fed. 419, 108 C. C. A. 341; Old Colony Trust Co. v. Atlanta Ry. Co. (C. C.) 100 Fed. 798; Steele v. Culver, 211 U. S. 26, 29 Sup. Ct. 9, 53 L. Ed. 74; McClelland v. McKane (C. C.) 154 Fed. 164; Foster on Federal Practice (5th Ed.) vol. 1, p. 103; Boston Safe Deposit & Trust Co. v. City of Racine (C. C.) 97 Fed. 817.

The right of a mortgagee under certain conditions to bring an injunctional suit to protect its security independently of the mortgagor is thoroughly established. Some of the cases cited above not only recognize such right on the part of the mortgagee but further hold that the mortgagor is an unnecessary party.

Such rule is applied where the suit is brought to restrain threatened injury to the security by trespassers or other tort-feasors, and where the threatened injury is by outsiders, strangers to the affairs and contracts of the mortgagor.

But none of the cases cited hold that such rule applies where the mortgagee instituted a suit based upon a contract of the mortgagor with third parties. Where the plaintiff sought to enjoin the employés from breaking their contract with the traction company, it necessarily was endeavoring to enforce the rights of its mortgagor. Its own rights were derivative of and limited strictly by the rights of the mortgagor. Moreover, in so far as it attempted by this action to fix or determine the rights of the employés under their contract with the traction company, it was embarking upon what was strictly a phase of the traction company's business policy. In such a case the traction company was an indispensable party to the action.

That such company is an indispensable party is clearly shown when we consider the possible, and in fact probable, embarrassment which the courts will meet, if separate actions in respect to this contract can be maintained in different jurisdictions. If this case were to proceed to trial without the traction company and the court upheld the contract and enforced its terms against the defendant employés, its decision would not be binding upon the mortgagor in a subsequent action. If the traction company were not a party to the action it would have a perfect right to test out the same question in the state court. Such a situation should not be tolerated. The mere statement of the possibilities shows the absolute necessity of making the traction company a party to this action.

In any action by the mortgagees to enforce an agreement made and entered into between the traction company and its employés, such latter parties are within their rights in insisting that all parties to the agreement be bound by the decree.

The rule is announced in Consolidated Water Co. v. City of San Diego, 93 Fed. 852, 35 C. C. A. 634, as follows:

"The general rule as to parties, as expressed in many of the authorities, is to the effect that all persons should be made parties to a suit in equity who are directly interested in obtaining or resisting the relief prayed for in the bill or granted in the decree. And in a case like the present, where the trial of the suit would necessarily involve the management and conduct of the affairs, and an adjudication of the rights, of the San Diego Water Company (the mortgagor), it is essentially necessary that it should be made a party to the suit, either as a plaintiff or a defendant."

Applying this rule to the facts in the instant case, it is apparent that the plaintiff's action is predicated upon the efficacy of a contract between the mortgagor and its employés. Such being the case, the transportation company, the mortgagor, is an indispensable party. By

aligning the transportation company with the plaintiff as we are required to do, the necessary diversity of citizenship to give the federal court jurisdiction is lacking.

The decree is reversed, with directions to dismiss the bill for want of jurisdiction.

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## PITTSBURG & ERIE COAL CO. v. GEORGE URBAN MILLING CO.

## SAME v. BUFFALO GRAIN CO.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 32.

1. SHIPPING ⟸200—GENERAL AVERAGE—RIGHT OF STRANDED VESSEL TO CONTRIBUTION.

In a suit to enforce general average, the ship does not establish her claim upon proof of the bare fact that she stranded; but she must show sufficient of the attending circumstances to warrant the inference that she stranded without fault.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 631–634; Dec. Dig. ⟸200.]

2. SHIPPING ⟸200—GENERAL AVERAGE—NEGLIGENT STRANDING.

The stranding of a barge loaded with wheat in Buffalo harbor, when making the turn into Buffalo river, on a shoal plainly marked and known to navigators of the harbor generally, *held* due to the negligence of the master in failing to take into consideration the length and depth of his vessel, the stage of the water, and the current, which precluded the owner from the recovery of contributions in general average from the cargo owners for expense of lightering.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 631–634; Dec. Dig. ⟸200.]

Appeals from the District Court of the United States for the Western District of New York; John R. Hazel, Judge.

Suits in admiralty by the Pittsburg & Erie Coal Company, owner of the steam barge P. D. Armour, against the George Urban Milling Company and against the Buffalo Grain Company. Decrees for libelant, and respondents appeal. Reversed.

For opinion below, see 226 Fed. 332.

The libelant is a corporation existing under the laws of the state of Pennsylvania. Two actions in personam in admiralty were begun by the libelant, owner of the steam barge P. D. Armour; one against the George Urban Company, and one against the Buffalo Grain Company. The steam barge on November 6, 1909, left the port of Superior, Wis., for the port of Buffalo, N. Y., laden with a cargo of about 97,000 bushels of wheat. Of this about 49,000 bushels were consigned to the George Urban Milling Company, and about 48,000 bushels were consigned to the Buffalo Grain Company. The barge was a wooden steam barge about 300 feet in length and was drawing about 17 feet 8 inches to 17 feet 10 inches on her arrival in the harbor of Buffalo. She arrived at the south entrance to the harbor about 8 a. m. on November 12, 1909, and proceeded inside of the Buffalo breakwater to the north entrance. When making the turn into Buffalo river she grounded on a shoal to the east of the entrance to Reading channel.

After it was found that the steamship could not release herself by use of her own power, and that the water was lowering, and that she was subject

to the danger of being opened by the strain, an attempt was made to release her with the assistance of tugs. This met with failure, and, as the steamship was so strained that she had commenced to leak, it was deemed necessary to lighter, and the services of a lighter and tug were procured, and a quantity of the cargo was removed. The next day another attempt was made to release the boat with the aid of two tugs, but this also was without success, and further lightering was resorted to, and the steamer was finally released and proceeded to a place of safety and discharge.

These two suits are brought upon the theory that the sacrifices, losses, and expenses incurred constitute a general average, to be apportioned to and borne by the vessel, freight, and cargo in the proportion of their value as saved. Except for the necessary differences on account of ownership of the respective parts of the cargo and the amounts claimed, the libels are the same. The answers and interrogations propounded thereto, and the answers of libelant to the interrogations are also alike. The cases were consolidated by consent and tried as one in the court below. That court came to the conclusion that the stranding of the barge was not due to negligence, but was occasioned by an error of judgment.

A decree has been entered against the George Urban Milling Company in the sum of $1,470.88 and against the Buffalo Grain Company in the sum of $1,440.88, and has directed that the respondents pay the costs in equal parts.

Brown, Ely & Richards, of Buffalo, N. Y. (Harvey L. Brown, of Buffalo, N. Y., of counsel), for appellants.

Holding Masten, Duncan & Leckie, of Cleveland, Ohio (Frank S. Masten and Frederick L. Leckie, both of Cleveland, Ohio, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The question presented to this court is whether this steamship was stranded through negligent navigation. If she was, of course, the consignees of the cargo are relieved from contribution and general average, and the decree must be reversed.

[1] In any action to enforce general average the ship does not establish her claim upon proof of the bare fact that she stranded. As this court said in Phipps v. The Nicanor, 44 Fed. 504 (1890):

"She would have to show sufficient of the attending circumstances to warrant the inference that she stranded without fault."

In this case the evidence shows that this vessel stranded on a fine morning, in broad daylight, with no fog, gale, or extraordinary conditions of any kind. The stranding occurred about 9:30 a. m. and the wind was estimated at about 15 miles an hour. The buoys and aids to navigation were all in place and in plain sight. The shoal upon which the vessel grounded was on the northerly side of the channel leading into the Buffalo river, being between what is known as the Reading channel and Buffalo river entrance channel. It was marked on the outer end by a horizontal striped stake, and the Reading channel bank was marked by a red stake, and the southerly bank was marked by a black stake. The shoal was known as "the old dumping ground," and has since been removed. The master in charge of the vessel is charged with knowledge of the location of the shoal and that it was marked by the black buoy. He was bound to know the bottom of the

Buffalo entrance, in so far as that knowledge was revealed by charts and soundings available to men of his grade of license.

The red and black buoy was put where it was for the very purpose of warning navigators against going behind or to the eastward of it. The master disregarded it, and went to the eastward, and in doing so got on the dumping ground, which is just what he might have expected. The libelant has not met the burden which the fact and circumstances of stranding put upon it.

The captain of the steamer had been a licensed officer of steam vessels since 1900, and all his service had been on the Great Lakes. He had, every season since he had been in command, visited the port of Buffalo in the Armour prior to the trip when she went aground. It may be that his somewhat limited experience in command as captain accounts for the trouble into which he got on this occasion. When he reached Buffalo he made the south entrance, as certain improvements were being made at the north entrance, and the Lake Carriers' Association had advised that the south entrance should be used while the improvements were under way. The vessel was proceeding under slow speed of about 3 miles an hour, and the indications on the breakwater showed, as he testified, that "the water was a trifle low"—from 4 to 6 inches below normal. His testimony as to what he did follows:

"We crossed over as usual, the usual distance off the breakwater, and when we neared the north entrance, I started to make the turn, port helm. There is practically a square turn, or a little more. We started to port, and she started coming, and she wasn't coming fast enough to suit me, and I ordered the wheel hard-aport, and they put her hard-aport. She came a little faster for a few minutes and then she stopped or slowed up. I rang her up first—signaled the engineer full speed ahead, and she didn't come. She wasn't coming fast enough to suit, and I backed her, backed her in order to swing her stern to port and straighten her up for the piers; backing did swing her stern to port, as I expected. When I ordered her to back, I ordered the helm amidships. It was put so. I continued backing until she started swinging nicely; the stern started swinging to port and started to come, as I considered fast enough to go ahead. Then I ordered the helm hard-aport, and rang the signal to the engineer, 'Full speed ahead.' I rang up full speed ahead, and she started to come ahead up full speed ahead, and she started to come ahead and started to swing, but didn't swing fast enough. She fetched up, port bow, as far back as a little past amidships; found she was on a shoal and deep water."

The trouble was that the current was stronger than he thought it was. The current set over to the northward and was the cause of the stranding. He testified that he found that the current had more effect on the barge than he figured on or expected. In his protest he stated that the current carried him toward the Reading channel, and before he "could straighten her up she grounded on a shoal to the east of entrance to Reading channel." At the trial the mate testified that "the current was a little stronger than he [the captain] thought it was." Asked as to what occasioned the difficulty he replied: "I was confident it was the current—all the time the current settling her down against the bank." The wheelsman, asked how it happened, answered: "We didn't allow there for the current." There is no doubt that the low water and the current caused the difficulty. But

the captain should have known the current, and the conditions and the effect of them, and he was bound to exercise the skill and caution required by the circumstances.

An experienced navigator testified that he noticed the vessel coming down inside the breakwater until she got a half length beyond the breakwater before she started to make her turn, and that his attention was especially attracted when her bow got past the end of the breakwater, as he knew she "couldn't make it unless she handled quick," as she "was too far to the northward; the others start to make the turn back further up inside of the wall." He was asked, "When you saw the Armour reach past the end of the breakwater, why did you continue to observe her that day?" He replied, "I expected to see her get on." It was to be expected that a vessel 300 feet long and with a beam of 40 or 42 feet and drawing 17 feet and 8 inches or 17 feet and 10 inches of water, and loaded with 97,000 bushels of wheat, and going from 3 to 4 miles an hour, would be slow in turning. Moreover, the shallower the water, the slower she would be in turning, and the poorer she would steer. If she could not make the turn "unless she handled quick," and it was impossible under the circumstances to "handle quick," the stranding was inevitable.

A witness called by the respondent was asked on cross-examination whether all vessels making this particular turn in the harbor made it alike. He replied in the negative. He was then asked whether each man exercised his own judgment and replied in the affirmative. "Q. He has to exercise his judgment as he comes to it? A. Yes, sir. Q. Sometimes the same vessel don't come in twice alike does it? A. No, sir." No doubt it involved an exercise of judgment to determine how this vessel was to make the turn. It was necessary to consider the length of the boat, her depth, the stage of the water, and the current. But it does not necessarily follow that, because there has been an error of judgment, there was no negligence. An error of judgment may be negligence. In The Eli B. Conine, 233 Fed. 987, 147 C. C. A. 661 (1916) this court said:

"'Lack of care under the circumstances,' which is negligence, is rarely willful or reckless; it is usually error of judgment. But the converse is not true —that every error of judgment is negligence. The error must be measured by the standards of conduct and business knowledge furnished by the evidence and by experience, of which even courts can take cognizance without direct testimony. If the error, viewed from that standpoint, is such as would not have been committed by a reasonable man, reasonably skilled in his occupation, it is negligence."

The error of judgment in the case now under consideration, was one which a master of a vessel, who is required to be an experienced and reasonably skillful navigator, would not have committed. It was therefore negligence.

The decree is reversed, with directions to dismiss the libel.

## HOSKINS v. DICKERSON.

(Circuit Court of Appeals, Fifth Circuit. February 5, 1917.)

No. 3022.

1. MILITIA ⟸8—ENLISTMENT—RIGHT OF PARENTS.
National Defense Act June 3, 1916, c. 134, § 27, 39 Stat. 185, declaring that no person under the age of 18 shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardian, providing that such minor has such parents or guardian entitled to his custody and control, applies to an enlistment in the National Guard called into the service of the United States, and is not applicable solely to enlistment in the regular army, though the section is found among provisions applicable to the regular army, the expression "enlisted or mustered into service of the United States" showing an intention of Congress that the section should apply to the National Guard, and hence the father of a minor under the age of 18 years, who without his written consent enlisted in the National Guard, is entitled to avoid the enlistment.
[Ed. Note.—For other cases, see Militia, Cent. Dig. §§ 14–18, 21.]

2. MILITIA ⟸20—ENLISTMENT—MINORS—"DE FACTO SOLDIER"—"DE JURE SOLDIER."
Where a minor over 16 and under 18 years of age enlisted in the National Guard without the consent of his parents, such minor became a de facto and de jure soldier, subject to the jurisdiction of the military authorities and liable to be tried by a court-martial for a military offense, notwithstanding his parents exercised their right to avoid the enlistment.
[Ed. Note.—For other cases, see Militia, Cent. Dig. §§ 45–60.]

3. HABEAS CORPUS ⟸16—ENLISTMENT IN ARMY—AUTHORITY OF COURT.
As Rev. St. § 761 (Comp. St. 1913, § 1289), commands the court, on hearing of the issues raised by petition for writ of habeas corpus and the return thereto, to dispose of the parties as law and justice require, the court will not, on habeas corpus brought by the parent of a minor over 16 and under 18 to avoid his enlistment in the National Guard, command his immediate surrender by the military authorities, where by reason of his enlistment he committed a military offense, but will allow his retention by the military authorities so that he may be punished by the proper military tribunal for the military offense; the court issuing the habeas corpus having no jurisdiction over such offense.
[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 16.]

Appeal from the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Habeas corpus by J. H. Dickerson against George C. Hoskins to obtain the custody of petitioner's minor child. From a judgment directing respondent to immediately deliver the child to petitioner, respondent appeals. Reversed, with instructions.

J. W. George, U. S. Atty., and J. P. Alexander, Asst. U. S. Atty., both of Jackson, Miss., and Maj. S. T. Ansell, Judge Advocate, War Department, of Washington, D. C., for appellant.

William H. Watkins, of Jackson, Miss., for appellee.

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

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

WALKER, Circuit Judge. On the 27th day of June, 1916, Otis Dickerson enlisted in the National Guard of the United States and of the state of Mississippi, and took the oath prescribed by section 70 of the National Defense Act of June 3, 1916. At that time he was under the age of 18 years, having been born on October 16, 1898. He had parents living who did not consent to his enlistment. He was serving as a member of the regimental band of the First Mississippi Regiment of the United States Army, which was encamped near Jackson, Miss., when his father, the appellee, filed a petition for the writ of habeas corpus against Col. George C. Hoskins, the commanding officer of that regiment, and E. C. Scales, the Adjutant General of the State of Mississippi. In the return to the writ issued on that petition, the enlistment of Otis Dickerson was alleged, and it was set up that he was held as a soldier under the federalization of the State Militia to answer the call of the President of the United States, and that formal charges for the offenses of fraudulent enlistment and receiving allowances and rations had been preferred against him, copies of which were made exhibits to the return, and that he would be brought to trial thereon as soon as practicable before a court-martial which had been ordered to be convened. The charges mentioned in the return were preferred after the service of the writ of habeas corpus. The appeal is from the judgment of the court, which recited "that petitioner, J. H. Dickerson, is entitled to the immediate possession of his son, Otis Dickerson, now in the custody of respondents," and ordered the respondents "to immediately deliver said Otis Dickerson to petitioner."

[1] Section 27 of the National Defense Act of June 3, 1916, contains the following proviso:

"No person under the age of eighteen years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: Provided, that such minor has such parents or guardians entitled to his custody and control."

This provision is a copy of section 1117 of the Revised Statutes (Comp. St. 1913, § 1885), except that the word "eighteen" is substituted for the word "twenty-one" where the latter appeared in the section mentioned. If the provision quoted is applicable to the enlistment of Otis Dickerson, that enlistment was voidable at the instance of his father. In re Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636; In re Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644; In re Miller, 114 Fed. 838, 52 C. C. A. 472; United States v. Reaves, 126 Fed. 127, 60 C. C. A. 675.

It has been insisted in argument that the provision applies only to the Regular Army, and not to an enlistment in the National Guard called into the service of the United States. Stress is laid upon the fact that the provision is found in the part of the act which deals with the Regular Army. We are not impressed by this suggestion. It is not uncommon to find in an act of Congress a provision not germane to the subject dealt with in other provisions with which it is associated. The fact that a provision is so placed cannot properly be given the effect of depriving it of the meaning which its words express. It cannot be supposed that, in an act which defined and specifically dealt with

the several branches of service constituting the Army of the United States (sections 1, 3, 58, 70 of the act), use would have been made of the expression, "enlisted or mustered into the military service of the United States," if it had been intended that the provision containing that expression should apply to only one branch of that service. The words used are appropriate to embrace the methods by which one may enter the military service of the United States, whether as a member of the Regular Army or as a member of the National Guard while in the service of the United States. In re Burns (C. C.) 87 Fed. 796. The conclusion is that the provision quoted applies to the enlistment of Otis Dickerson.

[2] As Otis Dickerson was over 16 years of age when he enlisted, he became a de facto and de jure soldier, subject to the jurisdiction of the military authorities, and liable to be tried by a court-martial for a military offense charged to have been committed by him prior to the exercise by his father of the right to avoid the enlistment. In re Miller, supra.

[3] When the petition for the writ of habeas corpus was filed, the petitioner's son was in the custody of the military authorities. A court-martial is the proper tribunal to try him for a military offense charged to have been committed by him while his enlistment was effective to the extent of subjecting him to military control and discipline. The election by the father, evidenced by the writ of habeas corpus, to avoid his son's enlistment, terminated the right of the military authorities to detain the latter under the enlistment. But it did not terminate the right of such authorities to continue their custody of the minor for the time reasonably required for the exercise of the military jurisdiction brought into play by duly made charges of the commission of military offenses by the minor while he was a soldier. The circumstances of the custody of the appellee's son by the military authorities, which were disclosed on the hearing below, differ from those disclosed in the case of In re Miller, supra, in that in the case cited the minor was under arrest on a military charge when the writ of habeas corpus was served, while in this case such charges were preferred after the service of the writ. We are not of opinion that the difference is a material one. In the one case, as well as in the other, the jurisdiction of the offense charged is a military one, not possessed by the court from which the writ of habeas corpus issued. It is not for that court to interfere with the exercise by a court-martial of its exclusive jurisdiction. The exercise of that jurisdiction would be interfered with by a withdrawal from the custody of the military authorities of one charged with the commission of a military offense while he was lawfully subject to military law, as the custody of the person proceeded against is necessary to enable the military tribunal to exercise its jurisdiction. On the hearing of the issues raised by a petition for the writ of habeas corpus and the return thereto, the court is authorized "to dispose of the party as law and justice require." R. S. U. S. 761 (Comp. St. 1913, § 1289). We are of opinion that, on the state of facts disclosed on the hearing below, law and justice did not require an order to the military authorities having Otis Dickerson in

custody for his immediate surrender to his father, the appellee. United States v. Williford, 220 Fed. 291, 136 C. C. A. 273; Ex parte Lewkowitz (C. C.) 163 Fed. 646; In re Lessard (C. C.) 134 Fed. 305; Motherwell v. United States, 107 Fed. 437, 48 C. C. A. 97.

The conclusion is that the application for the discharge of Otis Dickerson from the custody of the military authorities should not be granted until he has been released from the military prosecution duly instituted against him, and that the writ should be dismissed, but without prejudice to the petitioner's right to renew his application if the custody of his son shall be unlawfully continued.

The judgment of the District Court is reversed, with instructions to remand Otis Dickerson to the custody of the military authorities.

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## HOSKINS et al. v. FUNK.

(Circuit Court of Appeals, Fifth Circuit. February 5, 1917.)

No. 3023.

COURTS ⟸405(3)—CIRCUIT COURT OF APPEALS—DECISIONS REVIEWABLE.

Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133 [Comp. St. 1913, § 1120]) § 128, gives the Circuit Court of Appeals appellate jurisdiction to review by appeal or writ of error final decisions in the District Court, while section 129 (Comp. St. 1913, § 1121) provides that when in vacation an injunction is granted or receiver appointed, etc., an appeal may be taken from such interlocutory order or decree. No statute purports to confer on the Circuit Court of Appeals the jurisdiction conferred by Rev. St. § 763 on the Circuit Court to review the final decisions of any court, judge, or justice upon an application for a writ of habeas corpus or upon such writ when issued. *Held*, that the Circuit Court of Appeals is without jurisdiction of an appeal from an order made by the District Judge in vacation on the hearing of the issue raised by petition for habeas corpus and the return thereto.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097, 1099.]

Appeal from the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Petition by F. W. Funk for writ of habeas corpus against George C. Hoskins and others. From an order made by the judge in vacation, respondents appeal. Appeal dismissed.

J. W. George, U. S. Atty., and J. P. Alexander, Asst. U. S. Atty., both of Jackson, Miss., and Maj. S. T. Ansell, Judge Advocate, War Department, of Washington, D. C., for appellants.

W. H. Cook, of Hattiesburg, Miss., for appellee.

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

WALKER, Circuit Judge. The matter sought to be reviewed in this case is an order made by the District Judge in vacation on the hearing of the issues raised by a petition for the writ of habeas corpus and the return thereto. That order is not embraced by the language of the provision of section 128 of the Judicial Code that:

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

"The Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts," etc.

See Lambert v. Barrett, 167 U. S. 697, 15 Sup. Ct. 722, 39 L. Ed. 865; Carper v. Fitzgerald, 121 U. S. 87, 7 Sup. Ct. 825, 30 L. Ed. 882; Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399.

It is not an order of the District Judge in vacation which is made subject to review by this court by section 129 of the Judicial Code. No statute has been found which purports to confer on this court the jurisdiction which section 763 of the Revised Statutes conferred on the Circuit Court to review "the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of habeas corpus or upon such writ when issued." The conclusion reached in the case of Webb v. York, 74 Fed. 753, 21 C. C. A. 65, that, notwithstanding the absence of such a statute, the Circuit Courts of Appeals have in some way succeeded to the jurisdiction which the statute just quoted conferred on another court, is one in which we are unable to concur. The reasoning by which that conclusion was reached does not seem to us to be convincing. We have found no statute having the effect of conferring upon this court appellate jurisdiction to review such an order made by a District Judge in vacation as the appeal in this case seeks to present for review.

As, in our opinion, the appeal taken was unauthorized by law, it must be dismissed; and it is so ordered.

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## HOSKINS et al. v. PELL.*

(Circuit Court of Appeals, Fifth Circuit. February 5, 1917.)

No. 3024.

1. ARMY AND NAVY ⊂⊃19—ENLISTMENTS—VALIDITY.

Rev. St. § 1116 (Comp. St. 1913, § 1884), as amended by Act March 2, 1899, c. 352, 30 Stat. 978, provides that recruits enlisted in the army must be effective and able-bodied men and between the ages of 16 and 35 years; the limitation of age not applying to soldiers re-enlisting. Section 1117 (Comp. St. 1913, § 1885), as amended by National Defense Act June 3, 1916, c. 134, 39 Stat. 166, provides that no person under the age of 18 shall be enlisted or mustered into military service of the United States without written consent of his parents or guardians; while section 1118 (Comp. St. 1913, § 1886) declares that no minor under the age of 16, no insane, or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of a felony, shall be enlisted or mustered into the military service. Comp. St. Ann. 1916, § 1714, declares that all able-bodied male citizens and persons of foreign birth who have declared their intention to become citizens, between the age of 18 and 45, shall constitute the national forces, while National Defense Act June 3, 1916, § 57, declares that the militia shall consist of such persons. Act Aug. 29, 1916, c. 418, § 3, 39 Stat. 659, Articles of War 54, 55, and 58 respectively, declare that any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications and shall receive pay and allowances shall be punished by court-martial, that any officer receiving a forbidden enlistment shall be punished, and

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

*Rehearing denied March 20, 1917.

that any person subject to military law who deserts or attempts to desert shall be punished. A minor under the age of 16 took the oath of enlistment, was accepted, and returned to the home of his parents. Thereafter he was apprehended as a deserter and committed to the custody of the commanding officer of the regiment. *Held* that, while a minor over 16 and under 18 years of age who enlists without the consent of his parents or guardians is subject to the jurisdiction of the military authorities for an offense committed prior to the exercise by a parent or guardian of the right to avoid the enlistment, such minor did not become a soldier; the statutes declaring him incapable of changing his status by enlistment, although he might validate his enlistment by continuing in the service until he had reached an age qualifying him for enlistment.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 45–50.]

2. ARMY AND NAVY ⟸38—DESERTION—WHAT CONSTITUTES.

In such case, as the minor never became a soldier subject to military law, he is not a deserter under Act Aug. 29, 1916, § 3, Article of War 58, and so is not amenable to the jurisdiction of the courts-martial.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 81, 82.]

3. ARMY AND NAVY ⟸36—ENLISTMENT—FRAUDULENT ENLISTMENT.

In such case, where the minor did nothing but attempt to enlist, receiving no pay or allowances, he is not guilty of the offense of fraudulent enlistment denounced by Act Aug. 29, 1916, § 3, Article of War 54.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. § 79.]

Grubb, District Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Application by O. J. Pell for writ of habeas corpus against George C. Hoskins and others to obtain the custody of Oscar J. Pell, Jr. From a judgment commanding the immediate surrender of Oscar J. Pell, Jr., respondents appeal. Affirmed.

J. W. George, U. S. Atty., and J. P. Alexander, Asst. U. S. Atty., both of Jackson, Miss., and Maj. S. T. Ansell, Judge Advocate, War Department, of Washington, D. C., for appellants.

Hugh V. Wall, of Brookhaven, Miss., for appellee.

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

WALKER, Circuit Judge. On the 21st day of July, 1916, at Jackson, Miss., Oscar J. Pell, Jr., applied for enlistment in a regiment of the National Guard of Mississippi, which prior to that date the President had called into the service of the United States. He represented himself to be 18 years of age, when in fact he was under 16 years of age, having been born November 1, 1900. He took the oath of enlistment prescribed by section 70 of the National Defense Act of June 3, 1916, and was accepted. On the same day, July 21st, without, so far as appears, having done or received anything as a soldier, he returned to the home of his parents at Brookhaven, Miss. On September 24, 1916, a charge of desertion was made against him by an officer of the Mississippi National Guard, upon which he was apprehended at Brookhaven and was committed to the custody of the commanding officer of said regiment. On September 25th, his father, the

appellee, filed a petition for a writ of habeas corpus against such commanding officer, Col. George C. Hoskins, alleging that the latter was not entitled to the possession and custody of the petitioner's minor son, and a writ issued pursuant to the prayer of the petition. Col. Hoskins, in his return to this writ, alleged the enlistment of the petitioner's said son, the arrest and confinement on the charge of desertion, and stated that as soon as practicable there would be a trial on that charge before a court martial, to be convened by the orders of the proper military authorities. That return also contained the following:

"The respondent further returns that, if the age of the said Pell be as alleged in the said petition, then the representation made by him, to wit, that he was 18 years of age and over, was a false representation made in a material matter with intent to deceive the military authorities and did deceive them and did induce his enlistment, and therefore it is the purpose of the respondent, as it is his authority, to prefer formal charges against said Oscar Pell for the offense of fraudulent enlistment and to bring the said Pell to trial thereon as soon as practicable before a court-martial, to be convened by the proper military authorities to convene or direct the convening of said court-martial."

The appeal is from the judgment of the court ordering the immediate delivery of Oscar J. Pell, Jr., to the petitioner, the appellee here.

[1] It is contended in behalf of the appellant that Oscar J. Pell, Jr., should have been remanded to the custody of the military authorities, on the showing made that he was held for trial on a charge of desertion, and that he was subject to prosecution on a charge of fraudulent enlistment.

The statutes which may bear upon the questions presented are as follows:

"Recruits enlisting in the army must be effective and able-bodied men, and between the ages of sixteen and thirty-five years, at the time of their enlistment. This limitation as to age shall not apply to soldiers re-enlisting." (Changed by the provision of the Act of March 2, 1899, 30 Stat. 978, that "the limits of age for original enlistments in the army shall be eighteen and thirty-five years.") U. S. Rev. St. § 1116 (Comp. St. 1913, § 1884).

"No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: Provided, that such minor has such parents or guardians entitled to his custody and control." (Amended by the proviso of section 27 of the National Defense Act of June 3, 1916, by substituting the word "eighteen" for the word "twenty-one.") U. S. Rev. St. § 1117 (Comp. St. 1913, § 1885).

"No minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of a felony shall be enlisted or mustered into the military service." U. S. Rev. St. § 1118 (Comp. St. 1913, § 1886).

"All able-bodied male citizens of the United States, and persons of foreign birth who shall have declared their intention to become citizens of the United States under and in pursuance of the laws thereof, between the ages of eighteen and forty-five years, are hereby declared to constitute the national forces, and, with such exceptions and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States." Act April 22, 1898, c. 187, § 1, 30 Stat. 361 (U. S. Comp. Stat. [Ann. 1916] § 1714, p. 3607).

"The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall

have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia." Section 57, National Defense Act of June 3, 1916.

"The National Guard shall consist of the regularly enlisted militia between the ages of eighteen and forty-five years organized, armed, and equipped as hereinafter provided, and of commissioned officers between the ages of twenty-one and sixty-four years." Section 58, Id.

"Art. 54. *Fraudulent Enlistment.*—Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct." Acts of Congress 1916, Articles of War, Act of Aug. 29, 1916.

"Art. 55. *Officer Making Unlawful Enlistment.*—Any officer who knowingly enlists or musters into the military service any person whose enlistment or muster in is prohibited by law, regulations, or orders shall be dismissed from the service or suffer such other punishment as a court-martial may direct." Id.

"Art. 58. *Desertion.*—Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct." Id., p. 660.

It is settled that the age of one who, when he is over 16 and under 18 years of age, enlists in the army without the consent of his parents or guardians, if he has a parent or guardian entitled to his custody and control, does not render his enlistment void, and that he is subject to the jurisdiction of the military authorities for an offense committed prior to the exercise by his parent or guardian of the right to avoid his enlistment. In re Miller, 114 Fed. 838, 52 C. C. A. 472; United States v. Reaves, 126 Fed. 127, 60 C. C. A. 675; In re Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636; In re Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644. It clearly appears from statutes above set out that a minor under 16 years of age does not belong to the class of persons who are made liable to perform military duty in the service of the United States, and that his enlistment is peremptorily forbidden, without regard to the consent of his parent or guardian. Language used in the opinions in several of the cases cited shows that the rulings made in those cases are not applicable to the case of an attempted enlistment of a minor under 16 years of age. In the opinion in the case of In re Grimley, supra, the court, speaking of the reasons stated in support of the conclusion that an enlisted soldier cannot avoid a charge of desertion by showing that, at the time he voluntarily enlisted, he had passed the age for enlistment prescribed by law, said:

"Of course, these considerations may not apply where there is insanity, idiocy, infancy, or any other disability which, in its nature, disables a party from changing his status or entering into new relations."

In the opinion in the case of In re Morrissey, supra, in which it was held that the enlistment of a minor over 16 years of age was not voidable by him, it was said:

"The age at which an infant shall be competent to do any acts, or perform any duties, military or civil, depends wholly upon the Legislature. * * * Congress has declared that minors over the age of 16 are capable of entering the military service, and undertaking and performing its duties."

It well may be inferred from what was said in the opinion in the case of In re Miller, supra, that the court entertained the view that a minor under 16 years of age could not acquire the status of a soldier by an enlistment which was forbidden by law. The prohibition of the enlistment or muster into the military service of minors under the age of 16 years, insane or intoxicated persons, is found in the same sentence of the statute which prohibits the enlistment or muster into the service of a deserter from the military service of the United States or one who has been convicted of a felony. It is manifest, however, that the ground of the prohibition in the one case is the party's lack of capacity to change his status or to perform military service, while in the other case the prohibition is based upon previous misconduct of the applicant for admission to the service. This difference may warrant the treatment of a minor under 16 years of age as not liable to military duty where his forbidden contract of enlistment constitutes his only asserted connection with the service, though another person actually in the service would not be permitted to escape its duties, or penalties for a violation of them, by showing that, prior to his forbidden enlistment, he had deserted from the military service of the United States or had been convicted of a felony. However that may be, the plain language of the statutes leaves no room for doubt that an enlistment of a minor under 16 years of age stands upon a different footing from an enlistment of a mentally competent person over that age, and is as invalid as the enlistment of an insane or intoxicated person. Our conclusion is that statutes above set out sufficiently show that it was the intention of the lawmakers to negative the competency of a minor under 16 years of age to acquire the status of a soldier by enlisting for military service, and to deprive his attempt to do so of the effect of subjecting him to military authority. It is not denied that such an enlistment may be validated by the minor's continuance in the service until he reaches the age which qualifies him for enlistment. Ex parte Hubbard (C. C.) 182 Fed. 76.

[2] As the appellee's minor son was not duly enlisted in the service of the United States, he is not amenable to the jurisdiction of courts-martial. His contract of enlistment being void, the government acquired no right to his services. He could not be a deserter, as he never became a soldier. In re Davison (C. C.) 21 Fed. 618.

[3] It is to be observed that the offense of desertion denounced by the Fifty-Eighth Article of War cannot be committed by one who is not "subject to military law." The receipt of pay or allowances under an enlistment is an essential element of the offense of fraudulent enlistment denounced by the Fifty-Fourth Article of War.

It was not suggested that Oscar J. Pell, Jr., did anything beyond attempting to enlist. As the evidence adduced showed that the military authorities were without right to the custody of the appellee's minor son, the order made was a proper one; and it is affirmed.

GRUBB, District Judge (dissenting). I am unable to concur in the conclusion reached by the court in this case. Whatever may be the legal effect of the enlistment of a minor under 16 years of age, if the minor has sufficient age and intelligence to be capable of committing the offense of desertion, has actually deserted and is in confinement, awaiting trial before a military court on the charge of desertion, I do not think he should be released from military custody, until the charge has been disposed of by the court having exclusive jurisdiction to try it. I agree with the conclusion reached in the case of In re Cosenow (C. C.) 37 Fed. 668–671, that the effect of the statute is not "to make the enlistment so absolutely void that the recruit could not commit the crime of desertion, and that a court-martial could not retain jurisdiction under the charge." I think the question as to whether the minor was capable of and did in fact commit the offense of desertion should, in such a case, be left to the determination of the military court, and that the minor should not be released from military custody until the charge was so finally disposed of.

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## SHENANDOAH ABATTOIR CO. v. SUSTOCK.

(Circuit Court of Appeals, Third Circuit. February 14, 1917.)

No. 2158.

MASTER AND SERVANT ⊂⊃278(13)—INJURIES TO SERVANT—EVIDENCE—REPAIR WORK—UNGUARDED MACHINE.

In an action for injuries to an employé, whose hand was caught in a machine when the guard usually protecting it as required by statute had been removed, evidence *held* to show as a matter of law that the employé was testing the machine in connection with the repair thereof at the time, so that the operation of the machine without the guard was not negligence on the part of the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 961; Dec. Dig. ⊂⊃278(13).]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Action by William Sustock against the Shenandoah Abattoir Company. Judgment was rendered for the plaintiff, and defendant's motion for new trial denied (232 Fed. 900), and defendant brings error. Reversed and remanded.

E. M. Biddle, of Philadelphia, Pa., for plaintiff in error.

Clarence H. Goldsmith, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below William Sustock, a citizen of New York, recovered a judgment against the Shenandoah Abattoir Company, a corporation of Pennsylvania. Thereupon the latter brought this writ, alleging error was committed by the court in refusing its request for binding instructions.

The plaintiff was employed by defendant to operate a machine to clean the intestines used in its sausage factory. To do so, the intestines were inserted by the workmen between a slow revolving drum and a fast revolving spindle. While so inserting one, the plaintiff's hand was caught, drawn into the machine, and permanently injured. The alleged negligence of defendant, involved in the issue before us, was the absence of a guard on the machine when plaintiff was injured. Of the duty of the defendant, under the Pennsylvania statute (Act May 2, 1905 [P. L. 355] § 11), the pertinent extract from which is quoted on the margin,[1] to place a guard on this machine, and of the fact that it did furnish such guard, there is no question. The trouble arose in an interim when the guard was removed while the machine was being repaired. The proofs showed that before the accident the spindle and drum had gotten out of proper adjustment and the machine worked badly. A machinist, whose duty it was to adjust the machine, had been called in and was at work adjusting the bearings of the drum and spindle when the accident occurred. To make such adjustment, it was necessary to remove the guard and this had been done. The plaintiff, who did several kinds of work about the factory, but whose regular work was at this machine, came into the room and, while the mechanic was readjusting the bearings of the unguarded machine, attempted to run an intestine through it and was injured.

The legal side of this situation was properly summed up by the trial judge in these words:

"Now, the question for you to determine, under all the evidence in this case, all the evidence upon the part of the plaintiff and all the evidence upon the part of the defendant, is as to just what this man was doing. Was he operating this machine as a part of the ordinary work of that plant? or was he testing this machine as a part of the ordinary work of that plant? or was he testing this machine as a part of the work of the repair and adjustment of the machine, because I say to you as a matter of law that if at that time what he was directed to do and what he did do was the operation of this machine as a part of the business of the plant, there is evidence before you from which you can find that the defendant was guilty of negligence, and therefore responsible for the plaintiff's injury, because of the operation of that machine without a guard over these blades or paddles. But I say to you also as a matter of law that if that was not the work that was being done, but the work that was being done was a part of the repairs to the machine and the adjustment of it, and a mere testing of its operation to see whether or not the machine had been properly repaired and properly adjusted, then the absence of the guard is no evidence in this case on which you would be justified in finding the defendant to be guilty of negligence."

Of these instructions, as a correct statement of the law in the abstract, the defendant does not complain if the facts were such as to warrant the submission of that question to the jury. What it does complain of is that the evidence before the court unmistakably showed that Sustock was helping adjust the machine by the test of running an intestine through, and was not engaged in his regular work when this accident happened. If such be the case, if the facts were such

[1] "All vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws, grindstones, emery wheels, flywheels, and machinery of every description shall be properly guarded."

as to unmistakably show that the machine was being repaired, and that Sustock was working at repair and not regular work, then the court erred in denying the request of the defendant for binding instructions. We have carefully studied the entire proofs, and from such study we agree that the evidence so clearly showed that Sustock was engaged in repair work that no other inference could be reasonably drawn therefrom. They show that Sustock had worked on the machine for a long time, that on this particular day it had gotten out of working order, and that Lord, the mechanic whose duty it was to adjust it, was doing so. While Lord was engaged in such adjustment, Sustock came into the room where the machine was and told Stuckis, the foreman, who was testing the machine as Lord adjusted it, that he was wanted in another room. The testimony of Sustock shows what followed:

"Q. You did go into the gut room, and what did you see there? Did you go up to this machine? A. I saw John Stuckis standing alongside of the machine with a piece of intestine in his hand. Q. The machine that you were afterwards hurt on? A. Yes, sir. Q. What was Stuckis doing at that time? A. He was standing there with the intestine in his hand. I think he was about to insert it into the machine. Q. In the way that you have described? A. Yes, sir. Q. Who else were there at the time? A. John Lord and Dick Jones. Q. Who was Dick Jones? That is, what did he do around there? What was his work? A. He was fireman, I think, at that time. Q. That is the time I speak of. A. He was fireman. Q. Who was Lord? What did he do? A. He was mechanic of the building. Q. Did you have anything to do with the machinery there, or repairing it, or things of that kind, during the time you were there? A. Whenever I got orders to do it. Q. Were you a machinist? A. No, sir. Q. Did you ever get any orders to repair machinery? A. No, sir. Q. This man Lord was what? A. Mechanic. Q. Did he slaughter, or feed machines, or anything of that kind, at the time, or about the time, of this accident? A. No, sir; he was repairing all the machinery in the building. Q. Did he give his entire time to that work? A. Yes, sir. Q. And he was at this machine, you say, when you came in? A. Yes, sir. Q. We will begin now with what you said to Stuckis and what he said to you at the time you say you saw him about to put a gut into the machine, and the spindles I think you said were revolving at that time? A. Yes, sir. I told John Stuckis that the boy didn't have anything to do. John Stuckis, or Mr. Stuckis, said to me, 'You stay here, Bill, and try the machine, and see how it will clean,' and he disappeared. He went into the other room to give the boys work. Q. What did he do with this gut he had in his hand? A. He laid it down alongside of the machine. Q. How did he lay it down? A. He wrapped it on a thumb screw or a bolt that stands between the machine on the side here (indicating). Q. At that time was there any guard on either of the spindles? A. No, sir. Q. After telling you this he went from the room? Is that right? A. Yes, sir. Q. And at that time was there any tub of guts there near the machine? A. Yes, sir; there was. Q. What did you do then, or say? A. I took the gut to insert it into the machine. Q. The gut that he had laid down? A. Yes, sir. Q. Did you say anything at the time? A. When I inserted it into the machine it didn't *clean very well.* The machine didn't clean very well, and I told Lord that it *wasn't cleaning good,* and then he was on the other side of the machine with a *monkey wrench.* I don't know what he did. I don't know what he was doing with the monkey wrench. I think he was *adjusting it.* Then John Lord said to me, 'Try another one in.' I took another piece and inserted it into the machine, and it *still didn't clean very well.* Q. Did you say anything to anybody about the machine, or the spindles, or the covers, or anything at that time? A. I told John Lord that it *wasn't cleaning good.* He was standing on the other side of the machine.

Then he told me to try to put another piece into the machine. The third time I put a piece in my hand got fastened in the machine. Q. Did you say—

"Mr. Biddle: I decidedly think that on an important point of the case like this that should not be done.

"Mr. Robinson: Q. Will you tell us every word that was said about everything between you and Lord just before the accident? A. Before I started to operate the machine, I saw the protections were taken off, and I told John Lord to put the protections on the machine. I said, 'The water will splash.' John Lord said to me, he said: 'To hell with the protections. *We can run her without the protections.* It ain't necessary to have them on there, anyhow.' He said, *'I lost the bolts.'* Q. That was before you began at all, was it? A. Yes, sir. Q. And you inserted one piece in, you said, and you saw that it did not clean well? A. Yes, sir. Q. And you stated so to him, did you? A. Yes, sir. Q. And then he said, 'Try another'? A. Yes, sir. Q. Had you ever been told at any time before this day to take orders from Mr. Lord at any time? A. Yes, sir. When I first started there, every time I was sent to work with John Lord, I was told to take orders from him. Q. Had Lord been there during the two years that you had been there? A. Yes, sir. * * * Q. I am going to ask you to tell the court and jury just how your hand was hurt. A. My hand was fastened into the machine when I was inserting these intestines into the machine the third time. Q. That is the third intestine you put in? Is that what you mean? A. Yes, sir. After I told John Lord the second time that it had not been cleaning very well, *John Lord adjusted the machine some more.* I don't know whether he lowered the spindles or raised the drum, *but it seemed that the gripping was more tighter than it had been the first time, and as soon as I inserted the gut* into the machine it drew my hand right in to the spindles."

From this and other portions of his own testimony, it is therefore clear that Sustock took up the testing work which Stuckis stopped when he was called away, and he was injured while this machine was being repaired. The uncontradicted testimony on the part of the defendant also showed he was familiar with the working of this machine, with the manner of repairing and testing it, and that he was accustomed to work on it regularly, and at times to himself take it apart to repair and clean it. It is therefore apparent that there was no basis of fact or proof which warranted submitting to the jury the question of whether Sustock was engaged in regular, and not in repair, work when injured. The facts simply showed he was engaged in repair work.

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

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## BROOKLYN EASTERN DIST. TERMINAL v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 97.

1. MASTER AND SERVANT ⇐13—HOURS OF SERVICE ACT—"TRAIN."

The members of a switching crew employed by a terminal company engaged in interstate transportation, whose only duties were to move drags of one or more cars to or from car floats and about the terminal yards, are persons actually engaged in or connected with the movement of a train, within Hours of Service Act March 4, 1907, c. 2939, 34 Stat. 1415 (Comp. St. 1913, §§ 8677–8680), though switching operations have been held not train movements under Safety Appliance Act March 2, 1893, c.

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

196, 27 Stat. 531 (Comp. St. 1913, §§ 8605–8612), since a string of connected cars hauled on one track by one or more engines is in common speech a "train," and such employés are within the purpose of the Hours of Service Act to promote reliability and health of the employés.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⟸13.

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

2. MASTER AND SERVANT ⟸13—HOURS OF SERVICE ACT—"COMMON CARRIER"—TERMINAL COMPANY.

A terminal company, receiving and delivering goods only from or to common carriers by railroad or steamship with whom it had contracts, and dealing with the shippers and consignees only as agents for such carriers, is not a "common carrier" within the Hours of Service Act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⟸13.

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

3. MASTER AND SERVANT ⟸13—HOURS OF SERVICE ACT—PERSONS LIABLE—AGENT.

Though such terminal company is an agent of the common carriers with whom it has contracts, within Hours of Service Act, § 2 (Comp. St. 1913, § 8678), making it unlawful for the agents of a common carrier subject to the act to permit any employé subject to the act to work overtime, and section 3 (Comp. St. 1913, § 8679), making such agent liable to a penalty, its employés are not employés of a common carrier, so that the terminal company is not liable under the Hours of Service Act for permitting its employés to work more than 16 hours in one day, though it would be liable if it used the crews of the carriers in its operations and permitted them to work overtime.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⟸13.]

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

Action by the United States against the Brooklyn Eastern District Terminal for penalties incurred by violation of the Hours of Service Act. Judgment for the plaintiff on an agreed statement of facts, and defendant brings error. Reversed.

Writ of error to review a judgment of the District Court against the defendant below (hereinafter called the Terminal), for penalties incurred by violation of Act March 4, 1907, commonly called the "Hours of Service Act." The case was tried on an agreed statement of facts, which admitted that the Terminal had permitted several "members of switching crews," at their own request, to remain on duty for more than 16 consecutive hours.

Henry B. Closson, of New York City, for plaintiff in error.

Melville J. France, U. S. Atty., of Brooklyn, N. Y. (Vine H. Smith, Asst. U. S. Atty., of New York City, and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C., of counsel), for the United States.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. The Terminal is a corporation organized under the Transportation Corporations Law of New York (Consol. Laws, c. 63) for the purpose (as declared in its certificate of incorporation) of owning and employing vessels and other property in the business of transporting and storing merchandize in New York Harbor and the territory bordering thereon. It maintains a fleet of tugs and car floats, which convey cars to and from its station on the Brooklyn shore of the harbor, procuring and delivering such cars at the depots (mostly on the New Jersey shore) of sundry railroads; e. g., the Erie. Its own Brooklyn station contains float bridges, platforms, freight sheds, etc., all connected by railroad tracks, and does not apparently differ from many other water front freight yards in construction and arrangements. In order to haul the cars so handled from and to the bridges and places of loading and delivery, it hires several switching engines, which take "drags" of cars—i. e., one or more cars fastened to the engine—wherever they are wanted within the terminal limits. It owns no cars, and transports no passengers. To manage these "drags," so-called "switching crews" are employed by the Terminal, each consisting of a conductor, engineer, and a number of brakemen deemed sufficient.

It thus appears that the only business of the Terminal is to provide for some ten or more interstate railways, and certain steamship lines, which have no Long Island termini, a place for the receipt and delivery of freight, doing the same kind of work which the railroads themselves do at (e. g.) their New Jersey stations. This work is done in pursuance of identical written contracts with the Terminal's several patrons, under which the Terminal is paid so much per hundredweight for freight transported, receives and delivers goods in the name of (e. g.) the Erie Railroad, issues the bill of lading of the proper company, and collects freight moneys as agent, turning over all receipts in full to the patrons to which they severally belong.

The question presented by this writ is whether the Terminal is subject to the provisions and penalties of the statute invoked by the United States. The Hours of Service Act is declared by its own preamble to apply to "any common carrier or carriers, their officers, agents and employés" engaged in interstate or foreign commerce, and "employés" is defined as meaning "persons actually engaged in or connected with the movement of any train." It is admitted that the Terminal is by the carriage of goods from New Jersey to Long Island engaged in interstate transportation; indeed, that is the staple of its business.

[1] Whether a member of a switching crew is a "person actually engaged in or connected with the movement of any train" depends upon whether the drags of cars handled by these crews are "trains." This word has received construction in cases arising under the Safety Appliance Act, with the result that switching operations have been held not to be "train movement." United States v. Erie Railroad, 237 U. S. 402, 35 Sup. Ct. 621, 59 L. Ed. 1019; United States v. Chicago, etc., 237 U. S. 410, 35 Sup. Ct. 634, 59 L. Ed. 1023. See, also, La Mere v. Railway, etc., Co., 125 Minn. 159, 145 N. W. 1068, Ann. Cas. 1915C, 667; United States v. Grand, etc., Co. (D. C.) 203 Fed. 775;

Atchison, etc., Co. v. United States, 198 Fed. 637, 117 C. C. A. 34; United States v. Boston, etc., Co. (D. C.) 168 Fed. 153; United States v. Chicago Great Western, etc., Co. (D. C.) 162 Fed. 775.

In our recent decision in International, etc., Co. v. United States, 238 Fed. 317, — C. C. A. —, we pointed out how consistently the Safety Appliance Act had been construed to reach the mischief for which the remedy was provided; and we have no doubt the Hours of Service statute must receive the same liberal interpretation. A string of connected cars hauled on one track by one or more engines is in common speech a train. If it is to be brought within the scope of the Safety Appliance Act during mere switching operations, so that the air brake provision applies, the statute is a nuisance, not even contributing to safety; but men may as easily work beyond the limits of reliability and health on "drags" of cars as on the same number of cars traveling the open road; indeed, we think the work in yards probably more onerous and exacting.

The object of this statute is the preservation of efficiency by keeping the body sound, and, having regard to that legislative purpose, we have no hesitation in holding that the "switching crews" of the Terminal were "engaged in the movement of a train," within the meaning of the statute, although the same collocation of cars and engines would not be within the air brake provision of the Safety Appliance Act, when engaged in switching operations only.

[2] This statute, however, applies solely to "*common* carriers," it is so explicitly stated. That the Terminal is a carrier cannot be doubted, but a common carrier is one who by virtue of his calling undertakes to transport personal property from one place to another for all such as may choose to employ him, and every one who so carries and delivers for compensation the goods of all persons indifferently, is a common carrier. United States v. Ramsey, 197 Fed. 144, 116 C. C. A. 568, 42 L. R. A. (N. S.) 1031.

The point is too plain to need elaboration; this plaintiff in error is not a common carrier, for it transports only for those it has contracts with, and only such goods as its patrons intrust to it; it does not carry for "all persons indifferently." It is, however, the agent of several common carriers, employed by them to discharge to the public the duties of common carriage assumed by those railways and steamship companies which hire the Terminal for that purpose. United States v. Union Pacific, etc., Co., 213 Fed. 332, 130 C. C. A. 34. The same reasoning which finds the Terminal a common carrier, would necessarily apply the same term to every teamster who with his own vehicle collects and delivers goods for (e. g) an express company under a yearly contract. The test is that shippers and consignees have no contractual relation with the Terminal; they deal with the common carriers, as disclosed principals, through the Terminal as agent.

[3] There remains the question whether an agent of a common carrier subject to the statute may not be liable to the penalties thereby prescribed. Doubtless this is often the case; for section 2 declares it unlawful for the "agents" of any common carrier "subject to this act" to permit any employé "subject to this act" to do what the Terminal's

switching crew did, and section 3 declares "such" agent to be liable to a penalty. But these words necessarily depend for scope and effect on the declaratory preamble, which states that the act applies only to *common* carriers engaged in the described commerce and *"their* officers, agents, and employés." This limits the word "employés" to those of a common carrier, and does not permit its extension to the servants of an agent which is not itself a common carrier.

Thus if (e. g.) the Erie Railroad switched its own cars in the Terminal's yard, with its own crews, those men would be subject to the act, and if the Terminal, as the Erie's agent, compelled or permitted them to work overtime, liability would attach both to Erie and Terminal; but the employés of the Terminal itself are not within statutory language too explicit to admit doubt or require construction. See Baltimore, etc., Co. v. Interstate, etc., Com'n, 221 U. S. 617, 31 Sup. Ct. 621, 55 L. Ed. 878.

Judgment reversed.

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## RUCABADO v. LONGPRÉ et al.

## ABOY v. SAME.

(Circuit Court of Appeals, First Circuit. December 6, 1916.)

Nos. 1174, 1175.

1. EVIDENCE ⊂=350—STATUTES—RULE OF EVIDENCE.

Civ. Code Porto Rico, § 1195, providing that the date of a private instrument shall be considered with regard to third persons only from the date on which it may have been filed or entered in a public registry, from the death of any who signed it, or from the date of its delivery to a public official, which was included in a chapter entitled "Proof of Obligations," the other sections of which related to matters of evidence, was a rule of evidence, not of substantive law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1388–1397; Dec. Dig. ⊂=350.]

2. EVIDENCE ⊂=70—STATUTE—REPEAL.

Civ. Code Porto Rico, § 1195, provided that the date of a private instrument shall be considered, with regard to third persons, only from the date on which it may have been filed or entered in the public registry, from the death of any of those who signed it, or from the date on which it may have been delivered to a public official by virtue of his office. Act Porto Rico March 9, 1905 (Rev. St. & Codes, pp. 276–298), was entitled "An act to regulate the introduction of evidence in civil proceedings," and declared by section 102 what should be presumptions, which are satisfactory if uncontradicted, among them being the presumptions that private transactions have been fair and regular, and that a writing is truly dated. Section 170 of the same act provides that all royal decrees, and general orders, acts, and parts of acts in conflict therewith, are thereby repealed. *Held*, that the act of 1905 repealed section 1195 of the Civil Code, and that under the later statute receipts, checks, and other writings create a presumption of payment as of their date, even in an action between those not parties to the instruments.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 91; Dec. Dig. ⊂=70.]

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Appeals from the Supreme Court of Porto Rico.

Suit by Nancy Neron Longpré and others against Ramón Wolff Aboy and others, in which Mateo Rucabado intervened. Decree for the plaintiffs, and defendants and intervener separately appeal. Affirmed.

Otto Schoenrich, of New York City (Jorge V. Dominguez, of San Juan, Porto Rico, and S. Mallet-Prevost and Curtis, Mallet-Prevost & Colt, all of New York City, on the brief), for appellant Rucabado.

Otto Schoenrich, of New York City, for appellants Aboy and others.

Hector H. Scoville, of San Juan, Porto Rico (Daniel F. Kelley, of San Juan, Porto Rico, on the brief), for appellees.

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

BINGHAM, Circuit Judge. These cases are appeals by Mateo Rucabado, Ramón Wolff Aboy, and Diaz & Aboy from a judgment of the Supreme Court of Porto Rico.

August 19, 1899, Ramón Wolff Aboy sold to the plaintiffs (appellees), doing business as the Central "Puerto Real," certain real estate in the Island of Vieques, Porto Rico, for the sum of $28,750. The plaintiffs paid $8,750 at the time of the sale, and executed a mortgage to Wolff Aboy for the balance ($20,000), which they obligated themselves to pay on June 30, 1917. At the time of the sale the property was leased to Diaz & Aboy for the period of 10 years, from December 1, 1907, to June 30, 1917, on a monthly rental of $112, which lease the plaintiffs agreed to respect. In lieu of interest on the $20,000, Wolff Aboy was to receive the monthly rentals of $112 from Diaz & Aboy. Subsequent to the execution of the mortgage, the plaintiffs paid Wolff Aboy various sums of money on account of the mortgage, which, on June 15, 1911, amounted to more than the sum due on the mortgage, and Wolff Aboy promised to execute a deed canceling the mortgage, but failed to do so. July 31, 1911, Rucabado, one of the appellants, brought an action of debt against Wolff Aboy on a note given him by the latter for $12,000, and attached the mortgage credit of $20,000 appearing in Wolff Aboy's favor in the registry of property. November 9, 1911, the plaintiffs, mortgagors, filed a complaint in the district court of San Juan to cancel the mortgage. This proceeding was brought against the mortgagee, Wolff Aboy, and Diaz & Aboy; the latter being made defendants to compel them to pay the plaintiffs the monthly rentals of $112, instead of paying them to Wolff Aboy, he having been paid the amount of his mortgage and having no further interest in the property. November 29, 1911, Rucabado was allowed to intervene in the suit for cancellation to protect his attachment of the mortgage credit. Judgment by default was entered against Wolff Aboy. Diaz & Aboy answered the complaint, but did not appear at the trial. In the district court of San Juan judgment was entered against the plaintiffs, and they appealed to the Supreme Court of Porto Rico. The Supreme Court reversed the judgment of

the district court, and ordered a cancellation of the mortgage on the ground that it had been paid, and that Diaz & Aboy should pay plaintiffs the monthly rentals of $112 from the date of the judgment. From this judgment Rucabado and Diaz & Aboy have prosecuted this appeal.

In the district court the fact of payment in full of the mortgage indebtedness and the time when it was paid were based upon oral evidence, notes of Wolff Aboy indorsed and paid by the plaintiffs, checks paid Wolff Aboy, letters signed by him acknowledging payments upon the mortgage indebtedness, and the admission of the attorney for Rucabado that the papers were authentic and that the payments were made on the dates therein stated. In both courts it was found that the mortgagors had paid the mortgage indebtedness before Rucabado's attachment of the mortgage credit, and that there was no collusion between Wolff Aboy and the plaintiffs. In the district court it was held that Rucabado, by his cautionary notice of attachment in the registry of property, acquired, under the mortgage law of Porto Rico, only a preference "over other creditors whose claims against the same debtor were contracted subsequently to the entry of such cautionary notice; * * * that the intervener, Rucabado, has neither acquired a real right in the attached property, nor can be considered as a third party within the provisions of the mortgage law," but that, under the provisions of the Civil Code, "Rucabado is a third party whose rights cannot be questioned except by virtue of the evidence required by law for avoiding fraud and simulation"; that under section 1195 of the Civil Code the date of a private instrument can "be considered, with regard to third persons, only from the date on which it may have been filed or entered in the public registry, from the death of any of those who signed it, or from the date on which it may have been delivered to a public official by virtue of his office"; and that because of this the letters, notes, checks, and oral evidence offered in this case could not be used against Rucabado, a third party, to establish a date of payment prior to the attachment.

In the Supreme Court it was held that, inasmuch as the full amount of the mortgage had been paid in good faith, the payments were validly made within the provisions of sections 1132 and 1133 of the Civil Code, the debt was extinguished (section 1124), and the plaintiffs were released from the obligation with relation to the defendant Wolff Aboy; that, therefore, the debtor had the right to a cancellation of the mortgage, which right was not disturbed by the entry in the registry of the cautionary notice of attachment of the mortgage credit, which had no effect other than to record a preference to the creditor who had secured the attachment over other creditors whose claims against the same debtor were contracted subsequently to the entry of the cautionary notice; that the plaintiffs are not creditors (within the meaning of article 44 of the Mortgage Law), but debtors, of Wolff Aboy; and that Rucabado is not a third party within the provisions of Mortgage Law, articles 23, 25, and 27.

It was, however, held that Rucabado was a third party "according to the provisions of the Civil Code, and that as such the provisions of

section 1195 of the Civil Code are applicable to him"; that "if Wolff Aboy had given the plaintiffs one or more receipts for the partial payments of the amount due, and there were no other evidence of such payments than the said receipts, and Rucabado had denied their dates, then Rucabado would be entitled to invoke the said section in his defense"; that, instead of taking this position, he had admitted the payments, and dates of payments, shown in the letters, notes, and checks, and only questioned their scope and validity by "claiming that under the provisions of section 1195 of the Civil Code the dates are not valid as against him"; that this he could not do; that "section 1195 of the Civil Code is strictly applicable when there is no other evidence of an act or contract than a private document"; that it "only contains the presumption that the date of a private contract, in the absence of proof to the contrary, is, as regards a third person, the date on which it was filed or entered in a public registry, or of the death of any of the persons who signed it, or on which it was delivered to a public official by virtue of his office."

The assignments of error relied on in this appeal present the following questions:

(1) Whether Rucabado is a third person entitled to the benefit of the provisions of section 1195 of the Civil Code of Porto Rico; and

(2) If he is a third person entitled to the benefits of its provisions, whether the section states a rule of evidence which renders a private document inadmissible as the sole proof of the date of its execution, or states a rule of substantive law, rendering a transaction agreed upon in a private instrument wholly void as against third persons, though valid as between the parties.

[1] The appellants' contention is that Rucabado is a third person entitled to the provisions of the section, and that it is a rule of substantive law rendering an agreement embodied in a private instrument void as against third persons, though valid as between the parties to the agreement. This provision of the Code is found in the compilation of the Revised Statutes and Codes of Porto Rico, p. 732. The chapter of the Code containing this provision begins at page 731, and is entitled "Proof of Obligations." The general provisions under this title are contained in sections 1182 and 1183; the former provides that "proof of obligations devolves upon the persons claiming their fulfillment, and that of their extinction upon those opposing it," and the latter that "proofs may be given by instruments, by confessions, by the personal inspection of the court or judge, by experts, by witnesses, and by presumptions." In the first article public and private instruments are dealt with. It is there stated that "public instruments are those authenticated by a notary or by a competent public official, with the formalities required by law" (section 1184), and private instruments are those signed by the parties, but not fulfilling the requirements of a public one (section 1191); that "public instruments are evidence, even against a third person, of the fact which gave rise to their execution and of the date of the latter. They shall also be evidence against the contracting parties and their legal representatives with regard to the declarations the former may have made therein"

(section 1186); that "a private instrument legally acknowledged shall have, with regard to those who signed it and their legal representatives, the same force as a public instrument" (section 1193); that "the date of a private instrument shall be considered, with regard to third persons, only from the date on which it may have been filed or entered in a public registry, from the death of any of those who signed it, or from the date on which it may have been delivered to a public official by virtue of his office" (section 1195); and that "entries, registries, and private papers shall be evidence against the person who has written them only in all that may appear clearly stated; but a person who wishes to make use thereof is bound to accept them also in the part prejudicial to him" (section 1196).

It is evident from the title and the sections cited that these provisions relate to rules of evidence, and are not, in the strict sense, rules of law, and that section 1195 means that a private instrument, though dated, shall not in and of itself be evidence of the date of its execution as against third persons; that as to them it shall be considered evidence of its execution from the day on which it may have been filed or entered in a public registry or one of the other contingencies referred to in the section have occurred. In other words, it prescribes a rule of evidence, and not of substantive law.

[2] The Civil Code of Porto Rico went into effect July 1, 1902; but on March 9, 1905, its Legislative Assembly enacted a law, entitled "An act to regulate the introduction of evidence in civil proceedings," wherein it revised, enlarged, and, in many respects, materially altered the law of evidence as theretofore provided for in its Code. Compilation of Revised Statutes and Codes of Porto Rico, pp. 276–298. This act went into effect July 1, 1905 (section 171), and in section 170 provides that "all royal decrees, and general orders, acts and parts of acts in conflict with this act, are hereby repealed." Nowhere in this act are to be found the provisions contained in section 1195 of the Code. By it "public documents are such as are specified in article 1184 of the Civil Code" (section 45); "all other writings are private" (section 46).

In chapter 5 of the act, under the title "Indirect Evidence, Inferences and Presumptions," it states (section 96) that "indirect evidence is of two kinds: (1) Inferences; and (2) Presumptions"; and, having defined the nature of an "inference" and a "presumption," it states that "a presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted the judge or jury are bound to find according to the presumption" (section 100). After stating that "the following presumptions, and no others, are deemed conclusive" (section 101), it sets forth in seven paragraphs the circumstances under which presumptions of this class may arise. It then says that "all other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence" (section 102). Thirty-nine disputable presumptions, and the circumstances under which they may arise, are set forth, among which are the following:

(19) "Private transactions have been fair and regular."

(23) "A writing is truly dated."

The presumption that "private transactions have been fair and regular" is not restricted in its application as to parties, and is entirely inconsistent with the fundamental idea embodied in section 1195, which is that private transactions are presumed as respects third persons to be unfair and irregular; and the presumption that "a writing is truly dated" means that a writing, whether a public or private document, shall be presumed to have been executed on the date which it purports to have been. Both of these provisions are in conflict with the letter as well as the spirit of section 1195, and make it manifest that a fundamental change in the law was intended.

We are therefore constrained to hold that section 1195 was repealed by the act of 1905. Such being the case, the letters, notes, and checks that were introduced in evidence were presumptively executed on the dates which they respectively purported to have been, and as there was no evidence to the contrary, but it was in fact admitted that the payments were made as of the dates shown in these instruments, the court was right in ruling that the evidence was competent on the question of the dates of the payments, and also in deciding that the mortgage should be cancelled and that Diaz & Aboy should pay the rent to the plaintiffs. These conclusions make it unnecessary to consider whether Rucabado was a third person within the meaning of section 1195.

The decisions of the Supreme Court of Spain, interpreting the provisions of section 1227 of their Code (said to be similar to those of section 1195), which were rendered prior to the adoption of the Code of Porto Rico on July 1, 1902, do not seem to be in accord with one another. If that court has since determined upon a construction of this provision of their Code in accordance with the appellants' contention, its decisions would be of little or no aid in the present controversy in view of the act of March 9, 1905.

The decree of the Supreme Court of Porto Rico is affirmed, with costs to the appellees.

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## THE ANSONIA v. SULLIVAN.

(Circuit Court of Appeals, Second Circuit. January 23, 1917.)

No. 146

1. NEGLIGENCE ⊂⊃52—LANDOWNER—DUTY TO ANTICIPATE INJURY.

Defendant, the proprietor of a hotel, extending from street to street maintained a delivery entrance reached by a passageway running from street to street. Defendant prohibited the use of the passageway at night by vehicles, stretching a chain across it. Owing to the darkness, the chain was practically invisible. Plaintiff's intestate, who had made a delivery at the hotel in the daytime, and did not know of the presence of the chain, was caught as he proceeded down the passageway, thrown to the pavement, and injured, so that he died. *Held* that, as the hotel was a large one, and as defendant must have known that the delivery entrance would be used at all hours, and did not intend to prohibit pedes-

trians from so using it, it was guilty of negligence in failing to use some means of showing pedestrians the presence of the chain or barrier.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 65; Dec. Dig. ⊂⊃52.]

2. NEGLIGENCE ⊂⊃136(27)—CONTRIBUTORY NEGLIGENCE—WHAT CONSTITUTES.
In such case, as plaintiff's intestate did not know of the existence of the chain, and had found the passageway safe in the morning, he was not guilty of contributory negligence as a matter of law in using the passageway, for one who passes along a sidewalk has a right to presume it is safe, and does not need to anticipate danger.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 336, 337; Dec. Dig. ⊂⊃136(27).]

3. NEGLIGENCE ⊂⊃134(1), 135—ACTIONS—JURY QUESTION.
In an action against defendant proprietor of a hotel for injuries resulting in the death of plaintiff's intestate, who was caught by a chain stretched across a passageway by defendant, *held*, that the evidence warranted a finding that defendant was negligent and that deceased was not contributorily negligent.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267, 274–276; Dec. Dig. ⊂⊃134(1), 135.]

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

Action by Catharine Sullivan, as administratrix of the estate of Edward J. Sullivan, deceased, against The Ansonia. There was a judgment for plaintiff, entered upon a verdict in her favor for $5,000, and defendant brings error. Affirmed.

Edgar J. Treacy and Alfred E. Holmes, both of New York City, for plaintiff in error.

Augustus L. Richards and Ralph S. Harris, both of New York City, for defendant in error.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

COXE, Circuit Judge. At the time of the occurrences in question the defendant operated a large hotel fronting on Broadway and occupying the entire space between Seventy-Third and Seventy-Fourth streets for a considerable distance back from Broadway. The hotel is 18 stories in height and has accommodations for several thousand guests. A part is used for transient guests and a part is occupied by apartments, where the guests do their own housekeeping. The hotel has four main entrances for the use of guests—two on Broadway, one on Seventy-Third street and one on Seventy-Fourth street.

There is also a delivery entrance which opens into the basement where there is a service elevator for the delivery of merchandise and supplies of all kinds to the hotel and its guests. The only way of reaching the delivery entrance at the time in question was by a runway extending from street to street at the rear of the building. This runway was bounded by high walls on both sides. It was a one way road in the sense that vehicles could not pass each other while moving on the road proper. It was near the Seventy-Fourth street entrance that Sullivan received the injury which caused his death. A short distance from the entrance to the runway was a chain with rings at either

end. These rings were fastened to hooks in the opposite walls of the runway so that the chain sagged in the middle to about the height of a man's chest. There is a disagreement between the witnesses as to the exact height of the chain above the floor or pavement of the runway, but it is wholly unnecessary to attempt an accurate estimate in the face of the proof that the chain caught Sullivan and threw him down when he was endeavoring to deliver a package at the hotel. There can be little doubt that the purpose of the chain directly across the runway was to prevent delivery wagons going in after 6 o'clock. As one of the witnesses expressed it, "We don't allow any wagons down there after 6 o'clock summer or winter." This was the primary object of the chain and it was not intended to prevent pedestrians from transacting business with the hotel through the Seventy-Fourth Street entrance after that hour. The testimony is undisputed that servants and clerks having business with the hotel used the entrance without objection.

Sullivan had no notice of the chain and it does not appear that he was at this particular entrance at any time previous to March 21st, the day when he was killed. He was there during the morning of the 21st, but there was no chain across the runway at that time. At about half past 6 on March 21st the Gorham delivery wagon on which Sullivan was employed again drove up to the Seventy-Fourth street entrance and Sullivan, with his packages, started down the runway at a pace a little faster than a walk. When he reached the chain he was seen to "bound back" and fall. He was unconscious when the onlookers reached him, lying directly under the chain. He revived, but was taken violently sick soon after and died at the hospital the same evening.

There is no pretense that Sullivan was not an intelligent, careful man, with all his faculties unimpaired. There is no proof that he knew the custom of the Ansonia to put a chain across the runway at 6 o'clock. He had been there that morning and heard nothing and saw nothing to indicate that a chain was to be fastened across the roadway which was unobstructed in the morning.

[1] The defendant knew, or should have known, that this narrow entrance was being used at all hours of the day by tradesmen having business with the hotel. To them it was a plain, open, safe passageway where no dangers were to be apprehended. The defendant was at liberty to close this passage if it so desired, but it was its duty to do so in such a manner as to give notice to those who had used it that it was to be closed after 6 o'clock at night. A red light hung in the center of the chain would have given such notice. A gate painted white closed across the runway would probably have sufficed, but a single dark or rusted chain, hardly discernible in the dim light, gave a wholly inadequate warning.

[2, 3] The plaintiff's intestate, having used the passageway with perfect safety in the morning was justified in thinking that the same conditions prevailed, unless adequate notice was given to the contrary. The way was used by the employés of the hotel, practically all night, and the chain was intended not to stop them but to prevent horse-drawn wagons and motor cars from using the passageway after

6 o'clock. Pedestrians, not familiar with the custom of the hotel were liable to use it and they had a right to assume that a chain was not stretched directly across their path, invisible in the dusk or dim light. There were lights in the runway which might have revealed the situation but they were not lighted at the time of the accident.

The language of the New York Court of Appeals in McGuire v. Spence, 91 N. Y. 303, 43 Am. Rep. 668, is applicable:

"But one who passes along a sidewalk has a right to presume it to be safe. He is not called upon to anticipate danger, and is not negligent for not being on his guard. Whoever left this area in the sidewalk open and uncovered was guilty of a positive wrong. It amounted to an obstruction of the street. It was a trap set for the unwary, or for those hurried or inattentive. Nobody was bound to anticipate its existence, or to look for it, although it was visible. The plaintiff, therefore, was bound to no special care to avoid such an accident as happened, and the jury were justified on the facts in finding her free from negligence."

We think the questions of fact were fairly presented to the jury and their verdict was fully justified by the evidence.

Judgment affirmed with costs.

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## AKALITIS v. PHILADELPHIA & READING COAL & IRON CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1917. On Petition for Rehearing, January 23, 1917.)

No. 136

1. APPEAL AND ERROR ⟸1050(2)—REVIEW—HARMLESS ERROR.
   In an action for the death of plaintiff's husband, a servant, the erroneous admission of evidence as to the ages and occupation of plaintiff's children was harmless.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4154; Dec. Dig. ⟸1050(2).]

2. APPEAL AND ERROR ⟸261—REVIEW—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.
   Where no exception was taken relating exclusively to the language of the summing up of defendant's counsel, complaint on appeal cannot be predicated thereon.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1500; Dec. Dig. ⟸261.]

On Petition for Rehearing.

3. TRIAL ⟸234(8)—INSTRUCTIONS—REFUSAL.
   Where, in an action for the death of plaintiff's husband, a servant, the question of defendant's failure to place other servants present in court on the stand was fully discussed by counsel, the refusal of an instruction that the jury might assume that testimony of such witnesses, which would have been only cumulative, would have been unfavorable to defendant, was not error, where the court informed the jury that they might draw such inferences as they saw fit from the failure of defendant to place such witnesses on the stand.
   [Ed. Note.—For other cases, see Trial, Cent. Dig. § 534; Dec. Dig. ⟸234(8).]

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

Action by Marcel Akalitis against the Philadelphia & Reading Coal & Iron Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

On writ of error to review a judgment entered December 19, 1915, in favor of the defendant and against the plaintiff for costs. The action was brought in the Supreme Court of New York to recover damages sustained by the plaintiff by reason of the alleged negligence of the defendant and was removed by the defendant to the United States District Court for the Eastern District of New York on the ground of diversity of citizenship. The plaintiff is the widow of Vincent Akalitis, deceased, and brings this action pursuant to the laws of Pennsylvania (Act April 26, 1855 [P. L. 309] § 1), alleging that he died of injuries received while working for defendant in the Silver Creek mine, Schuylkill county, Pa., in August, 1913. She asserts that said injuries were induced by the negligence of the defendant in failing to provide a safe place in which to work. The jury rendered a verdict in favor of the defendant.

The record shows that the plaintiff has assigned error in 99 instances, about half relating to the admission and the refusal to admit testimony and the remaining half relating to exceptions to the rulings of the court in charging and failing to charge various propositions of law. Neither party has filed a brief in accordance with the rules of this court.

Baltrus S. Yankaus, of New York City, for plaintiff in error.

Macklin, Brown & Purdy, of New York City, for defendant in error.

Before COXE, WARD, and HOUGH, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). [1] The absence of briefs makes it exceedingly difficult to deal with the questions argued. The testimony to which objection is made by the plaintiff in error found at folios 135 to 141 inclusive and folios 348 to 359 would seem to be immaterial but in view of what took place at the trial it is clear that its admission was not prejudicial to the plaintiff. It is as follows:

"Q. Is the oldest boy, the 19-year old one here? A. Yes, sir. Q. What is he doing? A. He is working in some factory. Q. What is the age of the next child? A. 17 years. Q. Is it a boy? A. A daughter 15 years old. Q. Is she working? A. She just commenced. Q. Then the rest of the children are not working, are they? A. Four are going to school."

The testimony at folio 348 is as follows:

"Q. Have you ever been back to Pennsylvania since you came to New York the first time? A. I was there on a visit. * * * Q. When was it you went back to Pennsylvania on this visit? A. I visited my brother and sisters. Q. When did you go back to Pennsylvania then? A. It was over a year ago. * * * In the next March it will be two years. * * * It was the first of March. I stayed there three days, and then I come back."

If there was anything in this testimony which injuriously affected the plaintiff's case, we are unable to perceive it. That it was irrelevant and immaterial may well be admitted, but we do not see how it was in the least degree prejudicial.

[2] The summing up by the defendant's counsel is printed in full in the record. Why this was done does not appear. No reversible error

can be predicated of what counsel said to the jury as no exception was taken relating exclusively to the language of this address. The question of residence was withdrawn from the jury by the counsel for the defendant. Upon the entire evidence we are satisfied that the questions of negligence were for the jury to pass upon and that a result has been reached which is justified by the proof.

The judgment is affirmed with costs.

On Petition for Rehearing.

PER CURIAM. [3] The only ground stated in the petition for a rehearing about which we need to say anything is the complaint that we did not expressly rule upon the petitioner's exception to Judge Veeder's refusal to charge a request. It was to the effect that the jury might assume that the testimony of Lutcavage and Rowan, who were present in court, would have been unfavorable to the defendant because it did not put them on the stand. Rowan was assistant foreman. Lutcavage was a laborer under decedent's orders. Anything either of them knew would have been in the nature of things cumulative. Judge Veeder told the jury that counsel for the plaintiff and defendant had fully discussed the question as to the defendant's failure to put these men on the stand from their respective points of view and the jury might draw such inferences as they saw fit. This was as favorable an answer as the plaintiff was entitled to under the circumstances.

The petition is denied.

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## THE ORION.

(Circuit Court of Appeals, Fourth Circuit. December 21, 1916.)

No. 1480.

COLLISION ⇐136—SUIT FOR DAMAGES—PROOF OF DAMAGES FOR DETENTION.

On an issue as to the damages recoverable by a chartered vessel, injured in collision through the fault of the other vessel, by reason of loss of time while being repaired, proof of the time lost and of her daily net earnings under her then charter is sufficient to make a prima facie case, in the absence of any countervailing evidence.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 290; Dec. Dig. ⇐136.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Charles A. Woods, Judge.

Suit in admiralty for collision by P. Manolondis, master of the steamship Orion, against John Scully and Thomas J. Scully, partners trading as the Scully Towing & Transportation Line, owners of the barge Scully. Decree for libelant, and respondents appeal. Affirmed.

Frank V. Barns, of New York City, and Braden Vandeventer, of Norfolk, Va. (Hughes & Vandeventer, of Norfolk, Va., on the brief), for appellants.

H. H. Little, of Norfolk, Va. (Hughes, Little & Seawell, of Norfolk, Va., on the brief), for appellee.

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

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

ROSE, District Judge. The Greek steamer Orion and the barge Scully, belonging to the appellants, were in collision on the morning of April 19, 1915. The steamship was damaged, and the necessity of repairing her injuries delayed her sailing 2½ days. Her master filed a libel in personam against the appellants. They answered, but ultimately conceded that their barge was solely in fault. A reference was then made. After hearing testimony, the commissioner reported that the damages amounted to $2,468.58, of which $1,575 were for detention, and the remainder represented the cost of repairs and other disbursements resulting from the collision. The appellants excepted to the commissioner's report, but after argument it was confirmed by Circuit Judge Woods, then by special assignment holding the District Court.

While appellants have assigned as error the allowances for repairs and expenses, and have commented upon them as illustrative of what they claim was a laxity as to the proof of damage given below, they have confined their request for a reversal to that portion of the award intended to compensate for the time lost by the ship. They do not question that there was testimony justifying the finding that the collision postponed her sailing by 2½ days, but they contend that there was no sufficient evidence as to what such delay cost her owners, if it cost them anything.

The ship was at the time under charter, and at the demand of the appellants the charter party was put in evidence. The master, who was examined immediately after the collision, and of course before the ship sailed from Norfolk, testified as to the time consumed in making the voyage under the charter party from Genoa to Norfolk, as to the time which would probably be required to complete the return voyage, and the number of days which would be necessarily occupied in discharging her cargo in Italy. From the data thus furnished the commissioner calculated the gross daily earnings of the ship under the charter party. Her master also testified as to the disbursements which the ship would have to make in order to earn this money. From this data the commissioner calculated the daily net earnings of the ship at $630 per day, and awarded $1,575 as damages for her detention for 2½ days. The appellants say that the charter party shows that the ship would have been subjected to other expenditures than those included by the commissioner in his calculation. They did not attempt, however, to show that such expenditures were in fact incurred on that particular voyage by the ship, what was their amount, or what would ordinarily be their amount. It is highly improbable that, had full evidence been given as to such matters, the commissioner's calculations would have been materially affected. The record does not disclose that these particular objections were ever brought to his attention.

The second contention of the appellants is more far-reaching. They point to the fact that the ship offered no evidence as to the rates prevailing in the freight market at the time, nor did she show that she

either could or did procure immediate employment at equally satisfactory rates so soon as she completed the charter party in question. She produced no proof as to what her earnings had been for a period before and after such charter party. It is common to use some one or two or all of these methods to determine or aid in determining the value of time to a ship. There are circumstances in which the omission to prove any one of them would be fatal to her claim, but the admiralty is a very practical branch of law. It has, with reference to the testimony it will consider, always refused to subject itself to iron-bound rules. It is continually called upon to deal with transactions, some parts of which have taken place in distant parts of the world. To require each detail to be proved in the way upon which a court of common law would insist would be to deny justice. The cost of procuring the testimony would oftentimes exceed the amount in controversy.

All the world, even a judge, knows that freight rates have been steadily rising ever since the fall of 1914, and that every ship which could safely float has been in constant demand. To require formal proof of such facts would be pedantry run mad. If the appellants had any reason to believe that the charter party in evidence was at a higher rate than the ship could command at the end of her voyage, or that there were any other circumstances which made the sum awarded in this particular case unjust, they could have brought them to the attention of the commissioner, or of the learned judge sitting below. In that event, had any of their allegations seemed at all plausible, the ship could, and doubtless would, have been required to produce further testimony. In the absence of all countervailing evidence, the ship made out a sufficient prima facie case.

The decree below must therefore be affirmed.

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## PANAMA R. CO. v. BOSSE.

(Circuit Court of Appeals, Fifth Circuit. February 5, 1917.)

No. 3015.

1. MASTER AND SERVANT ⟸304—LIABILITY TO THIRD PERSONS—VIOLATION OF SPEED REGULATIONS.

A corporation operating a motorbus is liable for injuries caused by the negligence of its chauffeur in running at a speed faster than permitted, since a corporation can act only through agents, and every act of an authorized agent within the scope of his employment is the act of the corporation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1226–1229; Dec. Dig. ⟸304.]

2. DAMAGES ⟸32—PERSONAL INJURIES—PAIN AND SUFFERING.

Under the jurisprudence of the Canal Zone, and under Civ. Code Republic of Panama, arts. 2341, 2356, in force in the Canal Zone, damages for physical pain and suffering are recoverable.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 40, 41, 71; Dec. Dig. ⟸32.]

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

3. DAMAGES ⟸132(13)—EXCESSIVE DAMAGES—INJURIES TO FOOT.
Where plaintiff was knocked down by a motorbus, the wheels of which passed over him, crushing his right foot, breaking the bones thereof, and necessitating the amputation of the second toe of one foot, from which, however, no permanent injury, which would cause any diminution of his earning capacity, would result, a verdict for $2,500 damages is not so excessive as to justify interference by the Circuit Court of Appeals.
[Ed. Note.—For other cases, see Damages, Cent. Dig. § 384; Dec. Dig. ⟸132(13).]

In Error to the District Court of the Canal Zone; William H. Jackson, Judge.

Action by Theodore Bosse against the Panama Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank Feuille and Walter F. Van Dame, both of Ancon, Canal Zone, for plaintiff in error.

Theodore C. Hinckley and Stevens Ganson, both of Panama, Republic of Panama, for defendant in error.

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

PARDEE, Circuit Judge. This suit was brought in the court below under article 2341 of the Civil Code of the Republic of Panama, in force in the Canal Zone, reading as follows:

"He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without prejudice to the principal penalty which the law imposes for the fault or offense committed"

—to recover damages from the Panama Railroad Company on the following state of facts: The plaintiff in error, a corporation organized under the laws of the state of New York, was operating motorbusses between the town of Balboa and the city of Panama in the month of July, 1916, and in the afternoon of the 3d day of that month a motorbus of plaintiff in error, while being driven by the chauffeur in charge, an employé of the plaintiff in error, at a rate of speed in excess of 20 miles per hour in the public highway in the town of Balboa, without warning, struck defendant in error and knocked him down; the wheels of the motorbus passing over him, crushing his right foot, breaking the bones thereof, and causing him such severe injury that he was forthwith removed to the Ancon Hospital for treatment. Defendant in error was struck by the motorbus on a public highway, which, at the time, was filled with pedestrians, including women and children. There were no sidewalks on either side of the road. As a result of the injury, defendant in error suffered the loss of the second toe of the right foot, from which no permanent injury will result, to cause him any diminution of his capacity to earn a livelihood.

The complaint filed in the case alleged the violation of the speed order promulgated by the executive of the United States February 28, 1912, and also alleged confinement in hospital for a considerable length of time, and that complainant had suffered physical damage,

and in mind and health, by pain and suffering. To this complaint, the defendant below interposed a demurrer, on the ground that the same does not state facts sufficient to constitute a cause of action, and especially to all that part of plaintiff's complaint wherein mental and physical pain and suffering are set up as an element of damages. This demurrer was overruled, trial was had before a jury resulting in a verdict of $2,500, and, judgment being rendered thereon, motion was filed for a new trial, which was overruled; whereupon defendant below sued out this writ of error.

The assignments of error cover the overruling of the demurrer, the refusal of the court to direct a verdict in favor of the defendant, and the overruling of a charge that the jury be instructed that the physical pain endured by the defendant in error as the result of his injuries constitute no element of damages under the laws of the Canal Zone, and that the court erred in overruling the plaintiff's motion for a new trial.

[1] On consideration of the record, we conclude that the demurrer to the complaint was properly overruled. The main contention on that ground is that the railroad company was not responsible for the acts of negligence of its employés resulting in injury to others. Corporations act only through agents, and every act of an authorized agent within the scope of his employment is therefore the act of the company.

[2] Under the jurisprudence of the Canal Zone, and we think a proper interpretation of articles 2341 and 2356, damages for physical pain and suffering are recoverable.

[3] While the objection that the verdict was excessive is insisted upon in this court, we find nothing in the record in the way of facts to justify our interference therewith.

On the whole record, we find no reversible error assigned or patent, and the judgment of the District Court of the Canal Zone is affirmed.

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## In re KAUFMAN.

## In re SUISMAN.

(Circuit Court of Appeals, Second Circuit. January 8, 1917.)

No. 77.

1. BANKRUPTCY ⟸404(1)—DISCHARGE—NATURE OF RIGHT.

Under the present Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544), a discharge is a legal right, unless some objection is filed and affirmatively sustained for reasons specifically enumerated in section 14 (Comp. St. 1913, § 9598) of the act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 679, 681–691; Dec. Dig. ⟸404(1).]

2. BANKRUPTCY ⟸408(4)—DISCHARGE—OBJECTIONS—CONCEALING ASSETS—OWNERSHIP OF PROPERTY.

A voluntary bankrupt, to whom his brothers-in-law had conveyed a store under a recorded conditional sale contract, and who had permitted

it to be taken back by them under that contract more than two years before his bankruptcy, after which the bankrupt was employed in the store as manager for his brothers-in-law, and later for his brother, to whom the store had been conveyed by another recorded conditional sale contract, is not the owner of the store, so that his failure to list it among his assets is not a concealment of property, which prevents his discharge in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂=408(4).]

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

In the matter of Jacob S. Kaufman, voluntary bankrupt. From an order of the District Court, granting discharge to the bankrupt, Max Suisman appeals. Affirmed.

In 1906 two brothers named Cantarow owned a drug store in the city of Hartford. Their sister, a licensed pharmacist, was engaged to be married to the bankrupt, Kaufman. By way of giving her a dowry, the drug store was (in 1906) conveyed to the bankrupt and Miss Cantarow, who shortly became Mrs. Kaufman. Such transfer was by a bill of conditional sale duly recorded, the amount recited as due to the Cantarows being $2,000—a sum apparently somewhat less than the store, good will, etc., were worth; the overplus was dowry. The bankrupt and his wife conducted the store (Kaufman being also a licensed pharmacist) in their own name until April 22, 1912. Shortly before that date a small judgment was obtained against the bankrupt, and at various times, prior thereto some $600 had been repaid the Cantarows by either Mr. or Mrs. Kaufman.

For the purpose of protecting themselves, as well as preventing collection of the judgment against Kaufman, the Cantarows, on said April 22d, took possession under their conditional sale bill; the Kaufmans not objecting. Subsequently one of the brothers Cantarow conveyed his share of the business (thus revested in them) to another sister, one Sophie. On January 20, 1914, this brother and sister conveyed the property to one Isaac L. Kaufman (a brother of the bankrupt), conditioned upon the ultimate payment to the grantors of $5,000.

All the aforesaid conveyances and bills of sale were duly recorded in compliance with the laws of Connecticut. The bankrupt's brother was not a licensed pharmacist, and the bankrupt took out such licenses as were necessary for the conduct of the drug store in his own name as an employé. There is nothing to controvert the testimony that, from the time of the surrender of the property to the Cantarows in 1912, he was but an employé of his brothers-in-law, or his brother, as the case might be. He managed the business from the time it was conveyed to him and his prospective wife (who died, apparently before bankruptcy).

On March 27, 1914, Jacob S. Kaufman filed a voluntary petition in bankruptcy, was duly adjudicated, and applied for discharge within the statutory period. This appeal was taken from the order overruling objections and granting discharge.

Jacob Schwolsky, of Hartford, Conn., for appellant.
Albert C. Bill, of Hartford, Conn., for appellee.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] If discharges in bankruptcy depended (as they once did) upon a vote of creditors, doubtless the method of conducting business hereinabove displayed would not induce most men to grant the privilege prayed for. But a discharge under the present act is a legal right, unless some ob-

jection be filed and affirmatively sustained, for reasons specifically enumerated in section 14 of the statute, and not otherwise.

[2] The objections herein, though put in several ways, amount to this, viz.: That the drug store really belonged to Jacob S. Kaufman, and, not having been included in his schedules, he is guilty of concealing assets and making a false oath, and therefore should not be discharged. There is a portion of one objection, which apparently seeks to assert that discharge should be refused because the surrender or transfer of the drug store from the Kaufmans to the Cantarows on April 22, 1912, was in fraud of creditors. This may be quite true, but the only conveyance of that kind which by section 14 of the act is made ground for refusing discharge is a transfer within four months of petition filed, and this transfer was nearly two years old when the petition herein was presented.

The sole question raised by this appeal is whether, within the statutory period, Kaufman owned the drug store or conveyed the same. It is apparently true that the Cantarows, who undoubtedly owned it in 1906, thereafter so arranged matters as to afford out of the business a livelihood to their sister and brother-in-law, giving them an opportunity to become owners upon payment of sums of money, too moderate to be explained otherwise than by family affection. There was no secrecy about this; all creditors could discover the actual status of affairs by investigating the public record office. One may suspect that the bankrupt's brother is really a servant, but there is no proof. Yet he took title from the Cantarows, who, if they wished to benefit the bankrupt without giving him property subject to payment of his debts, had the right of so doing, if the forms of law were observed. Legal formalities were observed, and we conclude with the District Judge that as matter of fact Kaufman did not own the drug store in question, nor any share thereof, for nearly two years prior to bankruptcy.

The order appealed from is affirmed, with costs.

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## In re BUDD.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 135.

BANKRUPTCY ⊂=255—RIGHT OF RECEIVER—POSSESSION OF LEASED PREMISES.

Where the term of a lease was to begin at a date several months in the future, and it was agreed that the lessee, who had paid the first month's rent, should have possession rent free until the beginning of the term, that right inured to the benefit of the receiver in bankruptcy of the lessee, and the lessor cannot claim the reasonable rental of the premises during the time the receiver was in possession prior to the commencement of the term fixed by the lease.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 352; Dec. Dig. ⊂=255.]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of William Budd, bankrupt. Petition by the W. & E. Realty Company to revise an order of the District Court which reversed an order of the referee directing the trustee to pay the petitioner a certain sum for the occupation of the petitioner's premises by the receiver. Order of the District Court affirmed.

Ernst & Cane, of New York City, for petitioner.

Jesse S. Epstein, of New York City, for trustee.

Before COXE, WARD, and HOUGH, Circuit Judges.

COXE, Circuit Judge. On October 22, 1915, the W. & E. Realty Company leased to the bankrupt, William Budd, the premises known as 157 West Thirty-Fourth street, New York, for the term of five years and nine months, beginning May 1, 1916. The rent for the first year was $6,000 with a small advance for each year thereafter. The rent for the month of May, 1916, was paid in advance and the bankrupt entered into possession of the premises, no charge being made for the months intervening between October 22, 1915, and May 1, 1916. On January 21, 1916, an involuntary petition was filed and a receiver was appointed who remained in possession of the leased premises until March 15, 1916. The claim asserted by the landlord—the Realty Company—is that the receiver is liable for a reasonable rent during his occupation of the premises. The receiver, on the other hand, insists that by express agreement between the bankrupt and the Realty Company the bankrupt was permitted to occupy the premises until May 1, 1916, without compensation of any kind and that this right inures to the receiver who, in this respect, occupies the same position as the bankrupt, had no bankruptcy proceedings intervened. The referee decided that the receiver should pay for the use of the premises during the period which he occupied them. He says:

"Not holding possession under a lease accepted by himself or the trustee he cannot avail himself of any advantage which the bankrupt's lease carried after January 21, 1916."

The referee found that $883.18 was a reasonable sum for the receiver to pay for such occupancy and made an order accordingly. The District Court reversed this ruling holding, in substance, that the right of possession by reason of the payment of the May rent and the privilege of occupancy given by the landlord until that time, the trustee acquired the right to the possession of the premises as an asset of the bankrupt's estate.

The bankrupt by the provisions of the lease and agreement with the landlord was given the use of the premises rent free until June 1, 1916. There is no dispute as to this proposition and the only question is whether the receiver occupying the position of the bankrupt and standing in his shoes, is not entitled to the same rights. We cannot see why he is not so entitled. If the bankrupt had paid the rent in advance can there be a doubt that during the period for which the rent was paid the use of the premises belonged to the receiver or trustee? How is the situation altered because as part of the general transaction the period until June 1st was given free of rent? Having expressly

agreed that this period belonged to the bankrupt how can the landlord successfully claim that it belongs to him? In legal effect the possession of the premises was vested in the bankrupt until June 1, 1916.

The order of the District Court is affirmed.

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NEILL et al. v. KINNEY.

(Circuit Court of Appeals, Third Circuit. January 25, 1917.)

No. 2167.

1. PATENTS ⊜26(2)—INVENTION—COMBINATION OF OLD ELEMENTS.
In looking for invention in a combination of old elements, the court is guided by the new and useful means which the combination may afford, or the new and useful results which may be obtained from it.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27, 30.]

2. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—OIL WELL DERRICK.
The Neill patent, No. 933,386, for an oil well derrick of tubular metal, while not generic and for a combination of old elements, in view of its novel and useful qualities of simplicity, portability, durability, and economy, all of which have been recognized in the art in a marked degree, discloses patentable invention; also *held* infringed.

3. PATENTS ⊜35—INVENTION—UTILITY OF DEVICE.
While a mere summation of points of merit does not constitute invention, their presence in a markedly increased measure cannot be overlooked in estimating the utility of a device, and in determining whether it produces new and useful results, within the principle upon which patents are granted.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 39.]

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

Suit in equity by Thomas A. Neill and Lee C. Moore & Co. against Frank Kinney. Decree for defendant, and complainants appeal. Reversed.

Frederick W. Winter, of Pittsburgh, Pa., for appellants.

Kay, Totten & Powell, of Pittsburgh, Pa. (Robert D. Totten, of Pittsburgh, Pa., of counsel), for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an action for infringement of Letters Patent No. 933,386, for an oil well derrick. Claim 1, being the only claim in issue, was held invalid by the District Court for want of patentable invention. The case comes before us on this single issue, infringement being found if the patent is valid. The claim fairly describes the invention, and is for a combination containing the elements we have numbered. It is as follows:

"1. A metal oil well derrick or tower, comprising (1) tubular leg sections, (2) clamping sockets uniting the ends of adjacent leg sections and (3) provided with two sets of perforated ears or flanges located substantially 90 degrees apart and each providing three perforations arranged in vertical rela-

tion to each other, and (4) tubular girts and braces provided with flattened perforated ends, (5) a girt being bolted to the intermediate perforation in each set of the ears or flanges, and (6) a brace bolted to the upper and lower perforations of each set of ears or flanges."

All these elements (with the possible exception of the one numbered 3) are old in the art. We are therefore confronted with the question whether this claim presents a combination involving invention or is a mere aggregation of old elements skilfully arranged.

Drilling rigs, used in the drilling of oil wells, have made a great advance from a primitive beginning. Into an art highly developed and conspicuous for the resourcefulness of its operatives the patentee entered, and in combining what was already there, he raises a very close question as to whether the structure of his patent is the product of his own mind or of the minds of others, and whether he has made a contribution to the art so original and substantial as to amount to a step in advance, for which he is entitled to the reward of a patent. The determination of this question has required a consideration of the art, its problems and accomplishments, to an extent not disclosed by the very brief outline that follows.

Exploration for petroleum and natural gas has always been conducted by drilling bore holes. In drilling bore holes there are two fundamental operations—drilling and hoisting—and the character of these operations, considered with reference to the purpose for which they are conducted, the region of the undertaking, geological conditions, economy of construction and of operation and maintenance after completion, determines the character of drilling mechanism and structures.

The record date of the art of drilling wells is January 15, 1808, and the original rig, used in drilling for salt, was known as the Spring Pole and Tripod. This rig consisted simply of a wooden walking beam or spring pole mounted on a forked stick, suggestive of an old-fashioned well-sweep, with its stationary end weighted by a stone. To the upper or spring end of the pole was attached a rope, and to the lower end of the rope was connected a crude drilling instrument. This was lowered into tubing consisting of two strips of wood whittled in half tubes and wrapped with twine. The operation was performed by manually springing the elastic pole up and down, causing the tool at the end of the rope to descend with force, ascend and descend again. Here was a combination of drilling mechanism and drilling structure, and, primitive as it was, it contained the essential features of all subsequent development in deep well drilling, and was adopted as the best the art afforded when the oil and gas industry started with a rush in 1859.

The spring pole and tripod principle, in which the structure and means of operation are inseparably combined, was pursued with varied modifications for years, until in the evolution of the art, drilling mechanism became a thing apart from the supporting and hoisting structure which carried it, and the two became separate arts, or certainly distinct branches of the same art. We are concerned in this suit not with drilling mechanism in the sense of power and means of applying it, but with structures in which the drilling means is housed and the drilling operation conducted.

Considered with respect to its characteristic as a structure, the spring pole and tripod was followed by the square-rigged braced wooden derrick or hoisting tower of familiar appearance. The very early oil well derricks of this type were made of poles cut from nearby forests and crudely framed together. Their subsequent modification was brought about by the requirement for increased strength and height, and consisted chiefly in a change from rough timbers put together by inexperienced hands to sawed lumber framed by skilled carpenters. These derricks were high and narrow, and stood upon comparatively narrow bases. They were subjected to severe lateral strain from wind and to a compression strain that in certain operations of hoisting was tremendous. While the problem of meeting these strains was in a measure solved by triangularly stiffening the structure with braces and girts, the problem of wind strain had not been completely solved at the time of the invention in suit, but had indeed been somewhat intensified by the substitution of planks for bare timber poles.

The first derricks were made of wood, because of the abundant supply and low cost of material when operating in wooded districts. But operations were at times conducted where wood was not at hand and was to be had only at high cost. The advantage of cheap material for wooden derricks was offset by the high cost of skilled labor required in constructing them and by the very considerable loss of lumber in taking them down by the customary method of toppling them over. Wooden derricks were also liable to destruction by fire, and in regions of large operations were blown down by hundreds in heavy windstorms.

The uncertainty of oil flow and the movement of operations from one field to another made economy in the construction, removal, and new construction, a factor in the industry; hence inventors turned their thoughts to the art and invented derricks of many types, seeking always a structure made of cheap, strong and durable material, adapted to be moved from place to place and to be used in timberless regions, and so designed as to permit the ready assembling and disassembling of parts at low cost and with little damage. Thus portable and semi-portable drilling rigs came into use. But it was soon found that portable rigs could not economically be made of wood because of its destructibility, so different types of metal and semi-metal derricks came into the field, each bringing its own peculiar merits and defects.

The first metal derricks were of structural steel in angle iron parts. Their advantage over wood consisted in saving the whole structure upon removal; but their disadvantage lay in their weight and in their greater material and labor cost. They were in a sense vertically erected bridges and only men somewhat skilled in the art of bridge-building could erect them.

The next step in metal derricks was in pipe or tubular construction, the particular field of the patent in suit. Pipe construction had advantages over angle iron construction, but its peculiar defect was weakness at the joints at which the leg sections or uprights met and from which the girts and braces radiated. The joints held a real problem. This problem was attacked by all patentees whose inventions are cited as

anticipations to the patent in suit, and it may safely be said was solved by none of them.

These patents were offered to show the state of the prior art, and were all the testimony produced by the defendant. From these patents, a very brief analysis of which is given in the margin,[1] it is fair to say that Neill, the patentee, may have gotten the most of his ideas. He may have gotten from Snow (No. 493,660) the idea of a metal derrick, and from Shannon (No. 876,243), Hyde (No. 331,714) and Gates (No. 411,432) the idea of a tubular metal derrick. Wilson (No. 566,364) and Caldwell (No. 487,902) may have suggested a socket without a clamp, and Bullock (No. 407,993) a socket with a clamp, and all excepting Snow may have shown the uses of girts, braces and sectional legs. While the disclosures of these prior patents may in one way or another have contributed elemental ideas to Neill's complete concep-

[1] The Shannon Patent, No. 876,243, the only tubular metal derrick designed for oil well use which appears actually to have been used, has the fatal defect of threaded leg joints, causing the legs to break where the threads cut the pipe, and also a structural weakness in bolting a pair of braces to each girt and the two girts to the same joint, so that if the joint bolt breaks, the whole corner falls.

In the Hyde Patent, No. 331,714, there are neither clamps nor sockets. The leg sections are joined by a threaded union, and are encircled by the eye of the girts and braces at the joint. There is no testimony that derricks of this construction were ever used.

In the Wilson Patent, No. 566,364, there is a joint socket (not a *clamp* joint socket) in which the leg sections rest loosely. The girts are connected with the socket by threads, the braces by bolts. There is a resemblance in the mechanism of this structure to that of the patent in suit in the vertical arrangement of the three parts for joining braces and girts.

The Snow Patent, No. 493,660, shows a tower for windmills made of angle iron. This construction does not show sectional upright members and therefore does not present the problem of joints and the necessity for clamp joint sockets, the essence of the patent in suit.

The Caldwell Patent, No. 487,902, does not disclose means for clamping sections of upright posts. In this construction, the posts merely fit into shallow tubular sockets to which braces are attached, and are adjusted by turn buckles. There is no evidence that this device was ever used.

The Gates Patent, No. 411,432, shows an iron tower for tanks, in which the corner posts are pipes of one piece from bottom to top, but says that the posts may be made of sections and be joined together by ordinary threaded coupling, a thing shown by the testimony in this case to be entirely impracticable for oil well use. No problem of coupling is suggested or solved in this patent.

The Bullock Patent, No. 407,993, shows a slotted sleeve for connecting tubular sections. It is a socket, in fact a clamp joint socket, but its arrangement is such that the leg sections enter the socket but a slight distance and are kept from contact by a space through which a tie-rod holding the girt is carried to the other side and bolted. The one similarity of this socket to the socket of the patent is that it is a clamp joint socket, but it is so different in structure and function that it cannot be considered to have solved the problem of joining sectional uprights and horizontal and diagonal girts and braces in one grip.

The Hyde Patent, No. 338,668, shows a method of forming an eye in the end of a tubular member. The flattening of a tube end and forming it into an eye is old in the art and is one of the old things which the patentee of the patent in suit appropriated. In doing so, he did not impinge upon whatever invention Hyde may have made. These are all the patents cited.

tion, they do not when aggregated disclose the Neill structure, nor did they suggest to others the possibility of his subsequent combination. It is not possible to combine any two of their elements and produce his structure, nor is it possible to produce it by combining all, unless they be substantially modified, and a new element of "two sets of perforated ears or flanges located substantially 90 degrees apart and each set providing three perforations arranged in vertical relation to each other" for girt and brace attachment, be added. Though elements of prior art patents are separately found in modified form in the Neill structure, these elements as combined by Neill resemble nothing before combined in the art, and, in our opinion, do not constitute anticipations of the Neill patent.

Though not invalid because anticipated by the art from which its elements were taken, we approach the question whether the patent is invalid for lack of invention in combining those elements. The Patent Office found and the District Court denied invention upon precisely the same patent references. As these opposite findings raise a doubt as to invention, we address our inquiry to those considerations which the courts have said turn the scale in such cases. Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. Ed. 952.

The District Court held the patent invalid upon its finding that the claim of the patent does not disclose a single element not found in the prior art, and that the combination of elements does not produce a new or better result than other derricks in the art, with the possible exception of greater durability.

[1, 2] In looking for invention in a combination of old elements, we are guided by the new and useful means which the combination may afford or the new and useful results which may be obtained from it. The novelty and utility of the patent, both in means and results, are so closely related in the testimony that we shall consider them together. There is no question that the old elements of the patent, when combined, make a new structure; nor is there question that they produce new results. The question is whether the novelty of structure is patentable novelty, in that new results are produced by employing old means in a new way. It is difficult to find invention in the structure from new functions separately performed by the old elements, because alone each performs very much its old function, but collectively they perform a new function by producing new and better results than before produced either separately or in combination. Therefore, the patentable novelty of the invention must be determined not alone by the novelty of its means, which includes marked simplicity of construction and the solution of the problem of weak joints in tubular derricks, but by the number and measure of its new uses and improved results, the principal of which are simplicity and economy in construction, operation and transportation, all promptly recognized and extensively adopted by the art.

The derrick of the patent is singularly simple. It is excelled in that regard by no other derrick shown in the testimony. Its simplicity is its chief claim to excellence, though it was its undoing in the court below. In design it is simpler than a child's Meccano, and in assem-

bling and putting together its parts, less thought is required than in putting together that toy. The parts are so formed in shape and size that they fit only their proper places and cannot be put together wrong. In this respect they are fool-proof. They may be assorted and put in place entirely by unskilled labor with the aid of no other tool than a wrench. The sections are so arranged in dimension that as the structure rises it may be used as its own scaffolding. The clamp sockets fit only the places intended for them, and to the clamp sockets are connected the girts and braces in the only places in which they can be fastened, the tension of all parts being estimated and perfected in the shop, thereby dispensing with mechanical adjustment or manipulation in the field. The structure may be disassembled as readily as assembled, again acting as its own scaffolding. It may be transported at lower cost because of its lesser weight and without the damage usual to threaded and delicate parts of other metal designs.

The derrick of the patent, though lighter, is stronger than any shown in the art; and though not presenting the first clamp joint socket, it employs one that disposes of the problem of weak joints in tubular structures. The structure is more durable in service and transportation, thereby appreciably reducing loss by damage and decreasing cost of labor in those operations, which have always been important economical considerations in the use of derricks. With the derrick of the patent it is testified that the only loss customarily occurring is the loss of nuts and bolts. The saving in labor cost is effected and measured by the substitution of common labor for skilled labor. While its original cost is greater than that of a wooden derrick, yet because of its durability and economy in handling, its cost is less in the end. Its capacity to stand lateral wind pressure is an important element of economy, one witness testifying that out of 1,000 wooden rigs he had seen as many as 200 blown down in one storm, while he had never had a Neill derrick blown down.

Its novelty and utility in structure and results have commanded a prompt and extensive recognition by the art, one witness testifying that his oil company abandoned the use of all wooden and steel derricks when the Neill derrick appeared, and now uses 3,000 of them. Another witness stated that the other steel derricks he had seen in use were about one per cent. of the number of Neill derricks. Another testified that his oil company had in use seven or eight angle iron derricks and five or six hundred Neill derricks. Rig-builders testified to the rapidly growing and expanding use of the Neill derricks over other metal derricks; and the licensee showed that it had furnished approximately 165,000 clamps (the central element of the patent) for use upon Neill derricks in all the oil states of the country, except California, and that it had sold derricks to 200 customers widely distributed in East Indies, Russia, Austria, Galicia, Roumania, Trinidad and British Guinea.

[3] While the derrick of the patent, in view of its position in the art, is not a pioneer, and while it is not a great invention, yet it has in combination in a novel and useful way the qualities of simplicity, portability, durability and economy. We are of course aware that a mere summation of points of merit does not constitute invention any more than

a mere aggregation of elements. Yet their presence in a markedly increased measure cannot be overlooked in estimating the utility of a device and in determining whether it produces new and useful results within the principle upon which patents are granted. These qualities do not separately appear to the same extent in any derrick shown to have existed before, and are not collectively found in any derrick at all. The recognition by the art of its new means and results, and the fact that the structure of the patent has largely replaced many structures of other designs, constitute persuasive evidence of invention and are proper matters to be put in the scale when invention is in doubt. Minerals Separation Co. v. Hyde, 242 U. S. 261, 37 Sup. Ct. 82, 61 L. Ed. ——; Diamond Rubber Co. v. Consolidated Tire Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527; Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 429, 430, 22 Sup. Ct. 698, 46 L. Ed. 968; The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154; Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. Ed. 952.

We are of opinion that invention is shown and that the first claim of the patent is valid.

Although the patentee has not made a generic invention, he has nevertheless made a distinct advance in the art, for which within its scope he is entitled to protection from infringement. We are of opinion that the structure of the defendant clearly infringes the first claim of the patent in suit, and therefore direct that

The decree below be reversed.

MERGENTHALER LINOTYPE CO. v. INTERNATIONAL TYPESETTING MACH. CO. et al. INTERNATIONAL TYPESETTING MACH. CO. et al. v. MERGENTHALER LINOTYPE CO. MERGENTHALER LINOTYPE CO. v. INTERTYPE CORP.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

Nos. 50, 118.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—TYPOGRAPHICAL MACHINE. The Kennedy patent, No. 1,104,512, for a typographical machine, conceding its validity, *held* not infringed.
2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—LINOTYPE MACHINE. The Hall patents, No. 665,212 and No. 665,326, relating to slugs in a linotype machine and casting mold for the same, *held* not anticipated, valid, and infringed.

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

Suits in Equity by the Mergenthaler Linotype Company against the International Typesetting Machine Company and Erskine Hewitt, receiver of such company, and against the Intertype Corporation. From the decree in the first suit, both parties appeal; in the second suit, plaintiff appeals. Affirmed.

By reason of the decisions of the District Court and the action of the plaintiff in withdrawing its appeals as to two of the patents originally involved the present controversy is limited to the Kennedy patent and the two Hall patents. The claims involved are 19, 20, 21, 22 and 55 of the Kennedy patent No. 1,104,512, claim 2 of Hall patent No. 665,212 and claim 1 and 2 of the Hall patent No. 665,326.

Robert Fletcher Rogers and William R. Kennedy, both of New York City, for Mergenthaler Co.

Edmund Wetmore and Robert D. Eggleston, both of New York City, for appellees International and Intertype Cos.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. By reason of the number of patents involved directly and indirectly and by reason of the fact that both parties have appealed from the decisions of the District Court, the record presents a complicated and confusing situation. The issue is, however, much simplified by the following statement found in the brief of the plaintiff-appellant:

"The particular patent thus involved in the two cases is Kennedy No. 1,104,512, to which the present brief is limited as the others are of comparatively minor importance."

[1] We will, therefore, proceed to an examination of the issues presented by the Kennedy patent. The original Mergenthaler linotype patented in March and May, 1885, and in September, 1890, was a machine of extraordinary capacity and utility. It seemed to possess al-

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

most human attributes and as soon as it was understood there was a complete revolution of the printing art. In most of the large printing establishments these machines are found and their use, which began over 30 years ago, has become well-nigh universal. This machine is now free to all, and in considering improvements thereon we should not be influenced by the character of the basic invention but should treat the machine upon which improvements have been made, precisely as we would treat changes and improvements upon any other complicated and ingenious combination, uninfluenced by the marvelous capacity of the original Mergenthaler machines. In other words, after the expiration of the basic patents the machines covered thereby were open to the use of all and the defendants have the same right as the plaintiff to make and use these machines, thus set free by the expiration of the patents. There is now no room for a broad generic invention and whatever patents have been issued since the expiration of the basic patents or which hereafter may be issued, must necessarily be for improvements only. Both parties may improve the original linotype machine and, if what is done in this way required the exercise of the inventive faculties, may secure a patent therefor, but neither party can maintain a monopoly in that which was set free by the expiration of the basic patents.

In Mergenthaler Co. v. International Co., 229 Fed. 407, 143 C. C. A. 527, which, like the present action, was brought upon patents for minor details, this court in a preliminary statement used the following language which is applicable to the present situation:

"Every patent here involved deals with some detail of the complicated machine known as the 'Linotype.' That remarkable and successful machine, which revolutionized the printing art, was conceived by Mergenthaler and in its great fundamentals protected by patents, which were correctly held to be pioneers in the art. National Typographic Co. v. New York Typographic Co. (C. C.) 46 Fed. 114. These fundamental patents have now expired. During their lifetime improvements in one or other of the details of their structure were devised, some trivial, some of more importance. Although it was not to be expected that the patents taken out to cover them would receive the broad construction which had been accorded to the earlier group, the patentees who took them endeavored, so far as possible, to incorporate in them statements as to 'essence of the invention' and claims so phrased that contention might be made that their language was broad enough to cover combinations in some instances, quite different from those particularly shown in the specifications and drawings."

The District Judge selected claim No. 22 of the Kennedy patent as the best illustration of the group of claims now involved. It is as follows:

"In a typographical machine, the combinations of distributing mechanism, a plurality of magazines facing in the same direction and movable as a whole to shift one into and another out of operative relation to the distributing mechanism, and means for effecting such movement of the magazines, the said means being mounted upon the machine frame so as to be removable therefrom as a whole."

The judge thought that the "idea of making a unitary structure which could be easily removed and nearly as easily fitted even to existing second-hand machines, was and is Kennedy's real thought and his

actual contribution to the sum of human knowledge." He also thought it was "a meritorious though minor feat of invention," but that the claim was not infringed for the reason that the defendant's device is not removable at all in the sense in which "removable" is used in the patent. It will serve no useful purpose to discuss the prior art in detail. Substantially all that it is necessary to say will be found in the opinions below and in the opinions of this court on the former appeal. In brief, the situation is this—a great invention which the plaintiff controlled became public property by the expiration of the basic patents. Anxious to continue this profitable business it has, as stated in defendant's brief, secured "about 1,000 patents relating to linotypes," and has brought many suits for the evident purpose of eliminating the defendants as competitors.

Although the plaintiff is entirely within its rights, its action in pursuing the defendants upon what, in many instances, are claims for unimportant details of construction, hardly commends it to a court of equity. Dodge in 1895 produced a machine described as a combination in a linotype patented to Mergenthaler one of the elements being "means for adjusting the magazine to bring one or another of its compartments into operative relation to the distributing and assembling mechanisms." Wich, in 1901, says:

"One object of the present invention is to equip a Mergenthaler linotype magazine comprising a series of magazines."

Other prior patents show a plurality of magazines, each containing a set of matrices so arranged that any one of the magazines may, at will, be brought into operative relation with the other parts of the machine. Without going further into the details of the prior art, there can be no doubt, we think, that on February 1, 1913, the date of Kennedy's application, the field of invention was an exceedingly narrow one. Assuming that the patent is valid it must be construed narrowly and we are of the opinion that as so limited, it is not infringed by the defendant's machines. Substantially the same machine is involved that was the subject of controversy in the former suit. 229 Fed. 407, 143 C. C. A. 527. To state the arguments upon the question of infringement would greatly extend this opinion without any corresponding advantage. The matter is tersely and clearly summed up by the District Judge in his opinion on motion for preliminary injunction of May 26, 1916, as follows:

"But even if result only be looked at I do not think that either defendant's present or former result is that of Kennedy. What he did was to show a simple and ingenious method of adapting a single magazine machine to multiple magazine requirements. What the defendant has now done is to make a main frame which will support upon the same pivots or pinions any one of three supporting frames of differing capacities; but each of the three supporting frames is mechanically exactly the same frame that was urged as an infringement in the last litigation. If that frame did not infringe none of the present models can offend."

[2] It remains to consider the two Hall patents Nos. 665,212 for a mold and 665,326 for a slug, and the decree based thereon in favor of

the plaintiff. The International Typesetting Machine Company and its receiver appeal from the decree. Claim 2 of the mold patent is alone involved and is as follows:

"2. A linotype-mold, having the slot *o*, groove *3*, and groove *6*, substantially as described and shown."

Both claims of the slot patent are involved and are as follows:

"1. The improved linotype having a broad upper face with the type characters thereon, the relatively thin body portion, and the ribs on the body sustaining the overhanging portion of the face.

"2. A linotype having an unbroken upper face, a relatively thin slug or body to sustain the same, and ribs extending from the overhanging portion of the face downward on the body, said ribs and the vertical edge of the overhanging part being flush with each other and parallel with the opposite side of the slug, whereby the slugs are adapted to be locked together and to produce a form without openings in its surface."

These improvements seem so simple and obvious as the natural development of the art that we are in doubt whether anything more than the skill of the calling was required to make the changes required. The original Mergenthaler patents, as before stated, revolutionized the printing art and every feature of that machine is regarded as sharing in some degree, at least, in the wonderful advance made in that art. What would be regarded as a simple and obvious improvement in another machine is in this art looked upon as the product of a high type of inventive genius. Though we think this homage is perhaps carried too far, we appreciate that in a machine so complicated and so delicately organized, it may be doing injustice to one who makes a well defined advance in the art to treat him as a skilled mechanic only. Undoubtedly a slug which carries a large face must be made of less metal proportionately than the small solid slug. Hall has the advantages of the solid slug, but by reducing the amount of metal used he enables it to chill and set quickly in the mold and reduces the amount of metal to be cut away by the trimming knife. The mold patent is also for a small improvement substantially the same as in the slug patent as the one is cast in the other. The question of invention is a doubtful one but we are inclined to think the doubt should be resolved in favor of the patents.

It follows that the decrees of the District Court are affirmed with costs.

## PELTON v. AMERICAN AUTO HEATER CO.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 94.

PATENTS ⊂328—INFRINGEMENT—ENGINE EXHAUST HEATER.

The Kempshall patent, No. 670,080, for a device for using engine exhaust for heating purposes as limited by its specific description of the device, *held* not infringed.

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

Suit in equity by Clyde S. Pelton against the American Auto Heater Company. Decree for defendant, and complainant appeals. Affirmed.

The action is upon the single claim of the Kempshall patent, No. 670,080, of March 19, 1901, for a "device for utilizing engine exhaust for heating purposes."

The specification declares that the invention relates "to an improvement in engines for use in motor carriages, and has especial reference to that class of engines which are internally explosive." It also states that the patentee desires to utilize "exhaust gas or steam" for heating purposes, and that the device is "equally applicable to engines in which steam is employed as the motive force." Decree was based (as appears from the opinion only) solely on noninfringement.

The claim in suit is as follows:

"The combination with an engine, of two mufflers adapted to receive the exhaust therefrom, one thereof situated to serve for heating purposes, independent connections between said mufflers and the exhaust of the engine, and valves for controlling each of said independent connections, whereby either one of said mufflers may be employed according as heating is desired, substantially as described."

Melville Church, of Washington, D. C., for appellant.

William Macomber, of Buffalo, N. Y., for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The court below did not specifically pass upon the validity of the patent, nor do we express any opinion thereupon.

After decision below, but before final decree, and on May 18, 1916, a disclaimer was filed striking out of the specification all reference to the use of the patented device with or in steam engines. The evident purpose of this was to limit the inventive thought to a heating apparatus in conjunction with what are commonly called "gas engines," as distinct from those steam driven. The validity of this disclaimer we do not find it necessary to pass on, and shall assume that the patent is to be construed as it would have been if the matters sought to be disclaimed "had never been included in the description of the invention, or the claims of the specification." Schwarzwalder v. New York Filter Co., 66 Fed. 158, 13 C. C. A. 380; Dunbar v. Meyers, 94 U. S. 194, 24 L. Ed. 34.

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

The patentee does not pretend to have devised a new muffler or mufflers; indeed, he recommends the use of a style covered by an earlier patent referred to in his specification.

He shows two mufflers (preferably of another man's style), one situated in the usual place (i. e., in proximity to the actuating machinery), and another and (so far as the patent shows) identical muffler situated in or under the body of the carriage, and connected with the engine cylinders by long pipes branching from the exhaust. By these pipes the products of combustion are to be conveyed far enough from the engine, to enable the passengers in the coach to warm themselves at the second muffler. The noise of the exhaust is lessened or silenced, in the same manner and by an identical device, no matter whether the weather be hot or cold, or what muffler be connected with the exhaust. This result is reached by "valves for controlling" the passage of the heated gases, and these valves as shown are of the ordinary screw type. The method of heating is to cut off the warm weather muffler by means of a valve at each end thereof and open two valves on branch pipes from the exhausts, thus permitting the gases to flow into the heater muffler.

Reading this patent as though Kempshall had never said anything about steam engines, it is just as true as before that the patent is to be interpreted in the light of the prior art. This phrase means (at least) the sum total of all such achievements and facts made public before the date of invention, as enable or tend to enable skilled men to do what the patentee claims as his invention, and of all facts and achievements that render easier the doing thereof.

It cannot be denied that a knowledge of how to minimize or silence the noise of a steam exhaust, or to use the products of combustion in a locomotive furnace for heating purposes, go far to enable any skilled mechanic to attack if not to solve the problem laid before Kempshall; for "explosion," as that term is used in relation to gasoline engines, is but an accelerated combustion, and many problems of explosion engines are identical with those of steam.

It follows that a considerable number of patented devices introduced in evidence are to be considered as prior art in relation to this patent, even admitting the validity of the disclaimer. Of them it is enough to say that Scott, 381,647, and Healey, 491,482, clearly show arrangements for utilizing steam engine exhausts of such a nature as to greatly limit the field of invention open for the utilization of any exhaust; while Pennington, 570,441, shows that it was not new to utilize for heating purposes the particular kind of exhaust incident to an explosion engine.

But it hardly needs consideration of the prior art to perceive the limitations of this patent. The patentee has limited it himself, for he claims nothing but a combination so specifically described as to render it necessary to hold that the only novelty asserted is the means described, of shutting off the primary muffler when using the heater; and such was the decision below.

This defendant uses the ordinary exhaust pipe in proximity to the engine, from that a branch leads backward, which becomes a heating coil that in turn discharges into a second muffler. This second muffler is not a heater, nor are there independent connections between the two mufflers and the exhaust. The defendant's single valve is not only different in construction, but it is so arranged that it can never entirely close the main exhaust, and is therefore unable to perform the function of the two sets of valves which are an essential feature of the patent in suit.

Upon the ground of noninfringment the decree is affirmed, with costs.

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## GLOBE KNITTING WORKS v. SEGAL et al.

(District Court, E. D. Pennsylvania. January 31, 1917.)

No. 1295.

1. PATENTS ⟸262, 319(1)—INFRINGEMENT—REMEDIES.
The remedy of a patentee in case of infringement is an action at law to recover damages together with the right to an injunction to restrain further infringement, in which case, because of necessity, a court of equity may, to do full and complete justice, award damages.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 403; Dec. Dig. ⟸262, 319(1).]

2. PATENTS ⟸319(1)—INFRINGEMENT—JURISDICTION—RELIEF.
In a suit for the infringement of a patent, the right of a court of equity to award damages is dependent on the granting of purely equitable relief.
[Ed. Note.—For other cases, see Patents, Dec. Dig. ⟸319(1).]

3. PATENTS ⟸222—INFRINGEMENT—DAMAGES.
Under Rev. St. § 4900 (Comp. St. 1913, § 9446), a patentee who did not mark his device with the word patented is not entitled to recover damages for an infringement except on proof that defendant after notice of the infringement continued it.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 352; Dec. Dig. ⟸222.]

4. APPEAL AND ERROR ⟸662(1)—RECORD—CONCLUSIVENESS—MOOT CASE.
While the courts will not determine a mere moot question or pass on abstract claims, a suit for the infringement of a patent will not be dismissed on the ground that only a moot question is involved, because of the undenied statement by defendant's counsel that the infringement was merely trivial and was desisted from as soon as the attention of defendant was called to it; the record showing a denial by defendant of every claim of right made by plaintiff and a stipulation that defendant after notice of plaintiff's claim and knowledge of the assertion of infringement had disposed of articles which plaintiff claimed infringed.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2850; Dec. Dig. ⟸662(1).]

5. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The Clarke patent, No. 1,035,819, for an improved union suit undergarment, construed, and *held* in view of the prior art and patents not to disclose patentable invention with respect to the claim of a closed crotch of a double thickness of elastic material and so not infringed by defendants.

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In Equity. Bill by the Globe Knitting Works against Keeva Segal and Benjamin Segal. Sur trial hearing on bill, answer, and proofs. Bill dismissed.

Cornelius D. Ehret, of Philadelphia, Pa., and Luther V. Moulton, of Grand Rapids, Mich., for plaintiff.

J. Bonsall Taylor and E. Hayward Fairbanks, both of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. [1-3] The remedies allowed to the owner of a patented device for a trespass upon his property rights involve the right of recovery for the damages sustained where a legal injury exists. The remedy to enforce this right is primarily afforded through an action at law. There is also included the right to a writ of injunction restraining the defendant from further infringement. This remedy is necessarily an equitable one. Because of this necessity, where an injunction is sought, to resort to a court of equity, that court, in order to do complete and full justice, may determine and award damages. This latter power is, however, only incidental to the former, and hence we have the principle that when jurisdiction does not attach, in order to determine whether an injunction should issue and no other grounds of chancery jurisdiction appear, a court of equity has no jurisdiction to take cognizance of the case merely to award damages. Under the federal statutes no damages are recoverable without proof that the defendant continued the infringement after the notice provided for in R. S. 4900 (Comp. St. 1913, § 9446).

[4] The principle universally applied by all courts is that they will not determine mere moot questions or pass upon mere abstract claims to rights of property or otherwise. These observations are prompted by the statement of counsel for defendant that the trespass upon the claimed rights of plaintiff here complained of were trivial and were desisted from as soon as the attention of defendant was called to the alleged infringement, and that the plaintiff was so notified and an abandonment of the proceedings suggested upon payment of costs by defendant. There was no contradiction of this statement, and no denial by the plaintiff of the facts asserted. Did the case disclose these facts, we would have presented a plaintiff asking for damages which he could not recover, and asking for an injunction against a continuing infringement which was neither being continued or reasonably to be expected might be continued. Such a proceeding could result in no other substantial finding than that the validity of the letters patent of the plaintiff was not denied by this defendant. The record of the case, however, not only discloses no such facts but, on the contrary, a denial, at least seemingly earnest, of every claim of right made by the plaintiff, and a stipulation that the defendant had made and sold, after notice of plaintiff's patent and knowledge of the claim of infringement, garments which the plaintiff alleges to be substantially identical with those made under the protection of its patent.

The silence of the plaintiff, in face of the statement of counsel, in this view of the record, would not carry the implication of an admis-

sion of the facts as stated, but may be construed as an assertion of his right to ignore statements flatly opposed by the record proofs. We are, of course, confined to the facts as disclosed by such proofs.

[5] The letters patent involved bear the number 1,035,819, and were issued to Algernon E. Clarke, for an improved union suit undergarment. That the patentee was not a pioneer is disclosed by his application. The objectives of his claimed invention were a "closed crotch," assuring good wearing qualities in the "crotch" without making it too heavy, and giving the garment sufficient play so that in stooping or otherwise the "crotch" would not be drawn up against the person of the user so as to make the garment uncomfortable. To accomplish these ends, he cuts out a triangular shaped piece of material from the crotch, and inserts in place of the fabric removed a "double thickness" of very elastic fabric. The result claimed is that a certain amount of give is imparted to the crotch part of the garment. This result is accomplished without being accompanied by any of the disadvantages present when other makes of garments are worn. One thing, of which the user of the garment is rid, is that, as the inserted fabric is rendered elastic by means of the character of the weaving, there is no rotting as when rubber is used, and no wearing of the parts as when the fabric used is more closely knitted. Another is all uncomfortable pressure at the "crotch" is removed. This is forestalled by the elasticity of the crotch insertion and by inserting, at the neck, narrow strips of "very elastic" material which stretches in one direction only. This latter contrivance is stated not to be essential to the success but to be an aid to the successful working of the crotch contrivance. It is not, however, included in the combination, claim to which is made.

There is in the application a clear admission that (1) union garments, (2) such garments with openings, and (3) with flaps to cover the opening, were all in common use; and there is a disclaimer of any claim to the invention of the flap, this having been a feature of garments of the kind referred to both when used with open or closed crotches. It is not altogether clear whether the patentee meant to state that (4) the use of rubber or a surplus quantity of material at the crotch to assure the required give was common, or whether he merely means to state that his crotch construction is better than either of the suggested crotches. Nor is it entirely clear what the patentee had in mind to express by the phrase adopted in describing the idea of removing a portion of the fabric at the crotch and filling in this space "with a double thickness of very elastic fabric." It might convey the idea that the inserted fabric should be made of "double thickness" by being made to consist of two pieces laid one upon the other or be "doubled" in the sense of being twice as large as required and folded over so as to reduce it, when thus folded, to one-half size, or it might be understood to mean that the inserted fabric was twice as thick as the material cut out. Neither of these ideas is carried into the garment as made either by the plaintiff or the defendant, if all are to be judged by the exhibit samples.

The material of the defendant's make of garment is thinner than

that of the plaintiff, and the inserted piece is noticeably thicker than the material of the garment, and very much more elastic.

In the plaintiff's make of garment, the inserted piece is perhaps thicker than the material of the body of the garment, and is somewhat more elastic; but the difference in either respect is not great.

There is a like departure in the garments as made from the preferred triangle form which the inserted fabric is described to have. This preferential "triangle shape" is not carried into the claim nor reflected in the garments as made. In the latter the crotch piece is more diamond shaped. This may, however, be due to the handling of the exhibits and to the forcible stretching of the crotch to test its elastic qualities.

The keystone of the arch of the combination claimed is clearly a crotch inserted in the construction of the garment, the inserted material consisting of an elastic knit fabric performing the function of supplying the required give.

A test of whether invention is involved is supplied by presenting to our minds a garment, such as described in the claim, but having instead of the inserted crotch one made of the material of the garment, and having a surplus of material so as to supply give, and having also in mind the defects of such make of garments in that this surplus of material was uncomfortable to the wearer and was not durable. The suggestion of cutting out the crotch and inserting elastic material in place of the part removed might well be an improvement by getting rid of the defects, and involve invention. The invention might not be thought to be of a very high order but nevertheless be held to be present.

Another test is afforded by adding to the garment to be improved the feature of having the crotch cut out and an elastic crotch inserted made of a fabric containing rubber so as to give it elasticity, the rubber of which would, however, deteriorate under use and the garment be thereby rendered less durable, and the suggested improvement being to make the inserted crotch of "an elastic knit fabric extending well up in front of the garment and extending down the leg seams," and this made definite by reference to the inserted fabric being in the preferential shape of a triangle. It would seem that the only novelty in the suggestion would be in the substitution of one material for another and in the shape of the inserted piece. There would be no new or added function given to the inserted crotch.

The invention involved in such a change could in turn be tested by assuming such unimproved garment to have been patented and the improver to be defending against a charge of infringement through and by the substitution of one material for another and a slight change in the shape of the inserted material.

The indicated judgments in these supposititious cases brings the decision of this case to turn upon the fact of whether the idea of an inserted crotch to afford the necessary elasticity to that part of the garment was novel or known to the art at the time of this claimed invention. No better evidence against a patentee that a given idea was old could be had than through the admissions of the application for

the patent. This applicant was compelled to pass the ordeal of the Patent Office. He was confronted by the then known state of the art. He did not claim to be a discoverer but an improver. He must therefore describe the thing to which his claimed invention was an improvement. The description which he gives certainly incorporates all the elements of the garment described in his claim, except the thought of cutting out the crotch and inserting the knit material in the open space thus made. This thought is clearly expressed in his application and implied in his claim as made. Was this idea also old? He admits the use of the open crotch. He admits the use of the closed crotch. He at least suggests the use of a crotch like his own made of a fabric to which elasticity is imparted by the presence of rubber instead of by being knitted as he preferred. Rubber material of this kind had long been known to the art and was to be had. Did he mean to admit that it had been used as he proposed to use the knitted material, or did he merely mean that the thought of using the rubber fabric (although never in fact used) had occurred to him but had been discarded in favor of knitted material? Whether the patentee admitted such prior use or not, was it so used? There is an obvious gain (not reflected in either the application or the claim) by making use in the inserted material of the fact that in many fabrics, as especially in those of the ribbed woven type, there is much more stretch in the lateral than in the longitudinal direction. The meaning which the applicant intended to attach to his reference to the use or possible use of rubber fabrics may be gathered from the prior patents with which he is assumed to be familiar and doubtless was. The allusion to rubber is thereby explained.

The defendant in the Segal patent, No. 1,114,540, which postdates that of Clarke, makes an illy disguised attempt to write into the Clarke patent the inventions which preceded both. The fact, if it be a fact, gains nothing by this ex post facto effort. Let us see what the fact is. Taking them up in inverse order, Terwilliger, No. 992,291, is for a union garment with a diamond or triangular shaped gusset in the front and rear parts of the crotch. It differs from the Clarke idea essentially only in the respect that the required give is afforded by the fullness of the material inserted and not by its elasticity or stretching quality.

Johnson, No. 973,200, incorporates the identical thought of an inserted piece with that of the Clarke patent; but here again the stretch is given by the fullness of the inserted piece and not by the character of the material.

Stecker, No. 924,013, proposed with respect to overalls the very same objectives which Clarke aimed to reach in undergarments "to afford give under bending or stooping strains," and he accomplishes his object by substantially the same means. There is a like use of a gusset, inset, or insert of a diamond or triangular, or bow shaped piece of material essentially identical with the Clarke plan in every respect except the make of the fabric inserted.

It is unnecessary to pursue the inquiry further. This makes clear that Clarke meant to admit that the art had furnished him with the idea of everything which (in the aspect of the case we are now con-

sidering) he incorporated in his patent claim, except the added thought which he supplied of using a gusset of "elastic knitted fabric." To award a patent for the mere substitution of one material for another and give the patentee the exclusive use of that material when used in his combination would have far reaching consequences which the policy of the law would not favor.

The conclusion reached is that this bill should be dismissed, with costs. In reaching this conclusion, we are not unmindful that the validity of this patent is asserted as one to be upheld for a combination involving invention, into which the elastic gusset enters merely as an element. Into this we do not care to go, because no finding of infringement can be made against this defendant except that based upon his encroachment upon plaintiff's combination in respect only to this one element. Our conclusion therefore involves no finding of the invalidity of this patent. The finding merely is that there is no infringement by this defendant, unless a construction is given to the claim so broad that an undergarment, made up of any combination of elements into which this idea of a knitted elastic gusset enters as an element, would be an infringement, and that we decline to construe the patent thus broadly.

The bill of complaint is dismissed, with costs to the defendant, and a decree embodying these findings may be submitted.

## MARCONI WIRELESS TELEGRAPH CO. v. KILBOURNE & CLARK MFG. CO.

(District Court, W. D. Washington, N. D. December 11, 1916.)

No. 71.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—WIRELESS TELEGRAPH APPARATUS.
   The Lodge patent, No. 609,154, for improvements in wireless telegraphy, *held* valid and infringed.
2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—SYSTEM OF WIRELESS TELEGRAPHY.
   The Marconi patent, No. 763,772, for a system of wireless telegraphy, in which the transmitting station and the receiving station each contains an oscillation transformer, consisting of an open and a closed circuit, the two circuits at each station being in electrical resonance with each other, and in electrical resonance with the circuits at the other station, the object being to provide means whereby electric waves from a transmitting station may, when desired, be localized at any one or more selected receiving stations out of a group of receiving stations, construed, and *held* not infringed.
3. PATENTS ⟸241—INFRINGEMENT—INDENTITY OF RESULTS.
   Infringement cannot be predicated on results obtained, irrespective of the mechanical apparatus employed.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 380; Dec. Dig. ⟸241.]

In Equity. Suit by the Marconi Wireless Telegraph Company against the Kilbourne & Clark Manufacturing Company. On final hearing. Decree for complainant, and in part for defendant.

L. F. H. Betts, of New York City, E. C. Hughes, of Seattle, Wash., James J. Cosgrove, of New York City, and Peters & Powell, of Seattle, Wash., for plaintiff.

Philip Farnsworth, of New York City, and E. L. Skeel and Donworth & Todd, all of Seattle, Wash., for defendant.

NETERER, District Judge. The plaintiff alleges infringement of two letters patent, No. 609,154, issued August 16, 1898, to Lodge, and No. 763,772, issued June 28, 1904, to Marconi, and each held by complainant. Defendant denies infringement, and alleges that the claims made by Lodge and Marconi were patented prior to the Lodge and the later Marconi invention or discovery, by the issuance of patents to Marconi, Pupin, Tesla, Fessenden, and various other patentees. The record in this case is very voluminous, and many phases of the electrical art have been exploited. The courtroom was converted into a laboratory. The electrical apparatus was set up and operated in the laboratory of the defendants. Demonstrations were made at the Seattle office of the complainant, and likewise in the laboratory of the University of Washington. Demonstrations were made of plaintiff's apparatus, and of the Lodge patent, of the Tesla patent, and defendant's apparatus, and messages transmitted to and received from a station at the Navy Yard, Bremerton, Wash. Renowned physicists have tes-

tified for days, and have unfolded to the court the principle upon which and theory by which the various appliances are operated. Notwithstanding the voluminous record in this case, the issues of fact are few, and, aside from the history of the prior art, would make a limited record.

[1] It will not be necessary, in view of the very full history of the prior art set forth by Judge Townsend, in Marconi v. De Forest (C. C.) 138 Fed. 657, and Judge Veeder, in Marconi Wireless Telegraph Co. v. National Electric Signal Co. (D. C.) 213 Fed. 815, to review the prior art, except as it may have relation to resonance, and double circuit tuning of the transmitting and receiving apparatus. Since the commencement of this action, the Lodge patent has expired. This patent has been repeatedly adjudicated, and without further discussion, and without passing upon the merits, I think we may say that further inquiry as to its validity is not demanded. It is conceded that, if the Lodge patent is valid, it has been infringed.

[2] Defendant claims to use the principles and fundamental apparatus of the first Marconi, 1896, patent, expired, and Lodge patent, expired, and the high spark frequency suggested by Professor Pupin, in 1899. Marconi uses Hertz oscillations or electric waves, and in the specifications of his patent, No. 763,772, says he has "invented certain new and useful improvements in apparatus for wireless telegraphy," which—

"relate to apparatus for communicating electrical signals without wires and by means of Hertz oscillations or electric waves. The object of the invention is to increase the efficiency of the system and to provide new and simple means whereby oscillations or electric waves from a transmitting station may be localized when desired at any one selected receiving station or stations out of a group of several receiving stations," and "to provide a transmitter which by suitable adjustment will, as the patent states, localize or select any desired receiving station. In other words, the waves radiated from such a transmitter will affect only a single desired receiving station out of a number of different and distant receiving stations. According to the present invention, the system includes at the transmitting station the combination, with an oscillation transformer of a kind suitable for the transformation of very rapidly alternating currents, of a persistent oscillator, and a good radiator, one coil of said transformer being connected between the aerial wire or plate and the connection thereof to earth, while the other coil of the transformer is connected in circuit with a condenser, a producer of Hertzian oscillations or electric waves shown in the form of a spark producer, and an induction coil (constituting the persistent oscillator) controlled by a signaling instrument,"

—the term "persistent oscillator" being:

"An electrical circuit of such a character that, if electromotive force is suddenly applied to it and the current then cut off, electrical oscillations are then set up in the circuit which persist or are maintained for a long time."

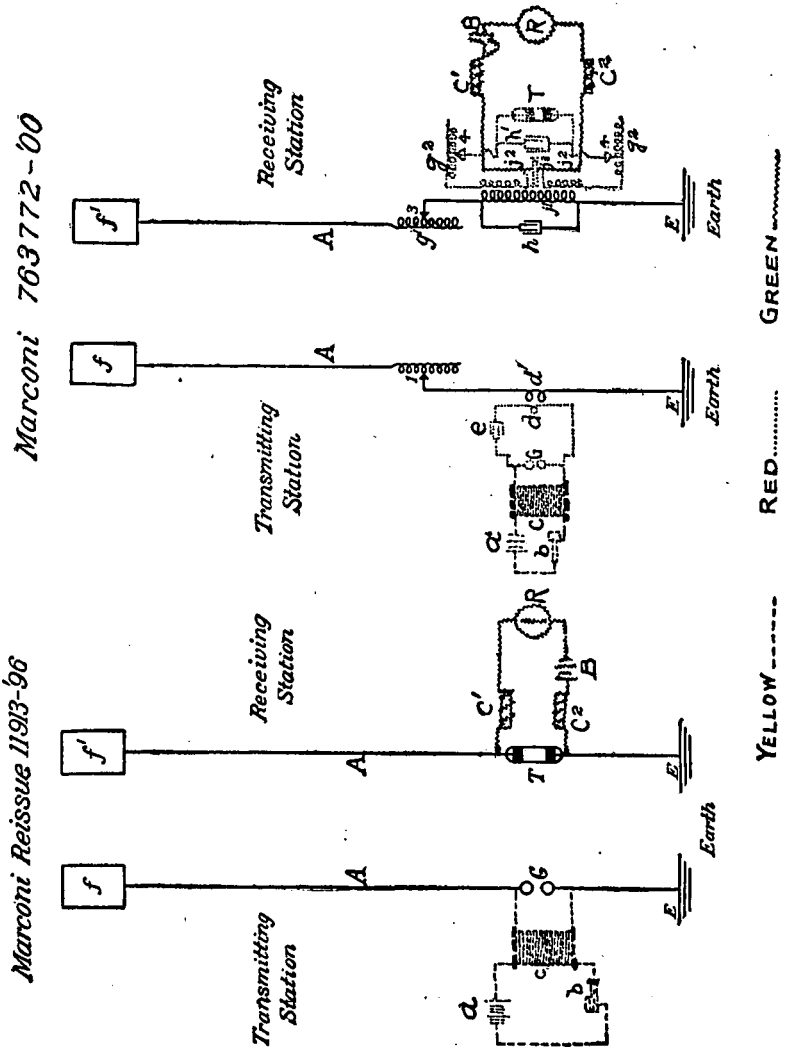
And a good radiator:

"An electrical circuit which quickly imparts the energy of electrical oscillations to the surrounding ether in the form of waves, being rapidly radiated in the form of electric waves by the electric conductor, the approximately closed circuit of the primary being a good conserver, and the open circuit of the secondary being a good radiator of wave energy."

The patent also provides:

"At the receiving stations employing my present invention I prefer to use a receiver such as those described in my several United States patents, Nos. 586,193, 627,650, 647,007, 647,008, 647,009, 668,315, capable of being affected by electrical waves or oscillations of high frequency."

Below is shown diagrammatically the Marconi patent applied for in 1896, and reissued as No. 11,913, shown at the left, and the Marconi patent in suit, shown at the right.



The transmitter of the patent in suit consists of an association of two circuits—a closed circuit, *G, d, e,* and an open radiating or antenna circuit, *f, A, d*[1], *E*. Of this association, the specifications (lines 33 to 36, page 2) say:

"Alternating currents of high frequency pass through the primary of the transformer (c) and induce similar oscillations in the secondary."

And page 2, lines 12 to 20:

"My experiments have demonstrated that the best results are obtained at the transmitting station when I use a persistent oscillator—an electrical circuit of such a character that, if electromotive force is suddenly applied to it and the current then cut off, electrical oscillations are set up in the circuit which persist or are maintained for a long time—in the primary circuit."

The primary circuit, therefore, is a persistent oscillating circuit.

The characteristics of the radiating circuit are expressed (page 2, lines 20–24) as:

"A good radiator—i. e., an electrical circuit, which very quickly imparts the energy of electrical oscillations to the surrounding ether in the form of waves —in the secondary circuit."

The inductive linking of these circuits is spoken of (page 1, lines 56–62):

"The system also requires as essential elements thereof, the inclusion in the lines (at both stations) from the aerial conductor to the earth of variable inductances, and the use at both stations of means for varying or adjusting the inductance of the two circuits at each station to accord with each other."

An essential element of each of the circuits is variable means of adjustment, which is indicated in the radiating circuit, by coil *1,* and in the closed or persistent oscillating circuit, *G, d, e,* the object being to adjust the circuits to be in accord with each other. Specification, lines 62–63, page 1:

"By this arrangement of apparatus I am able to secure a perfect 'tuning' of the apparatus at a transmitting station."

The definite purpose of the inventor with relation to adjustment of these circuits is more clearly set out at lines 118–129, page 2, in which he says:

"The capacity and self-induction of the four circuits, i. e., the primary and secondary circuits at the transmitting station, and the primary and secondary circuits at any one of the receiving stations, in a communicating system, are each and all to be so independently adjusted as to make the product of the self-induction multiplied by the capacity the same in each case, or multiples of each other—that is to say, the electrical time periods of the four circuits are to be the same or octavos of each other."

Page 3, lines 5 to 17:

"If the time periods of the circuits of the transmitting station are varied until they are in resonance with those of one of the receiving stations, *that one alone* of all the receiving stations will respond, provided that the distance between the transmitting and receiving stations is not too small."

"The adjustment of the self-induction and capacity of any or all of the four circuits can be made in any convenient manner and employing various arrangements of apparatus, those shown and described herein being preferred."

It is also said, page 1, lines 56 to 66:

"The system also requires as *essential* elements thereof, the inclusion in the lines (at both stations) from the aerial conductor to the earth, of variable inductances, *and the use at both stations of means for varying or adjusting the inductance of the two circuits at each station to accord with each other.* By this arrangement of apparatus, I am able to secure a perfect 'tuning' of the apparatus at a transmitting station, and at one or more of a number of receiving stations."

The source of power is connected with the primary circuit, which contains a condenser and the two circuits associated inductively, and the oscillations created in the primary circuit transferred to the antenna circuit.

The specifications further say:

"In operation the signal key *b* is pressed, and this closes the primary of the induction coil. Current then rushes through the transformer circuit, and the condenser *e* is charged, and subsequently discharges through this spark gap. If the capacity, the inductance, and the resistance of the circuit are of suitable values, the discharge is oscillatory, with the result that alternating currents of high frequency pass through the primary of the transformer and induce similar oscillations in the secondary, these oscillations being rapidly radiated in the form of electric waves by the elevated conductor."

The 1896 patent provides a transmitting station, comprising an elevated capacity, *f*, connected by means of the antenna, *A*, and spark gap, *G*, and thence to earth, and a source of energy, battery *a*, telegraph key, *b*, and an induction coil, *c*. When the circuit of the chart in yellow is closed by pressing down the key *b*, the current will flow from battery *a*, through the circuit, and the primary induction coil is energized, and that energizes the secondary of the induction coil, *c*, and the current is thereupon imparted to the spark gap, *G*, and when the resistance of the spark gap has been overcome, it breaks down, and the surgings across the spark gap produce oscillations in the antenna, *A*. The receiver has an aerial or antenna, *A*, connected to capacity, *f*, at the top, and earth, *E*, at the bottom. In the antenna circuit is a detector, *T*, connected to a local battery circuit, $c^1$, *r*, *b*, and $c^2$, and $t^1$, so that, when the energy is radiated from the transmitting antenna and impinged upon the receiving antenna, the detector, *T*, is operated, and in turn operates the telephone, which is indicated by *R*. The spark gap and the detector are in the transmitting and receiving circuits, respectively. The energy from the transmitting antenna is all radiated in two or three oscillations, being one big oscillation followed by two or three small ones. The antenna is a good radiator, and therefore not a persistent oscillator. The receiving antenna is a good absorber.

In the patent No. 763,772, in suit, Marconi removed the spark gap from the antenna circuit and put it in another circuit, *G*, *e*, *d* (red), in which circuit he put a condenser, so as to form a closed circuit. This closed circuit does not radiate energy, and is known as a persistent oscillating circuit. Marconi says:

"The approximately closed circuit of the primary being a good conserver, and the open circuit of the secondary being a good radiator of wave energy"

—and the purpose of the primary circuit being to slowly furnish the stored energy to replace that radiated through the antenna circuit, to

do so, the circuits must be in harmony with each other—tuned together.

To efficiently utilize the energy in the closed or primary circuit, it is necessary to associate it with the radiating circuit through a transformer or other means, and bring them into harmony or tune, and when they are in tune the energy is transferred from the primary to the antenna circuit, and radiated.

"Similarly two circuits of the receiver are linked through a transformer, so that electrical oscillations in the open or absorbing primary build up similar oscillations in the closed or conserving secondary, until the coherer breaks down," and "finally the four circuits must be tuned together." Marconi Wireless Telegraph Co. v. National Electric Signal Co. (D. C.) 213 Fed. 815.

In the first Marconi patent, it is said:

"According to this invention, I transmit through the air, earth or water, by means of oscillations of high frequency. * * *"

And again:

"When transmitting signals through the earth, I connect one end of the oscillation producer and one end of the circuit closer to earth and the other ends to plates, preferably electrically tuned with each other in the air and insulated through earth."

In his Nobel prize lecture Marconi says:

"A very small amount was used, the high tension current being produced by an ordinary Rhumkorf coil. The main feature of my system consisted of elevated capacity areas or antenna attached to one pole of the high frequency oscillators or receivers, the other pole of which was earthed. * * * Many technical writers have stated that the elevated capacity at the top of the vertical wire is unnecessary. * * * The necessity or the utility of the earth connection has sometimes been questioned, but in my opinion no practical system of wireless telegraphy exists where the instruments are not connected to earth. * * * Physicists seemed to consider for a long time that wireless telegraphy was solely dependent upon the effect of free Hertzian radiation through space, and it was years before the probable effect of the conductivity of the earth between the stations was satisfactorily considered or disclosed."

Again he says:

"A remarkable fact, not generally known, in regard to transmitters, is that none of the arrangements employing condensers exceed in efficiency the plain elevated aerial or vertical wire discharging through earth through a spark gap as used in my first experiments," and "by means of the sharp gaps in compressed air, and the addition of induction coils placed between the aerial and the earth, the system can be made to radiate through pure and slightly damp waves, eminently suited for sharp tuning."

Many statements are made, confirming the conducting functions of the earth. Professor Pupin, replying to Marconi's New York address, said:

"The first time wireless telegraphy of the present day was produced was when Mr. Marconi, in 1895, connected his sending wire to the ground and his receiving wire to the ground and let the spark go. That was the first wireless wave of to-day, and it was not a Hertzian wave, and has nothing to do with it. If we are to call it a wave, let us call it a Marconi wave."

He further stated:

"You have seen that Mr. Marconi uses condensers and spark gaps and interrupted currents. * * * I do not believe in condensers and spark gaps —if I can get a real alternator, give me a high-power alternator that will give 40,000 vibrations per second. * * * I would not express that opinion so boldly, perhaps, if I were not backed up by Mr. Marconi. * * * That is what Mr. Marconi wants; and he will have it if I can help him. With 100 kilowatts at 25,000 cycles, we should be able to telegraph to Australia. Distance means nothing. Hitch your wagon to the earth, and shake it hard enough, and there is no reason why you should not shake a message to Australia."

In the New York Electrical Society address, Marconi said:

"The arcs consisting of the condenser circuit and the elevated aerial or radiating circuit are more or less closely connected to each other by adjusting the inductance in the elevated conductor, and by the employment of the right value of capacity or inductance required in the condenser circuit, the two arcs were brought in electrical resonance, a condition which I first pointed out as being essential in order to obtain sufficient radiation and good tuning. * * * These two circuits are tuned so as to have approximately the same natural period of electrical oscillations. * * * It is well known that when using ordinary spark discharge in the primary circuit, unless weak coupling is employed, the oscillations set up in one circuit create oscillations of two frequencies in both circuits. This has the disadvantage that the radiated energy becomes divided between two waves of different length, and if the receiver is tuned to only one of these wave lengths, it will utilize or absorb only part of the energy reaching the receiver—the energy of the other wave being lost. * * * As it would have been too expensive to use vertical wires of very great height, the only alternative was to increase their size or capacity. * * *"

Tesla, in his book, page 213, with relation to resonance, says:

"To produce the best results, it is, of course, necessary to adjust carefully the capacity of the jars, the arc between the knobs and the length of the wires. My experience is that calculation of the length of the wires leads, in such case, to no result whatever. The experimenter will do best to make the wires at the start very long, and then adjust by cutting off first long pieces, and smaller ones as he approaches the right length."

The principle of resonance was old in the art, but apparatus by which to accomplish it was in the experimental stage. Resonant tuning implies accumulative action or building up by successive increments or pulses or waves from one circuit into another. "Resonant" is defined by the Standard Dictionary, 1895 Edition:

"Resonance, n. 1. The quality of being resonant; the act of resounding.

"2. Physics. (1) A *prolongation* or *re-enforcement* of sound by means of sympathetic vibration or the capability of producing such a *continued* sound. (2) By extension, the *increase* of vibration of any kind, as in electricity, by an intermittent force of the *same period.*

"The principle of resonance depends on the fact that to increase any movement of the nature of a vibration or oscillation, the force applied must act intermittently in the same period, as when a child moves a heavy swing by pushing always at the moment when the push has the greatest effect. The impulses are thus added together. An object capable of vibrating can always be set in motion in this manner by a neighboring object whose vibrations are in the same period, as when a note played on a musical instrument causes the same note on a neighboring stringed instrument to sound. The sounding-board of a piano, guitar, or the like, is capable of responding to vibrations of many periods, and hence re-enforces all tones equally; the air in a flue organpipe on the other hand, can respond to one note only, and hence selects that one from the fluttering noise produced by the air at the lip. In electric-

ity the principle is valuable in detecting and investigating electromagnetic waves."

Judge Veeder said in Marconi Wireless Tel. Co. v. Nat'l Electric Signal Co., supra:

"Resonance is an increase or amplification of the periodic motion by an intermittent force of the same frequency. A certain or natural period of vibration is characteristic of all bodies which, when displaced by the application of external force, tend, by virtue of their elasticity, to return and to execute free vibrations until, by virtue of their exertion, they gradually come to rest. Sonorous bodies, such as strings under tension, and confined portions of the air, as in the organ pipe, are further illustrations suggested by the term. Just as very feeble impulses applied to a pendulum at rest, at intervals *exactly* corresponding to its natural period of vibration, will cause almost any desired amplitude of swing, so bodies capable of executing vibrations by use of their own resiliency, may be put into strong vibration by a *series of impulses* in tune with their own natural period. Thus impulses from a tuning fork will cause another tuning fork of the same pitch to hum a note in unison. Resonance effects may likewise be observed in the flow of electricity in a circuit. A circuit possessing inductance and capacity has a certain time period of vibration. * * * Such a circuit is said to have a definite wave length. A circuit possessing capacity and inductance tends to oscillate electrically at its own frequency. It becomes the seat of the *induced* oscillatory current when subjected to the influence of electric waves of that frequency, each wave giving a slight impulse to the oscillations already excited, with the result that the induced electromotive force will be amplified in intensity, just as the swing of a pendulum is increased by the application of properly tuned though feeble touches. However, not only must the impulses, of whatever kind, be rightly timed, *but it is essential* to the utilization of resonance that there should be a long series of such impulses of approximately equal strength or amplitude. Having regard to ether waves, *such a train can only result where the oscillations from which they proceed occur in the circuit which gives out its energy slowly, for the amplitude of the waves depends upon the energy expended.*"

To reconcile persistency of oscillations and amplitude of vibration in the radiator was a real accomplishment. Induction coils, generators, primary circuits, spark gaps, condensers, inductors, and the various elements that make up radio-telegraphic circuits are means of getting into the antenna, oscillations both of the persistent nature and at the same time of great strength or amplitude. Marconi associated a circuit, an oscillator, which, left to itself, threw off its energy rapidly, and the oscillations in which would be rapidly damped, with another circuit, which was a good conserver of energy, and, instead of giving off the energy rapidly in one big wave, withheld it, and gave it off slowly, and fed it gradually into the antenna as it was radiated out into space, which he called the "reservoir circuit." He desired to associate with his aerial a reservoir circuit as a conserver of energy, so that the antenna would have a persistent train of oscillations. The characteristics of the patent in suit are two circuits, the oscillator or antenna, which is a good radiator, associated with a circuit which is supplied with energy by a source of power, and which is so proportioned as to be a conserver of energy or a reservoir, or a persistent oscillator. Lodge's idea was to throw the energy into the antenna just as quickly as possible, so as to leave the antenna free to vibrate without interference of other circuits.

The Marconi receiver in issue has two circuits of like characteristics, the antenna, being a good absorber, associated with the closed circuit,

which is a good accumulator, this latter circuit to be so proportioned as to be a good accumulator as distinguished from a good absorber, and the energy being transferred by resonance from the primary to the secondary in each case, so as to build up gradually and maintain oscillations, each of the four circuits to be adjusted or tuned to the same time period by adjustable means in each circuit, enabling independent varying of its time period for change of wave length.

Judge Veeder, in Marconi Wireless Telegraph Co. v. National Electric Signal Co., supra, said:

"The essential features of this apparatus and its departure from previous methods of operation are apparent. In his first patent Marconi had disclosed a method and apparatus for the effective transmission of wave energy through the ether of space, and for its utilization in communication of intelligible signals. But in this early apparatus the energy was quickly radiated, and as quickly absorbed. By reason of this characteristic, his radiator could not create, nor could his receiver store up, the effect of a sustained train of waves necessary for the utilization of the principle of resonance. It was an effective apparatus for distress calls and purposes of that kind, but there was necessarily interference between messages. Moreover, the electric energy that he could get into his transmitter was necessarily limited. The energy supply had to be adapted to the elevated conductor. The capacity of a vertical wire is not great, and the extent to which it may be increased by lengthening the wire or adding capacity areas is obviously limited. Lodge came forward with a new idea. Although he recognized the impossibility of having a circuit which should be at once a good radiator or absorber and a persistent oscillator, he proposed a compromise. He increased the persistence of vibration of his radiating circuit at the expense of its radiating qualities, and increased the accumulative power of his receiving circuit at the expense of its absorbing qualities. Effecting this compromise by means of the introduction of an inductance coil in an open circuit, he obtained a train of waves of approximately equal amplitude, and thus rendered effective syntony possible. But the syntony thus obtained was utilized for selectivity alone. It was attained at the expense of the radiating and absorbing qualities of the circuit; and Lodge still supposed that for distant signaling the single pulse or whip crack was best.

"Marconi's improvement, in his second patent, upon his own prior apparatus, and his solution of the difficulty involved in Lodge's compromise, consists in the substitution for a single circuit in both transmitter and receiver of a pair of circuits, one of which is so constructed as to radiate or absorb readily, and the other to oscillate persistently and be a good conserver of energy. By using two linked circuits in his transmitter, in which the circuit of the primary contains a condenser of any desired capacity, with the usual provision for its discharge through spark gap, and in the circuit of the secondary, the vertical wire, any required energy may be imparted to the radiator, since the closed circuit of the primary is a good conserver or reservoir of energy for the radiating open circuit of the secondary. This arrangement would be futile, however, without means whereby the stored energy of the reservoir circuit could be transmitted to the elevated conductor at the rate at which that conductor could effectively radiate it. The mode of getting the energy from the reservoir circuit into the radiating circuit, in like measure as it is radiated, is the tuning of the persistently oscillating circuit to the radiating circuit."

Judge Parker, in Re British Radio T. & T. Co., Ltd., which case is cited by plaintiff, in passing upon the English patent, in which the expression "persistent oscillator" is neither used nor defined in the specifications, says:

"As I interpret the patent, the essential features of the invention thereby disclosed are as follows: In order to get over a well-known difficulty in applying the principle of resonance as between transmitter and receiver in a

system of wireless telegraphy, a difficulty involved in the impossibility of a single circuit being at once a good radiator or absorber and a persistent oscillator, the inventor proposes to substitute for a single circuit in both transmitter and receiver, a pair of circuits, one of which is so constructed as to radiate or absorb readily, and the other of which is so constructed as to oscillate persistently and be a good conserver of energy. The two circuits of the transmitter are tuned together, and linked by means of a transformer in such a way that electrical oscillations in the closed and persistently oscillating circuit build up, and, inasmuch as the primary can act as a reservoir of energy for the secondary, maintain similar oscillations in the open and readily vibrating secondary. Similarly, the two circuits of the receiver, tuned to the same time period as the circuits of the transmitter, are linked through a transformer in such a way that electrical oscillations in the readily absorbing primary build up similar oscillations in a closed and conserving secondary, until such oscillations have strength to break down the coherer. * * * Take two circuits, and let one do one of the things and the other do the other. The electrical engineer, reading the specification, would thus be led, not only to expect a long train of ether waves created through the medium of an open radiating circuit by persistent oscillations occurring in a closed conserving circuit, but an actual increase in the total available energy of the radiating circuit, this increase depending on the conserving qualities of the closed circuit. In other words, the latter would be a reservoir of energy for the former."

Claim 3 of Tesla, No. 649,621, filed May, 1900, provides:

"3. The combination with a transmitting instrument comprising a transformer having its secondary connected to ground and to an elevated terminal, respectively, the means for impressing in electrical operations upon its primary, of a receiving instrument, comprising a condenser having its primary similarly connected to ground and to an elevated terminal and a translating device connected with its secondary. *The capacity and inductance of the two transformers have such values as to secure synchronization with the impressed oscillations.*"

And claim 10 of the Marconi patent in suit:

"10. A system of wireless telegraphy in which the transmitting station and the receiving station each contains an oscillation transformer, one circuit of which is an open circuit, and the other a closed circuit, *the two circuits at each station being in electrical resonance with each other, and in electrical resonance with the circuits at the other station,* substantially as described."

Braun patent, No. 697,544, filed February 6, 1899, has this recital (page 1):

"This divisional application relates to apparatus in which the transmitting wire is inductively associated with the oscillation circuit; an oscillating circuit, comprising a Leyden jar or inductance coil, is, and for a long time has been, well known to be a persistently oscillating circuit, or a circuit in which, its electrical equilibrium having once been disturbed by vibrations or oscillations, continue for a considerable length of time. In other words, this circuit is a source of maintained or sustained electrical oscillations. This circuit I have likened to a 'reservoir of energy,' a portion of which is radiated from the transmitting wire, *for every oscillation until there is no more energy left,* and the circuit ceases to vibrate."

While this patent was not issued until 1905, the knowledge disclosed in the application is in advance of the Marconi application; and this is also true of the other contemporaneous applications.

Pupin, in the discussion in New York, at the one hundred thirty-seventh meeting of the American Institute of Electrical Engineers, November 22, 1899, on the possibilities of wireless telegraphy, at page

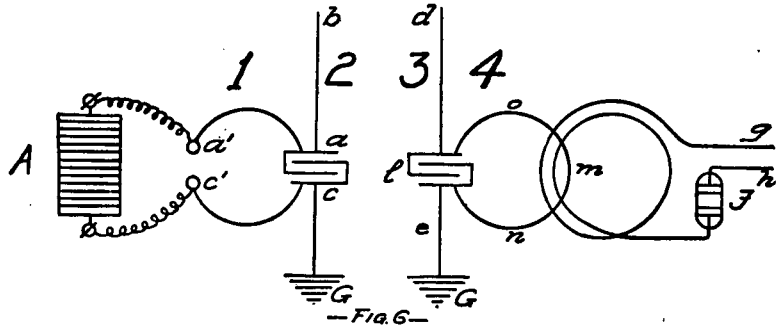
524 of the published report of the proceedings, among other things, said:

"The forced oscillations of the string are not rapidly decaying, because the body vibrating it—the tuning fork—is a sonorous body. The condenser, *a*, *c* (Fig. 6), with a shunt, is an electrical oscillator, an electrical tuning fork. * * * You start oscillations in this circuit just as you start the vibrations of the tuning fork by a stroke. These oscillations then keep up the oscillations in the vertical wire. * * *"

Mr. Pickard has diagrammatically represented the suggestion, as follows:

PUPIN 1899 FOUR CIRCUIT SYSTEM

TRANSMITTER PRIMARY A PERSISTENT OSCILLATOR RESERVOIR. LIKE THAT OF MARCONI PATENT IN SUIT.




—FIG. 6—

"By varying the dimensions of the shunt, *m*, *n*, *o*, or capacity of condenser *e*, we can tune this circuit."

Judge Veeder, in referring to the Marconi patent in suit, in Marconi Wireless Telegraph Co. v. National Electric Co., supra, said:

"By using two linked circuits in his transmitter; in which the circuit of the primary contains a condenser of any desired capacity, with the usual provision for its discharge through the spark gap, and in the circuit of the secondary, the vertical wire, any desired energy may be imparted to the radiator, since the closed circuit of the primary is a good *conserver* or *reservoir* of energy for the radiating open circuit of the secondary."

The principle of resonance in telegraphic art may be further shown by patents No. 640,516, issued January 2, 1900, to Pupin, for "electrical transmission by resonance circuits," and Pupin patent No. 519,347, issued in 1894.

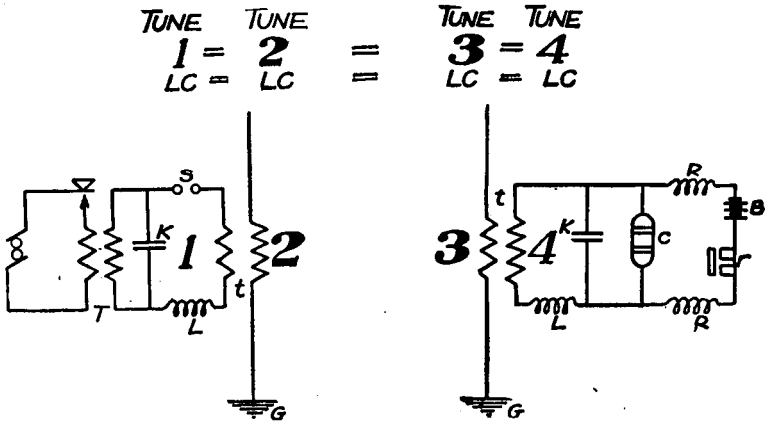
Stone, in his patent No. 577,214, issued February 16, 1897, being "improvements in resonant electrical circuits," assigned to the American Bell Telephone Company, after the circuit is described, says:

"Such a circuit is an ideal resonant circuit, and will be highly selective if the coil be of low resistance and great inductance, while the condenser is of small capacity. By the term 'selective' is meant that property which resonant circuits exhibit of responding more strongly to the currents of one particular frequency than to those of any other frequency, and by 'selectivity' reference is made to the degree to which they exhibit this selective property."

And in Stone patent, assigned to the same company, No. 638,152, issued November 28, 1899, for "new and useful improvement in telephony," it is said:

"In the present invention the high frequency current is developed by the disruptive discharge of the condenser in the sonorous circuit, * * * an arrangement of circuits by means of which the invention may be applied to selective and multiple telephony. For this purpose the sonorous resonating circuit * * * and the resonator circuit * * * are attuned to the same frequency, while those at * * * and * * * are attuned to some other frequency. * * * The frequency of this oscillatory current is determined by the electromagnetic, electrostatic, and dissipative resistance of the primary circuit. * * * The frequency of the current developed by the transmitting sonorous circuits is determined by the self-inductance and capacity of the circuit, including the primary of the induction coil, the inductance coil, the condenser, and the spark gap, and by *properly proportioning* this self-inductance and capacity, any desired frequency between very wide limits may be obtained. The attuning of the receiving circuits is likewise accomplished by proportioning the inductance of the secondary circuit to the capacity of the condenser located in the secondary circuit."

STONE 1899 FOUR TUNED CIRCUIT SYSTEM




February 28, 1900, Stone disclosed to Mr. Pickard a four-tuned cirsuit system, which Mr. Pickard has diagrammatically represented as above. June 30, 1899, prior to conversation with Mr. Pickard, Stone wrote to Mr. Baker, in which, inter alia, he said:

"Instead of utilizing the vertical wire itself at the transmitting station as an oscillator, I propose to impress upon this vertical wire, oscillations from an oscillator, which oscillations shall be of a frequency corresponding to the fundamental of the wire. * * * Similarly, at the receiving station, I shall draw from the vertical wire only that compound of a complex wave, which is of lowest frequency. If, now, the fundamental of the wire at the receiving station be the same as that of the wire at the transmitting station, then the receiving station may receive signals from the transmitting station, but if it be different from that of the transmitting station, it may not receive those signals."

In a letter of July 18, 1899, from Stone to Baker, he said:

"The tuning of these circuits one to another and all to the same frequency will probably be best accomplished empirically, although the best general proportions may be determined mathematically."

There is no controversy, I think, as to the authenticity of the letter of July 18th, and I am satisfied that the letter of June 30th was

written prior to July 18th, and there is no reason to doubt that it was written on June 30th, the date testified to by the witnesses who have knowledge, although I am satisfied that the date, June 30th, was written subsequent to the writing of the letter.

That resonant transfer of energy was long known to the art is further demonstrated by the fact that as early as May 9, 1894, Morris Hutin and Morris Le Blanc, in application for patent for "multiple telegraphy and telephony," used this language:

"It is clear that our electric resonators are circuits in which the real reactance as distinguished from the apparent reactance for the given periodicity of alternating currents is made zero, so that the impedance of the circuit is equal to its ohmic resistance. For the purposes of our invention it is often necessary to connect a part of the electric resonators together so as to form a group. * * * Supposing, now, that the line, either grounded at each end, as shown, or having a common return wire, is charged simultaneously with three sets of alternating currents having frequencies 1,000, 2,000, 3,000, respectively, it will be clear that the resonator-circuit *3'*, *4'*, and *5'*, will permit only the circuit having the frequency of, say 1,000, to pass through, and that the other resonators will only permit the currents having frequencies of 2,000 and 3,000, respectively, to pass through. If either of these currents is varied in intensity by any suitable device, at any point on the line, these variations will be felt by the transmitting device in the resonator circuit only which is adjusted to the frequency of the varied currents. * * * This analogy between * * * electrical resonance, we have fully set forth and explained in our articles in Lalumiere Electrique."

The prior art publications admitted in evidence present a wealth of information upon the prior art with relation to electrical resonance and tuning, and with the other evidence in the case, remove from my mind any doubt as to these principles with relation to the prior art long before the application for the patent in suit.

The essential necessity of plaintiff's Marconi patent is means to transmit the stored energy of the reservoir circuit to the antenna circuit, at the rate at which it can be effectively radiated, and the method by which this energy may be transferred into the radiating circuit, in the same quantity and as it is radiated, is by tuning the primary or persistently oscillating circuit to the antenna or radiating circuit, and thereby getting full value, utilizing between the two circuits the principle of resonance. The reservoir circuit is necessarily always a resonant—i. e., oscillating—circuit. The novel difference between the 1896 patent, expired, and the 1900 patent, as given by Marconi, is the removal of the spark gap from the "open transmitting circuit, and including it in the closed or nearly closed oscillating circuit, which closed oscillating circuit was inductively connected with the open antenna circuit." In the receiver circuit the detector is removed from the open antenna circuit with the same relation and upon the same principle.

That tuning is the essence of the Marconi patent in suit is further demonstrated by correspondence between Marconi and the examiner, upon the rejection of the claims by the examiner, in which he stated, December 24, 1900, inter alia:

"It is required that further and clearer description be inserted in the specification as to what is meant by 'persistent oscillator' and 'good radiator' "

—and the further understanding of the examiner from correspondence is shown from the following extract from his letter of February 11, 1902:

"Applicant's argument has been carefully considered, and though difficult of interpretation by reason of grammatical defects, and also because of what seems to be discontinuity of idea, it is correctly or otherwise interpreted by the examiner to mean that the fundamental of the aerial conductor is a harmonic of the local primary, or vice versa, and that such a relation necessarily requires that the vibrating body of fundamental periodicity *have constants such as cause it to be a persistent oscillator and the acrial conductor elcctrical constants which make it necessarily a good radiator.*"

And counsel for Marconi, in a letter of April 8, 1902, say:

"It is very plain that the necessity or desirability of tuning the two circuits of the primary to each other, or making them accord to each other in their natural period of oscillation, is not an obvious suggestion from prior descriptions of desirability of tuning a primary to the receiver, as is seen from the fact, although the English patent of Thompson, No. 22,020, of 1899, describes a two-circuit primary, yet the inventor makes not the faintest suggestion of the desirability of having the periods of oscillation accord with each other, and although Mr. Marconi himself, in his patent No. 627,650, describes a two-circuit receiving instrument, yet he did not make any suggestion that it would be of advantage to make the periods of oscillation of the two circuits accord."

In determining the construction to be placed upon public documents, consideration is given to departmental interpretation.

June 13, 1903, in Re Braun, Application Serial No. 704,505, appears a statement by the Patent Office prior to the issuance of the plaintiff Marconi patent in suit, and while the application was under consideration, of the meaning of the term "persistent oscillator," in which it is said:

"Only a definite limited amount of energy can be stored up in any capacity apparatus, and in the case of a given oscillator for wireless telegraphy it is evident that there is always a fixed maximum charge that cannot be exceeded. If, therefore, an oscillator of given capacity is so constructed as to radiate substantially all of its energy in one or two waves, the one or two waves so radiated will be of the maximum energy possible with such a system, *whereas if the oscillator is so devised as to be a persistent oscillator, it will send out a very much greater number of waves at each discharge, but each wave will have only a fractional amount of the energy that could have been radiated in a single wave.* For instance, in the one case the given capacity being charged with a given amount of energy, $x$, the energy of the one or two waves in the one case will be substantially equal to $x$, or to $x^2$, as the case may be, *whereas, in case the radiator is arranged to be a persistent* oscillator so as to give *a long train of waves, as for instance 100,* then the energy, $x$, being split up among 100 waves of a train, the energy of each one of those waves will be represented by the value $x/100$. For use with a coherer, which, from its nature, operates only in response to the maximum potential impressed at any one instant, the first arrangement would be 100 times more efficient than the latter. It is obvious that if the coherer is so far distant that it will only respond effectively to a wave having the energy, $x$, at the transmitter, it will not respond to 100 or 1,000 or an infinite number of waves having only the energy $x/100$."

And Marconi, in his affidavit, when referring to the Braun circuit transmitting apparatus, says:

"Much less had he [Braun] understood that there was or could be any advantage in making the two circuits of such inductance and capacity as to have a natural period of oscillation in accord with each other."

And, referring to the Braun patent, in his deposition, he says:

"Hence the Braun patent illustrates merely the introduction of the transformer without any disclosure of the principles of my patent, namely, the

proportioning of the circuits to act as reservoir and radiator respectively, while efficiently transferring the energy by tuning these circuits to one another. My patent No. 627,650 differs essentially in principle from my patent No. 763,772, in that in the former I did not describe or disclose the fact that the closed oscillating receiving circuit was to be *tuned to the open* antenna receiving circuit, while in my patent No. 763,772, *I disclose and describe means for attaining* this useful object."

And on page 28 of his deposition he says:

"Furthermore this [Fessenden] patent shows no means whereby the tuning could be effected, there being no variable elements shown in either of the circuits."

And on page 31:

"The difficulties to be overcome in order to transmit an intelligible message to a great distance prior to the utilization of the invention of my patent No. 763,772 were *manifold.* They were also the result of interlinked and obscure causes, and hence one of the greatest difficulties must be overcome to attain success. In the evolution of the apparatus of my patent No. 763,772, I found that I could attain the long distances desired by *separating the functions performed in the original* single wireless transmitting circuit of my patent No. 586,193 and reissue No. 11,913, and assigning them to associated unlike circuits, one of which was a *closed circuit,* and hence not capable of radiating energy, and the other an *open* circuit which was capable of radiating energy, I found that by doing this I could so construct the closed or nonradiating circuit as to make it serve as a *reservoir* and so perform the function of receiving a relatively large initial charge, and that by *properly associating* the circuits and *tuning* them to have the same period, *transfer* this stored energy to the open or radiating circuit and obtain an efficient radiation of a larger quantity of energy with very much less decay of the waves. The transmitting difficulties thus overcome were the *inability to efficiently store* a quantity of energy and the inability to radiate it without undue losses and high damping."

It would therefore appear that the definitions given in the specifications and claims to meet the reference made by the Patent Office preclude any other conclusion than that tuning was the purpose sought. Sargent v. Hall Safe & Lock Co., 114 U. S. 86, 5 Sup. Ct. 1021, 29 L. Ed. 67; American Stove Co. v. Cleveland Foundry Co., 158 Fed. 983, 86 C. C. A. 182.

The application not being for the principle of resonance or tuning, or such foundation as a scientific fact, reference to specification may be made for interpretation of claims made. Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed. 279.

Marconi is not a pioneer in the art of resonance in his invention, in the sense that he discovered the principles of resonance or the art of tuning two circuits to the same frequency. His accomplishment must rest upon the utilization of known principles which he co-ordinated with ideas of his own invention, which are involved in the patent in issue, and have proven of great value to the world. His patent is not for tuning in general, but for particular, variable, selective apparatus, which the defendant does not use.

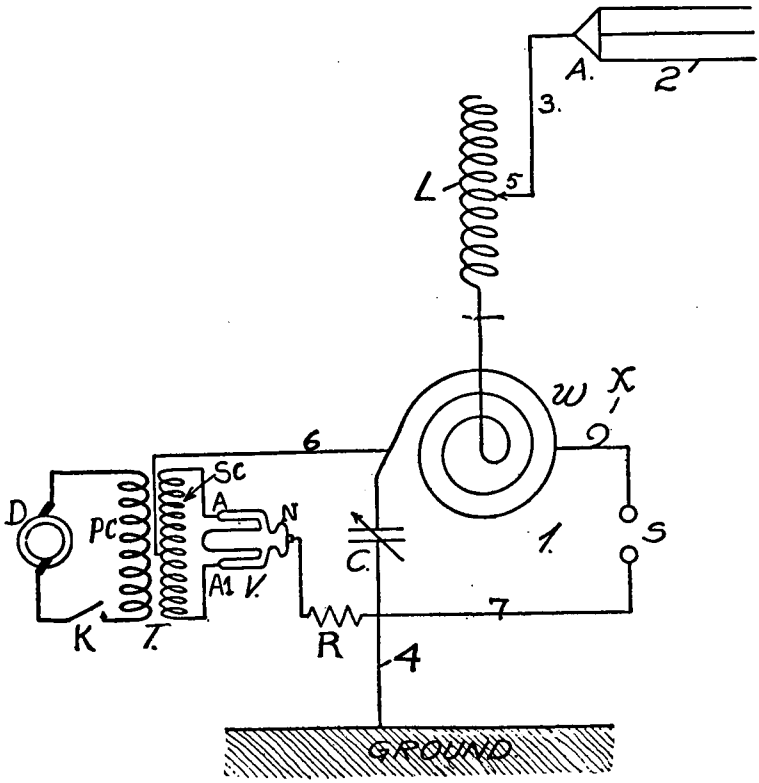
"By way of specific and detailed information as to how the capacity and self-induction of these circuits may be independently adjusted, so as to make the product of the self-induction multiplied by the capacity the same in each case, and thus obtain four circuit tuning, a table of tunes is given. The broad claim of invention resides, therefore, in the independent adjustment of the capacity and self-induction of the four circuits, two at the transmitting sta-

tion and two at the receiving station, so that the product of these elements in each of the two circuits shall be the same, in order that the circuits may be in electrical resonance with one another. This broad invention is covered by claims 10 and 20 in issue." Marconi Wireless Telegraph Co. v. National Electric Signal Co., supra.

The Simpson mercury valve transmitter is diagrammatically represented as follows:

DEFENDANT'S "SIMPSON" MERCURY VALVE TRANSMITTER

SIMPSON DRAWING




*D* represents an alternating current dynamo, and *T* a power transformer, *V* a mercury vapor rectifying valve, having terminals, *A*, *A* [1], and *N*. *A* and *A* [1] are anodes, the positive terminals of the valve. *N* is called a cathode, the negative terminal. *R* is resistance; *C*, variable condenser. *2* represents the horizontal structure of the overhead portion of the antenna. *3* is a vertical wire connecting the overhead portion of *2* by variable connection *5*, with the inductance coil *L*, this being a helical coil. *W* is a flat spiral inductance coil, connected to the inner terminal of the inductance coil *L* at the terminus of its center convolu-

tion. The extremity of its outer convolution is connected to one terminus of the variable condenser, *C*, and the other terminus of the variable condenser, *C*, connected to the earth by conductor, *4*. *S* is a spark gap of special form and is connected to the ground through the conductor *7* and the ground connection wire *4*. The alternating current dynamo is connected through its brushes each to the respective terminus of the primary coil *P c*, of the power transformer *T*. *K* is the operator's key. The secondary coil of the power transformer *T* is designated as *S c*. Each outer extremity of this coil is connected to the respective anode of the mercury valve *V*. From the center of the coil is taken a conductor, *6*, which is connected to the variable condenser, *C*, at the point where it is joined to the extremity of the outer convolution of the spiral *W*. The cathode end of the mercury valve *V* is connected to one extremity of the resistance *R*. The other extremity of the resistance *R* is connected to the variable condenser *C* at its terminal opposite to that connected to the center point of the secondary coil *S c*; the same extremity of the resistance *R* is also connected to the ground through the common ground conductor, *4*. The transmitter functions, as stated by Mr. Simpson and other witnesses, by having dynamo *D* generate an alternating potential current between its brushes, one brush being upon each of the collector rings, of 110 volts and sometimes 220, depending upon the type or kind of machine, the pressure or potential, of 110, or sometimes 220, is stepped up in the power transformer *T* to a pressure normally 4,400 volts between the outer terminals of the secondary coil *S c*, sometimes dropping to 4,000 volts. The pressure from the outer terminal to the middle conductor, *6*, is just one-half, or 2,200 volts, when it is 4,400 volts between the outer extremities of coil *S c*. The mercury valve, *V*, will conduct current under normal conditions from the anodes, *A*, *A* [1], to the cathode *N*. The current will not flow from the cathode *N* to either anode *A* or *A* [1], unless a relatively high pressure is placed upon the valve. A pressure impressed upon the valve, in the machine in evidence, would be something like 20,000 volts to reverse the current. The direction of the flow of current from the secondary coil *S c*, and the power transformer *T* to the radiating system is always the same. It is a unidirectional current, that cannot reverse its direction of flow, because the valve acts as a check valve in the charging system, and permits the current to flow from its source, the secondary coil *S c*, to the point where it is needed. It does not permit the current to be returned from any such point to its source. The valve *V* has resistance which varies inversely with the current flowing through it. As the current becomes greater in quantity, the resistance becomes less. If the potential between each extreme terminal of the secondary coil *S c*, of the power transformer *T*, were in such a direction that if a current were permitted to flow through that coil, from the bottom of the coil, as shown on the chart, to the top of the coil, the valve *V* would only permit such current to flow from the upper terminal of the secondary coil *S c*, to the anode *A*, thence within the valve to the cathode *N*, thence through the resistance *R* to the variable condenser *C*, charging the variable condenser *C*, through the conductor *6*, back to the center of the secondary coil *S c*.

"If we imagine in the next instant of time that the alternating potential had reversed its direction, so that the direction of the alternating potential was such that it would produce a current normally flowing from the top of the secondary coil *S c*, toward the bottom of that coil, then such a current, with the arrangement shown on the chart, would flow from the bottom of the secondary coil *S c*, to the anode *A* 1 of the valve *V*; thence through the variable condenser *C*, and complete its circuit from the variable condenser *C*, through the conductor *6*, back to the center of the coil again, pulsations being sent in the charging circuit, through the valve *V* into the condenser *C*. These pulsations are also unidirectional, the valve *V* acting as a rectifier, rectifying the alternating current from the dynamo *D*, acting through the transformer *T* and sending unidirectional or pulsating currents into the variable condenser *C*. Now there is also a comparatively small amount of charge taken by the condenser which is constituted by the ground * * * and the overhead portion of the antenna, marked *2'* on the chart. That amount of energy is really exceedingly small as compared to the amount of energy placed in that portion of the antenna system, constituted by the variable condenser *C*. The spark gap *S* is so adjusted as to break down, at some prearranged pressure or potential. That potential is usually a peak potential of the pulsations; that is, the highest potential the pulsation reaches. It may even be a little higher than that, due to the so-called inertia effect of the circuit, which would raise it a trifle. This spark gap *S*, having been adjusted to break down at such a potential, when a sufficient amount of charging current has flowed into the variable condenser *C*, to bring its potential up to the breakdown point of the spark gap *S*, a discharge takes place. This discharge is always, with the arrangement of circuits shown in the chart, * * * which * * * is identical with the arrangement of circuits in actual use, from the bottom of the condenser *C*, through the conductor *7*, thence through spark gap *S*, the conductor *8*, and such fraction of the outer convolution of the spiral coil *W* as may be used, thence to the opposite terminal of the variable condenser *C*. That discharge is a unidirectional impulse, and, with a normal arrangement of circuits, i. e., the transmitter set up as it always is, for operation, is always a unidirectional impulse. The effect of it is this: Energy is placed within the antenna circuit, the antenna proper of this transmitter, directly from its source."

The antenna circuit is said to consist of the overhead conductor *2*, its vertical connections *3*, inductance coil, or some portion of inductance coil *L*, flat spiral inductance coil *W*, variable condenser *C*, earth connection *4*, and ground. The spark gap *S*, with its associated conductors forms a part of the antenna system. The energy, when communicated from its source into the antenna, is in the static, its potential form, but thereafter is converted from the static, its potential form, into the kinetic form, that is, into oscillations, within that portion of the antenna consisting of the overhead conductor *2*, conductor *3*, inductance coils *L* and *W*, condenser *C*, earth connection *4*, and ground. Such conversion is known to the art as impulse excitation. Impulse excitation of oscillating currents is one in which the energy is set in motion within the oscillating, radiating circuit, by a single impulse, as distinguished from a transfer of energy by other means.

The quenched spark gap introduced into this country in 1908 by the Telefunken Company, of Germany, and now used upon all apparatus in suit, has added much to the efficiency of wireless apparatus. By it the character of the wave can be readily controlled, and the quality (sharpness and purity) of the wave can be brought into harmony with the result desired, and the high frequency generator impulse system will enable the operator to hitch "your [his] wagon to the earth and

shake it, * * *" and send messages to distant parts of the world, as stated by Pupin, supra.

The action of the grounded antenna does not yet seem to be conclusively determined. Marconi's idea with relation to the grounded action changed from the time of the filing of the 1896 application, so that special emphasis to grounded influence was omitted from the 1900 application; but subsequent development confirmed his former belief, and Pupin's suggestion seems to receive emphasis in the high frequency generator impulse and "single chunk" conversion of energy apparatus of defendant.

The purpose of the Simpson mercury valve is to prevent an arc to form at the spark *S*, enabling that spark to rapidly regain its high resistance quality and open up in order that it may leave the antenna free to oscillate in its own natural way, and to rectify the alternating current into a "pulsating current."

The circuit comprised a part of the elements of the antenna system, condenser *C*, and a part of the spiral *W*, across which is placed the spark gap *S*, making a circuit composed of *S*, *W*, *C*, *?*, which has the characteristic of having a large ratio of capacity to inductance, and is not a persistently oscillating, generating circuit, but has a function of disturbing the equilibrium of forces which exist in the antenna system, in order that it may produce persistent oscillations of a single frequency in that antenna system. The effect of this circuit upon the radiating circuit, as stated by Dr. Kolster, "is such as to get the energy into that radiating circuit very quickly, and to thereafter allow it to oscillate freely in its own natural way." This circuit has enormous decrement, and is nonpersistent. It is not, as in the Marconi patent in suit, *primarily* a reservoir or persistent oscillator, and does not co-operate with the antenna on the principle of resonance.

The defendant, to demonstrate the fact of the "single chunk" conversion of antenna energy, introduced the result of experimentation conducted at the University of Washington with the Braun tube on the behavior of the Simpson Mercury Valve Transmitter. The photographic reproduction shows the type of photograph obtained by Dr. Kolster, by the use of the Braun tube. The method used was that of producing deflections of the spot of light across the fluorescent screen, and photographing that deflection of light. The deflection of the spot of light across the screen corresponds with the motions of the current, first in one direction and then in the other, and, if the disturbing circuit is not characteristically an oscillating circuit, by the use of the mercury valve, whose function is to rectify the alternating current supply, the spot of light would appear as in the photograph. If no mercury valve be used, an impulse would be obtained first to the left and then to the right, the time period being a function of the frequency of the generator in a 500 cycle generator supplying the condenser *C*, occurring at intervals of $^1/_{1000}$ of a second.

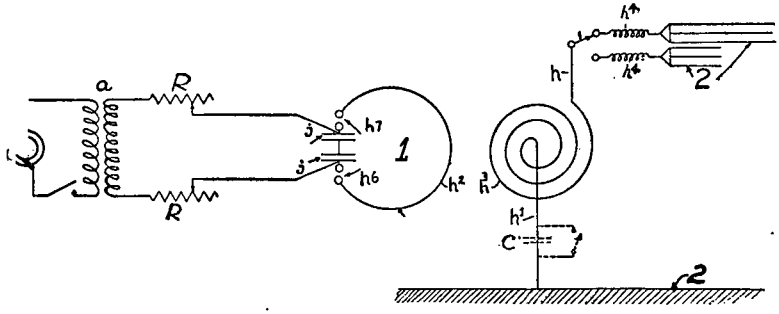
The contention of the plaintiff with relation to the Massachusetts test, in which it was shown that there were two and one-half oscillations in the antenna circuit, and that this must refute the contention of the defendants with relation to the Washington University photographic

test, may be answered by the suggestion that the Washington University result was obtained, the photograph speaks for itself, and defendant's witnesses to that extent are corroborated. The Massachusetts experiments show that there were many elements that entered into the experiments with relation to the appliances and the adjustment of the apparatus. Dr. Zennick's testimony, which does not seem to be denied, shows that photographs were only taken when the adjustments were such as to produce the desired result, and that the effort was for the purpose of obtaining evidence of oscillations in the trigger circuit, rather than to present to the court the result of all of the experiments that were made, together with the adjustments for each result—an impulse charging circuit such as defendant's requires a certain relative inductance and capacity and resistance to produce energy in substantially one oscillation, and the increase of inductance over capacity, and resistance beyond the proper ratio will change the characteristic of the impulse charging circuit—and the further fact that it is shown that, as stated by Dr. Zennick, "there was only one system, the dummy antenna, and only one kind of oscillations, the free oscillation of the antenna;" and it further appears that oscillatory circuits are not necessarily tuned circuits, and good tuning is not possible with 2½ waves in the train. No facts shown indicate that the oscillations were the result of resonant transfer of energy. Dr. Zennick further stated:

"I have actually calculated the curves, according to the photographs $B^1$ and $B$ $M$, assuming the figures given by Dr. Chaffee, * * * and we have length of about 600 meters capacity $C$ $L$, equal to .001 microfarads, and the resistance of about 6 ohms, meaning a decrement of about .06. The result is represented on the chart which I marked '$Z^7$', assuming as a decrement the value, .04, which had been measured in the tests made at the Bureau of Standards, and which corresponds to the figures given in the report of the committee on standardization of the Institute of Radio Engineers, pages 22 and 23, No. 1011, for a standard antenna of 600 meters we have length * * * assuming these figures, the corresponding curve is represented on the chart, $Z^8$. These curves show very clearly that after an extremely small percentage of the entire oscillation time we get the free oscillations of the antenna, if we compare these oscillations represented on charts $Z^7$ and $Z^8$ with the oscillations of the system oscillating from the beginning with its free oscillations, not only after 2½ oscillations—I have represented these oscillations in figures which are marked '$Z^9$', corresponding to a decrement of .06, and '$Z^{10}$', corresponding to a decrement of .04—it may be that we would hardly become aware of the difference between these figures if our attention had not been called to it. I may add the following: The committee on standardization of the Institute of Radio Engineers, in its report for 1915, Defendant's Exhibit 61, page 14, has defined 'impulse excitation' as follows: 'A method of producing free alternating current in an excited circuit in which the duration of the exciting circuit is short compared with the duration of the excited current.' This definition has again been agreed upon in one of the last meetings. I fully agree with this definition, and think, therefore, that the oscillations represented in Figures $Z^7$ and $Z^8$ represent a very good example of impulse excitation. There is no question that the impulse excitation would be still purer if the free oscillations were already present after one-half oscillations. I have shown this case in Figure $Z^{11}$ for the decrement of .06, but comparing this figure with the corresponding Figure $Z^7$, for the same decrement, it seems to me that the difference between these two figures is extremely small. From the standpoint of a physicist, therefore, and considering the result, it seems to me very immaterial whether the free oscillations start after one-half an oscillation or after 2½."

DEFENDANT'S "IMPULSE" TRANSMITTER

THOMPSON DRAWING




The defendant's Thompson impulse transmitter consists of a supply circuit, consisting of an alternating current generator and power condenser, *a*, connected with two resistances, *R*, *R*, which are connected to the opposite terminals of two condensers, *j*, *j*, connected in series with one another. Branching from this condenser *j*, *j* to either side is a symmetrical circuit containing spark gaps $h^6$, $h^7$, and a single turn of wire marked "$h^2$," this branch circuit being marked "*1*." Inductively associated with the single wire, $h^2$, is an antenna circuit consisting of the antenna marked "*2*" and the tuning inductance marked "$h^4$," the connecting wire marked "*h*," the coil marked "$h^3$," and the connecting wire marked "$h^1$," which may go directly to earth, or which may go through a condenser *C* to earth. The circuit containing the condensers *j*, *j* and the spark gaps $h^6$, $h^7$, and the single turn of wire $h^2$ may be called a disturbing circuit, and consists of the two elements, capacity and inductance, both being fixed in value. The other elements are so chosen that the ratio of the capacity to the inductance is extremely large. In the antenna circuit which is inductively associated with the circuit No. *1* of the chart $z^8$, the inductance coils $h^4$ and $h^3$ have means of varying their inductance by changing the number of turns on either one of the coils or both, in order that this antenna system may be tuned or adjusted to emit any wave length desired between 300 and 600 meters, and particularly two wave lengths 300 meters and 600 meters, which are the two wave lengths for use for commercial purposes.

There being no variable elements in circuit *1*, the only adjustments necessary are in the antenna circuit itself. The tests before the court demonstrated that no change in time period placed more than one wave in the antenna. In radiating a wave from the antenna of 600 or 300 meters, no variation is made in either the capacity or inductance of the charging circuit, the product of the inductance and capacity in circuit *1* being the same in sending out a 300-meter wave as a 600-meter wave from the antenna. In the operation of this transmitter the only variation in the inductance in changing from 300 to 600 meters is the use of a fewer number of turns in the inductance, and would, in most cases, be made by opening the switch short-circuiting the condenser *C*. The only adjustments are of the antenna circuit for the variation of wave length. The difference in the operation of the de-

fendant's impulse transmitter and the plaintiff type of transmitter is in the fact that there is an entire absence of resonant tuning in the impulse transmitter, whereas in the tuned, coupled circuit transmitter, for any change in wave length there must be a change of tune of the two associated circuits, so as to keep them in resonance. The defendant's impulse transmitter is electrically the same as Lodge's and carries out his thought with relation to the transmission of energy.

It is conceded by the plaintiff that the defendant's Thompson transmitter is not an infringement of the plaintiff's patent when used at 300 meters, but that when used at 600 meters the circuits are in substantial resonance, and because of such fact is an infringement of plaintiff's patent. I do not believe that this contention is tenable. The Thompson transmitter operates at different wave lengths, as demonstrated before the court, without variation of the time period of the impulse charger, and not upon the principle of resonant transfer. The structure of such apparatus substantially differs from plaintiff's, and because its variation is not limited, and at some point it is in harmony with an apparatus with a fixed variation, would not show conflict or infringement, where resonant transfer is not shown. No appliance is placed upon the defendant's apparatus by which tuning to other than fixed frequency can be made by the operator; whereas the plaintiff's apparatus is constructed with variable tuning appliances by which the operator can fix the time period to any desired wave length. The fact that coils of different length may be constructed and placed upon the Thompson transmitter, as was demonstrated by plaintiff before the court, and the time period be thereby varied, cannot avail plaintiff, as such would not be the structure of defendant; nor can the plaintiff be permitted to enlarge the claims of the patent by "broad tuning," in view of the express language employed in the patent.

PICKARD CHART

LODGE PATENT IN SUIT (EXPIRED)

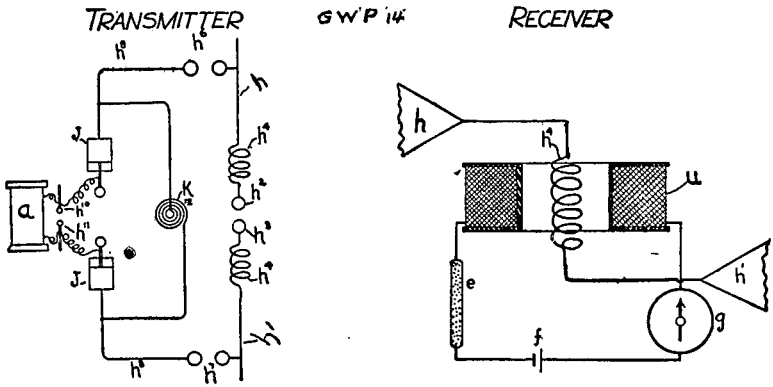



FIG. 4 FIG. 13

In the Lodge patent in suit, expired, is a radiating system, including coils $h^4$, $h^4$, and conductors $h$, $h^1$, being the antenna and ground connection, respectively, as a radiating circuit connected by way of spark gaps $h^7$, $h^8$, and $h^6$, $h^8$, to the charging or supply circuit. This circuit

consists essentially of two condensers, Leyden jars, *J, J.* To this supply circuit is added the coil, *k, k.* The intention is apparent that the spark gaps $h^2$, $h^3$, should be gaps of low resistance, and that *J, J,* should have a high potential; that spark gap $h^{10}$, $h^{11}$, is called a "starting gap," and when the spark gap $h^{10}$, $h^{11}$, breaks down, the charging supply circuit, *J, K, J,* delivers its charge through the gap $h^8$, $h^6$, and $h^8$, $h^7$, to the radiating circuit. When the Rhumkorf coil, *a,* is energized, there is a charge of the condensers, *J, J,* until all of the energy which can be stored in these, as limited by the potential reaching above the spark gap $h^{10}$, $h^{11}$, breaks down, the energy stored in these condensers, *J, J,* is converted into a sudden or impulsive current rush, first through the circuit *J, K, J,* and then immediately into an impulsive rush or charge of current across the gaps $h^8$, $h^6$, $h^8$, $h^7$, into the conductors *h* and $h^1$, and starts an electrical current through the gap $h^2$, $h^3$, very suddenly, and oscillations are set up in the entire antenna system and radiated. By this system it was not possible to obtain effective tuning or syntony. For effective tuning, resonant tuning, a relatively great number of impulses is required, that is, a drawn out train of waves. The coils $h^4$, $h^4$, are variable, so that, by changing their value, any desired frequency may be obtained and placed in electrical resonance with any receiving circuit.

Lodge does not use one circuit as a reservoir for the other, there being no resonant transfer of energy, the circuit in which the charge originates being entirely separated when the radiating circuit is charged.

"A receiver or resonator consists of a similar pair of capacity areas connected by a similarly shaped conductor or self-inductance coil, the whole constituting an absorber arranged so as to have precisely the same natural frequency of electrical vibration as the radiator in use at the corresponding remitting station, so that it can accumulate and receive impulses—that is to say, can act accumulatively—but it must not have a spark gap such as $h^2$ and $h^3$, or, if it have a spark gap, same must be carefully closed or shunted, or bridged across for a good short conductor. * * * Identically the same capacity areas and self-inductance coil can be used at will either as transmitter or as receiver * * * on condition that the 'discharge' spark gap $h^2$ $h^3$ of the radiator is perfectly closed whenever acting as receiver." (Lodge patent, page 3, second column.)

Lodge has an improvement of the receiving antenna linked through a transformer with a closed circuit containing a coherer, which circuit is not timed to the antenna circuit. The receiver circuit has in it also a variable coil $h^4$. By varying the number of turns in this coil, and hence its inductance, the receiver can be operated in electrical resonance, or tuned to a transmitting circuit.

For the purpose of furnishing a pure wave, Lodge provides that the energy undelivered to the radiating circuit be cut off, and states, on page 2 of his patent, that "the advantage of this is the charges so communicated are left to oscillate free from any disturbance due to maintained connection with the source of electricity," and the maximum effect will be produced on the receiving circuit.

The operation of Lodge patent, Fig. 4, is identical with defendant's in using impulse charging and variable inductance coil in the antenna. No reservoir circuit is used, and, when the radiating circuit is charged, it is entirely separated from the source of supply circuit which necessarily has some natural period.

The Lodge receiver consists of a primary tuned antenna circuit, $h$, $h^4$, $h^1$; $h^4$, in its entirety, is the vertical wire or antenna, and $h^1$ is the ground connection. The antenna circuit is tuned to the distant transmitter. It is an oscillating circuit and its inductance and capacity values are so adjusted that its time period is that of the distant transmitting antenna, and the variation adjustment is made by variation of the coil $h^4$ as shown in Figure 13, receiver. Surrounding coil $h^4$ is a secondary coil, $u$, and connected to the terminals of this secondary coil in the simple series circuit, are the detector, which, as Lodge states (page 4 of his patent) "may be a single point contact" (coherer), and battery, $f$, and the indicator, $g$. The secondary circuit of the receiver is so associated or linked with the primary or receiving circuit that it does not in any way interfere or hinder the free oscillation of this receiving antenna. As stated by Lodge, "The idea being thus to leave the resonator free to vibrate electrically without disturbance from attached wires," this being the same as shown in the transmitter in the Lodge patent, Figure 4, the idea being to have one single free oscillating circuit at both the transmitter and the receiver. Since coil $h^4$ is magnetically linked with the secondary coil $u$, the oscillations induce simple oscillations in this coil $u$ and its attached circuit. The energy in the antenna circuit of the receiver is transferred to the secondary circuit, not by being timed or tuned to the primary or receiving antenna circuit, but by being magnetically linked therewith and induced or forced upon the secondary circuit when any alternating current flows through coil $h^4$ and a forced vibration by means of this vibration of circuits produced. There are no variable elements in the circuit, hence it cannot correspond in time period or tune with the primary circuit. Lodge gives further details as to the apparatus used in the secondary circuit of this receiver, coil $u$, indicator $g$, and the battery and detector, $f$, $e$, when he says:

"In all cases it is permissible, and sometimes desirable, to shunt the coils of telegraphic instruments by means of the resistance or capacity, as shown at $W$ in Figure 12."

The operator in the transmitting station shown in Figure 4 of G W P 14, would first connect to his transmitting series of power, $a$, its storage batteries, and adjust coils $h^4$, $h^4$, to such values as would tune the circuit to the period of operation corresponding with the distant receiving station with which he wished to communicate, and then operate the telephonic key, causing a short and long series of charging currents from coil $a$ to the supply circuit $h^6$, $h^8$, $J$, $J$, $h^8$, $h^7$, to flow into the radiating antenna, these impulses being dots and dashes of the Morse code, the operation of this key being an intermittent operation, the intermittances being simply those of the spark discharging at the starting gaps $h^{10}$, $h^{11}$. If the Rhumkorf coil or induction coil is employed, the sparks usually occur at the rate of 10 or 20 per second, and the intermittent series of charge currents will flow into the radiator $h$, $h^4$, $h^1$. These currents set up oscillations in the radiator corresponding in frequency to the tuning of the circuit to which it has been adjusted. If the distant receiving station hears a signal, it will answer, and so the operator at the transmitter of Figure 4 will "listen in." If the transmitting station is correctly adjusted to the tune of

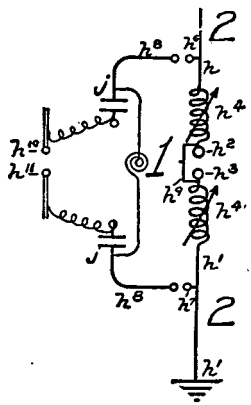
the receiving circuit $h$, $h^4$, $h^1$, the passing wave trains will flow through coil $h^4$, force oscillations upon the secondary circuit, affect the coherer $R$ of the circuit, and will transmit the signals from the transmitting circuit, which will be received by the operator. If the signal is weak, the operators can bring the transmitter and receiver into closer tune or resonance. The primary purpose of Lodge seemed to be the removal of the detector and its effect from the receiving antenna. Because of its resistance, it prevented free oscillations of the antenna.

PICKARD CHART

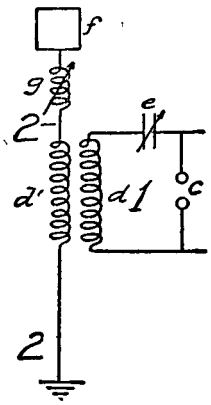
COMPARISON LODGE AND MARCONI PATENTS IN SUIT

| LODGE 1898 | MARCONI 1904 |
|---|---|
| No. 609,154 | No. 763,772 |

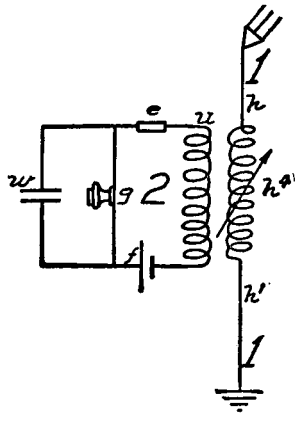
TRANSMITTER FIG. 4.



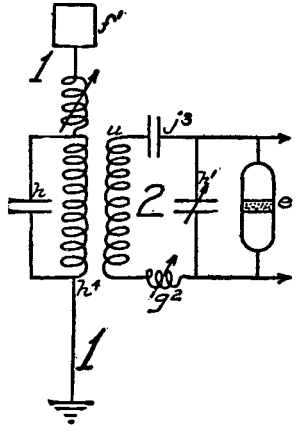

TRANSMITTER FIG. 1.




RECEIVER FIG. 13. AND DESCRIPTION.




RECEIVER FIG. 2.



In G W P Chart 47 is made a comparison between the Lodge patent and the Marconi patents in suit, in which it is claimed that the receiver, Figure 13 of Lodge, is identical with the defendant's standard receiver. The inductance and capacity values in the antenna circuit are so adjusted that its time period is that of the transmitting antenna, the adjustment being made by the variation of coil $h^4$, which is surrounded by the secondary coil, *u*, and connected to the terminals of this secondary coil in a simple series circuit, first, the detector, *e*, being a single point coherer; second, a battery, *f*, and third, an indicator, *g*, the secondary circuit being so associated with the receiving antenna circuit that it does not in any way disturb the free oscillations, "the idea being thus to leave the resonator free to vibrate electrically without disturbance from attached wires." This arrangement is the same as the transmitter, Figure 4 in the Lodge patent, the idea being to leave the transmitting antenna or single oscillating circuit entirely free to vibrate without any disturbance from attached wires, and the same is carried through the entire system of transmitting and receiving. Such receiver is commercially operative, the efficiency of which has been demonstrated before the court. In the right-hand lower figure is shown the Marconi receiver. Both have a receiving circuit, *1*, containing adjustments for tuning to the wave length of the transmitter, a wide difference appearing in circuit *2*. In defendant's receiver, which is Figure 13 of the Lodge patent, there are no adjustments. A fixed coil, *u*, is connected in series with detector, *e*, battery, *f*, and indicator, *g*; whereas, in the Marconi patent, there are, in the secondary circuit, a series of adjustments, adjustable inductance $g^2$, capacity $h^1$, these being the adjustments by which the secondary circuit *2* is operated in resonance or tune with circuit *1*. In the demonstration before the court, it was shown that it was necessary to make adjustments in the antenna or receiving circuit, and also to make adjustments of inductance and capacity in circuit No. *2*, while but one adjustment was made in the defendant's receiver, that being in circuit No. *1*. It is apparent that this receiver has but one tuned circuit, that being a fixed or nontunable circuit, while the plaintiff's receiver has two tuned circuits, the one being tuned to the other by independent adjustment.

Professor Fleming, in his book entitled "The Principles of Electric Wave Telegraphy" (1906 Ed.) page 218, in considering inductively coupled circuits such as Figure *1* of the patent in suit, says:

"When two circuits, having inductance, resistance, and capacity, are inductively connected together, we are then presented with a unique case to consider, if their natural time periods of oscillations when separate are the same. Oscillations in one circuit then create a strong response in the other coupled circuit. In practice, we find that this syntony or agreement between the time periods of the two periods must be very exact, if the phenomenon of resonance is to take place."

In the same book (page 490):

"There are in fact only two modes of coupling an open and closed oscillatory circuit which have any technical value. First, we may couple together the circuits in such a manner that a single pure oscillation, or one single period of vibration, is forced upon the aerial or radiator, not its own natural period, but that of the actuating closed circuit. Secondly, we may couple to-

gether circuits which have the same free, natural period, when separate, and thus establish a syntonism between the circuits, which, under the condition of a somewhat 'loose coupling' results in the radiation of waves of two different wave lengths."

The tuned relation between the circuits behave as a pair of coupled pendulums, and their interference with each other would produce complex waves, or waves of different lengths, as would the interference of the swinging pendulums with each other produce complex oscillations.

Plaintiff's patent in suit states that any of the prior single circuit or two circuit receivers may be used with the transmitter of the patent, and also deals with a special form of receiver, in which the capacity and self-inductance of the two circuits are to be independently adjusted, so that the product of self-induction multiplied by the capacity will be the same in the two circuits. Means of independently varying their tune must be provided. In the prior patents, No. 627,650, Nos. 647,007-647,009, and No. 668,315, referred to, there are no such independent adjustments. In Marconi patent, No. 676,332, a variable inductance coil is shown in the primary or antenna circuit. While this patent was filed after the date of the filing of the patent in suit it corresponds, as stated in the first paragraph of its specifications, on page 1, to Marconi's British patent No. 5387, dated March 21, 1900, being before the filing of application for patent in suit, and which corresponds to the United States patent in issue here.

The question of efficiency or selectivity is not the issue. The issue is infringement. The plaintiff's receiver may be much more efficient and more highly selective, and yet these qualities, of themselves, would not show infringement. There is a distinction between efficiency and selectivity. Efficiency simply means the amount of energy delivered to the detector. The efficiency of a receiver is the energy available at the receiving station, in the form of passing waves, the amount of energy which is delivered to the detector from such waves. An efficient receiver is one which transmits the greatest amount of energy to the detector, and thereby gives the maximum effect to the indicator. Selectivity is the sharpness of response with reference to transmitting stations of different frequencies or wave lengths. A very selective receiver is one which differentiates sharply between two different transmitting stations having nearly the same wave length or frequency. Defendant's receiver does not include the essential elements of the plaintiff's receiver. The persistent oscillator, variable condenser, and variable inductance in the detector circuit, are all lacking. There is no relation to tuning.

[3] The mere fact that the same result is obtained by the operation of an apparatus is not conclusive of infringement. Infringement cannot be predicated on results obtained, irrespective of the apparatus employed. The fact that the apparatus of the plaintiff, by "*broad tuning*," and the apparatus of the defendant in normal operation, secure the same result, does not signify infringement (Goodyear Shoe Mach. Co. v. Spaulding [C. C.] 101 Fed. 990); the established rule being that the invention, if any exists, is because of apparatus by which the result is obtained, and not the mode of operation, independent of the

mechanical device used (Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136). Results accomplished by mode of operation or function, separate from the means of mechanical devices, do not constitute infringement. Union Match Co. v. Diamond, 162 Fed. 148, 89 C. C. A. 172. The apparatus (Marconi) in suit is fundamentally different. The structures are different. The mode of operation is dissimilar. Because of such conclusion, it is not necessary to enter into any detailed discussion of the claims made in the plaintiff's patent, or double patenting, or any of the other issues raised. As to the apparatus furnished to the United States, this court, in view of the act of 1910 (Act June 25, 1910, c. 423, 36 Stat. 851 [Comp. Stat. 1913, § 9465]), has not jurisdiction, either over a suit for an injunction, or for an accounting. Foster Hose Supporter Co. v. Taylor, 191 Fed. 1003, 111 C. C. A. 667.

I think the prayer of the plaintiff should be denied, except as to the apparatus infringing the Lodge patent, for which an accounting is directed, and, unless the parties can agree as to the amount of damages, the matter will be referred to a special master to take testimony and report the same to the court, together with his findings and conclusions.

## KEYSTONE TYPE FOUNDRY v. WYNKOOP.

(District Court, S. D. New York. September 14, 1916. Decree November 23, 1916.)

No. 11–254.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—DESIGN FOR FONT OF TYPE.
The Smith design patent, No. 38,855, for a design for a font of type, *held* not anticipated and to disclose patentable invention; also, infringed.

2. PATENTS ⟸317, 319(1)—SUIT FOR INFRINGEMENT—EFFECT OF EXPIRATION OF PATENT.
Where a patent has expired during the pendency of a suit in equity for its infringement, an injunction will not be granted, but damages may be awarded for infringement during the time it was in force.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 559–565, 577, 578, 580, 581, 583, 584, 586.]

In Equity. Suit by the Keystone Type Foundry against David S. Wynkoop. On final hearing. Decree for complainant.

Ernest W. Bradford, of Washington, D. C., for plaintiff.
R. S. Harvey, of New York City, for defendant.

SHEPPARD, District Judge. [1] In addition to the defenses set up by the defendant's answer filed in Eq. 3–17 (which record is made a part of the files of this case No. 11–254 by stipulation), another is interposed by way of amendment allowed under order of court dated March 10, 1913, assailing the validity of plaintiff's design patent No. 38,855 of October 8, 1907, for a font of type on the ground that the

substantial and material parts thereof were previously patented by the same party under patent No. 37,379, March 21, 1905, and was therefore void as against the spirit of the patent laws for double patenting. It appears from the record that a motion by defendant to dismiss complainant's bill on the ground that the patent in suit was not for a design within the meaning of the statute was heard, and, after argument by counsel for both sides, was overruled by Judge Grubb of this court on August 5, 1914.

A number of patents were introduced in evidence to show the prior state of the art. These do not show to the court such a universal knowledge of the features which the plaintiff's patent No. 38,855 sought to protect as would require a limitation of its claim. While one or two letters or figures of the font may be similar to the like character or characters in the fonts of the prior patents, a casual examination clearly demonstrates that as a whole there is such dissimilarity of configuration and ornamentation of the font described in patent No. 38,855 as involves patentable novelty. The defendant's font as shown by the exhibits in evidence is an exact copy of that covered by plaintiff's patent No. 38,855 and as such constitutes an infringement.

[2] The monopoly granted to the Smith patent, No. 38,855, expired October 8, 1914. The prayer for injunction is therefore not now material or important to plaintiff. However, an order will be entertained referring to a master the question of amount of damages sustained by plaintiff through the infringement during the period in which the monopoly was in force.

Decree.

This case coming on to be heard on September 8, 1916, on plaintiff's bill and defendant's answer and amended answer, and on testimony in chief for plaintiff, testimony for defendant, and testimony in rebuttal for plaintiff, and on argument by counsel for each party, it is hereby ordered, adjudged, and decreed as follows: That plaintiff's design patent, No. 38,855, granted October 8, 1907, for an invention in a design for a font of type, was for a good invention under the statute, and not anticipated by any of the numerous prior patents or showing in prior publications introduced in evidence by defendant, and that said patent was therefore valid; that the type as manufactured and sold by defendant, as shown by the exhibits of evidence in the case, is an exact copy of the design forming the subject-matter of plaintiff's said patent, No. 38,855, and that its manufacture and sale constituted an infringement of plaintiff's rights as granted under said patent; that, the patent having expired since suit was begun, no injunction will be granted, but plaintiff may have judgment for the amount of its damages sustained through the infringement of its said patent by defendant prior to October 8, 1914, the day on which said patent expired; that the case be referred to a master to determine the amount of damages so sustained; and that plaintiff have judgment for its costs in this cause sustained.

## In re READING HAT MFG. CO.

(District Court, E. D. Pennsylvania. February 1, 1917.)

No. 4982.

BANKRUPTCY ⊂=268—TRUSTEE—SALE OF PROPERTY—AGREEMENT—TAXES.

Where the buyer of mill machinery, which was covered by the mortgage on the mill, to protect the bankrupt estate of the mortgagor, agreed with the receiver that the mill, without the machinery, would sell for at least $7,000, or that he would make up the deficit, which meant that the property should bring that amount free of incumbrances, so that the purchaser would have to pay the unaccrued taxes for the year of the sale in addition to his bid, and the buyer of the machinery himself purchased the mill for $7,200, which was more than the amount of the agreed purchase price, with unaccrued taxes, he is not liable for the amount of the taxes in addition to his bid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 372–379; Dec. Dig. ⊂=268.]

In Bankruptcy. In the matter of the Reading Hat Manufacturing Company. On petition to review an order of the referee requiring petitioner to pay the unaccrued taxes on land belonging to the estate under an agreement. Petition allowed, order revoked, and cause remitted, with instructions to enter an order in accordance with the opinion.

See, also, 224 Fed. 786.

Thomas O. Peirce, of Philadelphia, Pa., for petitioner.

Bertram D. Rearick, of Philadelphia, Pa., for trustee.

DICKINSON, District Judge. The present status of this case, out of which the question involved arises, is as follows:

There was property of the estate, consisting of land, a mill, and the machinery contents of the latter. There was a mortgage of the mill property, which the mortgagee claimed to be a lien upon the whole plant, including machinery. It was deemed by the receiver desirable to sell the machinery and what would otherwise be personal property separate from the land and buildings, and to sell the former as personalty. The practical effect of thus stripping the mill of its machinery might be to so depreciate its value as that the real estate would not realize sufficient money to pay the mortgage. The security of the mortgage would thus be impaired, and the result might be that the mortgagee would present a claim as a general creditor for such part of the mortgage debt as the proceeds of the real estate failed to reach. To give assurance against this consequence, and to forestall any objection by the mortgagee to a sale of the machinery, the purchaser of the latter was required to give, in addition to the purchase price of the personalty, his agreement that the real estate would bring at least the sum of $7,000. The petitioner entered into this agreement and became the purchaser of the personal property. The real estate was then exposed for sale and brought the sum of $7,200. The agreement was made

by a man by the name of Sylvester, but he is found by the referee to be nothing more or less than a name for the petitioner.

The referee was not only fully justified in making this finding, but it was conceded at the argument that the fact was as found. To secure the carrying out of his agreement, the petitioner deposited the sum of $1,000, which was to be returned to him if his agreement was complied with, but if he fell short in performance, then the receiver was to retain so much of the $1,000 as would put the estate in the same position as if the petitioner had so complied.

When settlement came to be made for the real estate, the trustee (who had succeeded the receiver) demanded, in addition to the price of $7,200 bid, the sum of $130.44 which represented the unaccrued taxes for the current year. The basis of this claim by the trustee was that he asserted the agreement between the receiver and the petitioner to have been that the petitioner, in addition to the price bid for the real estate, would assume and pay the current year's taxes, less the apportionment, to the day of sale. The terms of sale, as made by the referee, sold the property clear of all incumbrances, including the whole year's current taxes, and thereby operated as a divestiture of the lien of the taxes and threw the payment of the same upon the fund. The petitioner denied such to be the meaning of his agreement and refused the additional payment. It was finally arranged that the amount involved should be retained by the trustee, subject to the determination of the question between them. This determination is now being made. It turns upon the proper construction of the agreement. The construction of the agreement, as urged by the petitioner, is that he merely agreed that the real estate should sell for at least $7,000. When, therefore, it was sold for $7,200, his agreement was fully met and discharged, and is to be considered as if wiped out.

The referee has refused to accept of this construction. In this we think he is right. The view taken by counsel for petitioner is at first sight clear enough. To say that a property shall bring $7,000 seems to be a sufficiently definite statement. It develops, however, that it is nothing until the meaning of such a price is defined. For illustration, does it mean $7,000 clear of all incumbrances, or subject to them? The parties to this agreement defined $7,000 as meaning $7,000 clear of all incumbrances, with taxes, however, apportioned to the day of sale, thereby meaning $7,000 plus the unaccrued taxes, which the purchaser was to pay in addition to his bid. If this were all the agreement contained, this construction would still sustain the claim of the petitioner, because the property did bring the $7,000 and the amount of taxes involved in addition.

Counsel for the trustee met this view by the assertion that there are two agreements in the agreement referred to. One relates to the contingency of some one else than the purchaser buying the property, in which event the petitioner is relieved of his contract if the purchase price exceeds $7,000. The other relates to the contingency of the petitioner himself becoming the purchaser, in which event it is asserted the petitioner, as purchaser, agreed to pay the unaccrued taxes in addition to the price bid for the real estate. As the petitioner did buy

the real estate, this latter agreement is the controlling one. This is the construction put upon the agreement by the referee.

The argument in support of the view accepted by the referee is pressed with earnestness and with force by counsel for the trustee. It may be thus presented, prefaced by the admission that there is no obligation upon the petitioner to pay the apportioned taxes unless he so agreed; but it is asserted that such undertaking is found in the agreement of January 7, 1914. The argument is that he agreed to pay these taxes if he bought the property, and, as he did buy the property, his obligation to pay becomes complete.

There is something alluring in the logic of this mode of statement, but the argument thereby presented lacks convincing power, because it ignores the common sense of the situation in overlooking the palpable truth that the substantial purpose and scope of the agreement was to assure to the estate that the property would bring $7,000 plus these taxes. When, therefore, this object of the agreement was attained, the agreement was functus officio. The argument is answered by a denial of the first premise. The petitioner did not agree to pay more than his bid "if he bought the property," but only if he bought the property for less than $7,000 and the apportioned taxes. Under the view of the trustee the petitioner would be obliged to pay $7,200 and the taxes, and this he never agreed to pay. There was, it is true, the possibility that the estate might receive more, because the assurance was that it was to receive at least that much. This possibility was inherent and necessarily so. It is conceded that the estate is entitled to receive $7,200, less taxes, or $7,039.56. It, therefore, does receive at least $7,000, because it receives more. The petitioner retorts upon the trustee with his statement of the logic of his view. He likewise prefaces his statement with the proposition that he is not obliged to pay this $130.44 (representing the unaccrued taxes) unless he has so agreed, and that the only agreements into which he had entered are that of January 7, 1914 and his bid of $7,200 at the sale. There may be in the agreement of January 7, 1914, his undertaking to pay the $130.44, but there is no undertaking to pay the $7,200. By his bid he agreed to pay the $7,200, but he did not agree to pay the $130.44 in addition because that was included in his bid. It therefore follows that the only way in which an agreement to pay both can be manufactured is to make up a patchwork sort of contract, by taking an obligation to pay the $130.44 out of the agreement of January 7, 1914, and an agreement to pay the $7,200 out of his bid contract, and by piecing the two together make a contract to pay both. The petitioner denies a contract thus made to be his contract. The substantial agreement of the parties was this. It was anticipated that a sale would be made (such as in fact was afterwards made) clear of the taxes for the whole year. It was anticipated that the petitioner or some one else would be the purchaser. It was then agreed that as between the parties what the estate received should be at least $7,000, figured on the basis of the property being clear, but the purchaser paying the unaccrued taxes. In other words, the property considered as sold clear of all incumbrances should bring $7,000 plus the future part of the

current year taxes, all of which taxes the estate would be obliged to pay, because the property was sold clear, or, in still other words, the property should at least bring $7,130.44. If the estate did not receive that much, the petitioner was to make up the deficit. If it did receive at least that much, the agreement was met, and the petitioner quit of his contract. The estate in fact received $7,200, or $7,069.56 in addition to the $130.44, the apportioned taxes.

Our conclusion is that the petitioner is not obliged to pay a further $130.44 to the estate, and is entitled to the return to him of the sum deposited for the purpose.

The petition for review is allowed, the order of the referee revoked, and the cause remitted, with instructions to make an order in accordance herewith.

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## BROWN et al. v. FLETCHER.

(District Court, S. D. New York. January 15, 1917.)

1. COURTS ⟸335(1)—FEDERAL COURTS—PRACTICE.

Rev. St. § 913 (Comp. St. 1913, § 1536), declares that the forms of mesne process in suits in equity and admiralty in the federal courts shall be according to the principles, rules, and usages which belong to courts of equity and admiralty; while section 914 (section 1537) declares that the practice, etc., in civil causes other than equity and admiralty causes, shall conform as near as may be to the practice in like causes in the state courts. Section 916 (section 1540) provides that the party recovering a judgment in a common-law action shall be entitled to similar remedies, by execution or otherwise, to reach the property of the judgment debtor, as now provided in like causes by the laws of the state in which such court is held; and section 917 (section 1543) provides that the Supreme Court shall have power to prescribe in any manner not inconsistent with any law of the United States the forms of writs and other process, and the modes of framing pleadings, etc., of enrolling decrees, and the whole practice in suits in equity or admiralty. *Held*, that the state practice is adopted in the federal courts only in common-law actions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 902, 903, 906, 907; Dec. Dig. ⟸335(1).]

2. COURTS ⟸355—FEDERAL COURTS—PRACTICE.

Under such sections and new equity rule 8 (198 Fed. xxi, 115 C. C. A. xxi), declaring that final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution in the form used in the District Court in suits at common law, and in view of the local rules of practice providing for supplementary proceedings in common-law actions, and for the examination of the execution defendant in admiralty proceedings, a trustee against whom a decree has been rendered in his representative capacity may properly be examined in supplementary proceedings in accordance with the state practice; the adoption of the remedy of the execution not being limited to the mere writ itself.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 935, 936; Dec. Dig. ⟸355.]

In Equity. Suit by John A. S. Brown and others against Austin B. Fletcher, as testamentary trustee of Conrad Morris Braker, etc.

On motion to vacate an order for examination in supplementary proceedings. Motion denied.

See, also, 231 Fed. 92, 145 C. C. A. 280.

William P. S. Melvin, of New York City, for the motion.

Fredric W. Frost, of New York City, opposed.

AUGUSTUS N. HAND, District Judge. The suit in which this motion is made was brought in equity. After a demurrer to the bill of complaint based on lack of jurisdiction was sustained by the Circuit Court of Appeals (206 Fed. 461, 124 C. C. A. 367), the Supreme Court, on review, held that this court had jurisdiction, and remanded the cause for disposition on questions other than those of jurisdiction (237 U. S. 583, 35 Sup. Ct. 750, 59 L. Ed. 1128). Costs, however, were allowed against the defendant, as trustee, by both the Circuit Court of Appeals and the Supreme Court, and a judgment was docketed for these costs by the clerk of the District Court.

[1] It was decided by the New York Supreme Court, Appellate Division, First Department, in Matter of Gough, 31 App. Div. 307, 52 N. Y. Supp. 627, that trustees against whom a judgment had been rendered in their representative capacity might properly be examined in supplementary proceedings, and I think it clear that the order in this case was properly granted, unless such a remedy can only be exercised in the United States courts upon judgments recovered in actions at law. Section 913 of the Revised Statutes (Comp. St. 1913, § 1536) provides:

"The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the Circuit and Dsitrict Courts shall be according to the principles, rules, and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any Circuit or District Court, not inconsistent with the laws of the United States."

Section 914 (Comp. St. 1913, § 1537) provides:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

Section 916 (Comp. St. 1913, § 1540) provides:

"The party recovering a judgment in any common-law cause in any Circuit or District Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such Circuit or District Court, and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

Section 917 (Comp. St. 1913, § 1543) provides:

"The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the Circuit and District Courts."

It is familiar law that by the foregoing statutory provisions the state practice is only adopted in common-law actions. Rule 6 of this court expressly adopts the New York practice in common-law causes, and rule 4 in terms makes supplementary proceedings applicable to common-law cases.

[2] The Supreme Court, under section 917 of the Revised Statutes, supra, has, however, the power "generally to regulate the whole practice to be used in equity." Rule 8 of the new equity rules (198 Fed. xxi, 115 C. C. A. xxi) provides that:

"Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the District Court in suits at common law in actions of assumpsit. * * *"

I do not think that the words "by a writ of execution," or "in the form used in the District Court in suits at common law," are to be so narrowly interpreted as to refer only to the piece of paper itself known as the "execution," but are to include all the familiar incidents of that writ, the most common of which is supplementary proceedings. I am fortified in this opinion by the long practice which has, I believe, obtained in this district of granting orders in supplementary proceedings upon decrees in equity for the payment of money.

In the case of Byrd v. Badger, 1 McAl. 443, Fed. Cas. No. 2266, where a motion was made to set aside an order in supplementary proceedings, Judge McAllister, sitting in the Circuit Court for the District of California, stated that these proceedings were a substitute for a creditor's bill, mentioned the fact that the statute of California providing for supplementary proceedings was analogous to that of New York, and further held that, as proceedings in aid of execution were equitable and only cognizable in the United States Court in the exercise of chancery powers, the parties must proceed by creditor's bill and could not avail themselves of the statutory remedy of supplementary proceedings. It does not appear clearly from the opinion whether the relief sought was upon a judgment recovered at law, or a decree in equity; but the language used leads me to suppose that the foundation of the right was a judgment at law. If that be the case, Judge McAllister's decision would not represent the law in this court, because rule 4 of the local common-law rules passed in conformity with section 916 of the Revised Statutes, supra, provides:

"In common-law causes the parties shall be entitled to the same rights and remedies as respects attachments against the property of the defendant, and as respects proceedings supplementary to execution as are now or may be hereafter provided by the laws of the state of New York, which laws (in respect of common-law causes) are hereby adopted by this court."

Local rule 46 in admiralty further provides for an examination of the execution defendant and of such other persons as witnesses as he may show to be material. It is thus clear at law and in admiralty that the equivalent of supplementary proceedings in the state court is expressly provided for. I think it would be most unfortunate to give equity rule 8 so narrow a construction as to make it necessary to proceed by the cumbersome remedy of a creditor's bill, and in so doing to reverse the customary practice of this court for many years.

The motion to vacate the order for examination in supplementary proceedings is therefore denied.

## THE ADA.

(District Court, S. D. New York. December 22, 1916.)

1. SHIPPING ⊂=58(3)—CHARTERS—DAMAGES FOR BREACH.
   The general rule that, on withdrawal of a ship from a charter, the charterer is entitled to damages measured by the difference between the charter hire and the hire necessary to secure another vessel, applies only when a substitute can be procured equal to the vessel withdrawn. If that cannot be done, the charterer is entitled to recover lost profits based upon the usual rates of freight at the time and place and the cargo that could probably have been obtained.

2. SHIPPING ⊂=58(3)—CHARTERS—DAMAGES FOR BREACH.
   To entitle a charterer to damages because, as a result of the withdrawal of the chartered ship, he substituted another then under charter to him, at a sacrifice of her own cargo, to carry the cargo engaged for the one withdrawn, by which he sustained a loss, it must be shown that such action was a fair exercise of judgment to minimize the damages.

3. DAMAGES ⊂=67—INTEREST—DISCRETION.
   In admiralty, the allowance of interest on damages recovered is within the discretion of the court.
   [Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 135, 136.]

In Admiralty. Suit by the Universal Transportation Company, Incorporated, against the steamship Ada and the Rederiaktiebolaget Amie. On exceptions to commissioner's report.

Charles R. Hickox, of New York City, for libelant.

William J. Conlen, of Philadelphia, Pa., and Engel Bros., of New York City, for respondent.

LEARNED HAND, District Judge. The commissioner's report gives the general facts in this cause with enough detail to justify the omission of any preliminary statement, and I may therefore proceed at once to the specific matters in dispute as shown by the exceptions:

First. What was the primary damage from the loss of the outward voyage from New York to Genoa, about May 1, 1916?

Second. What was the loss of the future return voyage from Genoa to New York at the end of May, 1916?

Third. What was the indirect damage caused by the loss of freight on the Zealandia?

Fourth. What were the indirect damages from the loss of freight on the Sarnia and to the general good name of the libelant?

Fifth. What was the net freight for which the respondents were accountable to the libelants?

Sixth. What were the incidental items with which the respondents are chargeable?

Seventh. With what payments under the charter party should the libelants be charged?

Eighth. How interest should be computed, if at all?

[1] *The Outward Voyage.* Much confusion existed throughout the taking of the proof and in the presentation of the respondents' case in court through a misapprehension of the theory of the libelants' chief claim; i. e., the claim for the outward voyage. The libelants were obviously bound by the general rule of damages that the withdrawal of the ship entitled them prima facie to damages measured by the difference between the hire reserved in the charter and the hire necessary to secure such another bottom. No one disputes this, but it is a part of the rule that the substitute must be equal to the ship withdrawn, and the libelants assumed the burden of showing that there were none such. This they did show. It appeared that there were obtainable no charters which would permit the carriage of benzol or other such products. This proof the respondents did not meet. There remained only those ships which the libelants already had under charter, the Sibiria, the Liberia, the Sarnia, and the Zealandia. The Liberia was off the coast of Africa, without coal and unable to move. The Sibiria, though her charter allowed her to carry petroleum and its products, which would include benzol and toluol, was bound east on her last voyage. The Sarnia, with a charter to Lisbon, was not available, as she could not be taken to the Mediterranean; the same was true of the Urna. There remained available only the Zealandia, which was owned by the libelants, and which they tried to substitute, with what results will appear later. It is reasonably certain, therefore, that the usual rule of damages does not apply, and that the charterer's lost profits are the true measure of damages under certain limitation to be considered.

However, a distinction must be taken. The actual profits arising from the charterer's subcontracts are not the subject of recovery in a case like this. Profits upon subcontracts are not within the consequences with which the law charges one who breaks a contract, unless, when the contract is made, he has been advised of their actual, or proposed, existence. Masterton v. Brooklyn, 7 Hill (N. Y.) 61, 42 Am. Dec. 38. In so far, therefore, as the actual contracts of freight which the libelants procured were beyond what were usual at that time and place, they could not recover. Thus, while the loss of those profits was the true measure of the charterer's actual loss, it was not the measure of damages, which, on the contrary, were limited to the reasonable profits of such a voyage under those circumstances.

But if in fact the actual profits lost are less, or no more than, the probable profits of such a voyage, this distinction does not apply. Now

the actual profits, making every allowance which the libelants show themselves to have lost through the delay, amount to no more than $167,000, and the allowance made them is $176,000. The allowance is in fact made upon the basis of what the Ada would have earned upon certain suppositions, and these suppositions do not distinguish this voyage from what was to be expected at that time and place. Therefore the award itself is no greater than what should reasonably have been anticipated.

The profits of the supposed cargo of the Ada were all tabulated in Exhibit 41, which professed to be a kind of manifest with the freight values extended. The total of this manifest, after clerical deductions of $3,541.25 were subtracted, came to $238,522.81. In making it up, some of the quantities were necessarily estimated, and, as there was no way of correcting the estimates, I think they must be accepted. There are no doubt chances of error in this, but it is one of the chances inherent in testimony. In respect, however, of the more valuable part of the cargo, benzol, we have a means of checking the calculations, because we may assume that the weight measure of benzol in all drums but Stewart's shipments was about 1,000 lbs., or forty-five hundredths of a ton, and that it measured about 24 cubic feet. It is true that Boulton's weight figure is. thirty-eight hundredths, but Erickson's should be preferred.

However, before making these corrections, it is necessary to eliminate certain of the items altogether. Thus it is conceded that, upon Exhibit 41, the seventh item, 150 drums of benzol, is duplicated in the thirty-second item, which is $6,750. It is also apparent that the fifteenth item, 420 drums of benzol, is also duplicated in the thirty-fifth item; this results in a further deduction of $18,750. Further, it is proved beyond doubt that the twenty-ninth item should be 100 drums, not tons, which would, at $2 a pound, be worth $4,800, resulting in a further deduction of $7,200. Finally, there is a very serious doubt about the last item of 600 drums from L. H. Stewart. There seems to be no question from Karminski's testimony that 370 drums were all that the Carbolite Chemical Company ever ordered Stewart to ship. As to 230 drums the consignment was, therefore, on Stewart's authority alone. Of course, he could have been held liable in law; but it seems to me rather absurd to suppose that this would ever have been done, or that so much of it should count as freight which would actually have materialized. I shall eliminate so much of this freight, $11,040. The total of these is $43,740. Finally, in calculating item No. 19 on the basis of forty-five hundredths tons of benzol to the drum and 24 feet, we get a further deduction of $946; a similar treatment of item No. 34 results in a deduction of $960—a total of $1,900.

We therefore start with a corrected manifest of $190,882.81. But this sum does not represent any cargo that the Ada could ever have carried, because she only arrived on April 22d, and could not have sailed before April 30th. Two of the contracts were canceled for this delay, and for that alone—item 1, on Exhibit 41, or $1,000, and item 17, of $22,800. Whether the other contracts, nearly all of which could have been also canceled for delay, would have remained uncanceled, no

one can say. If they all did, $167,000 was the sum of the cargo which the Ada would have carried, unless the libelants could have got more freight than they did between April 7th and April 30th. Six of the 40 items on Exhibit 41 were booked on or after April 7, but they were not very large—except item 38, which appears to have been procured while the shipper was in ignorance of the withdrawal. The extent to which the libelants during that period would have got more cargo is therefore an open factor, just as the extent of cancellations for delay. This must rest in speculation.

Erickson swore that there was enough cargo offering to fill two such ships, and no witness contradicts him. However, it is only an estimate, and that of a hostile witness. The other sailings thereabouts hardly bear him out. The Asahi Maru carried 3,000 tons in March, of which 750 was benzol. She refused 300 or 400 drums, amounting to say 150 tons, which would have added $30 a ton to the freight substituted for it, and would have brought her total earnings to $203,000. The carrying capacity of the Ada, whose dead weight was 3,350 to 3,450, appears, from the earlier voyage and the bookings on this, to have been 2,800 or 2,900 tons. At that rate she might have earned $196,000 or $190,000 on this voyage.

The Sibiria carried 600 tons of benzol, and after she was lightened she earned $125,000. Before being lightened, she would have earned $148,000. Her capacity was greater than the Ada's. The Zealandia and the Sarnia each left light, because, as the libelants say, of the injury to their good name. I shall, in view of the record, leave them out of account. The Sammanger, of the respondents, with a cargo of over 5,000 tons (measurement), bound for Genoa and carrying benzol, earned gross $219,000.

All this evidence should, in my judgment, have some effect upon whether the Ada could have booked more freight than she did, but for the withdrawal. We are certainly not absolutely bound by the estimates of experts, even though they be not contradicted. Taking it into consideration, I think I shall not accept Erickson's estimate, but figure the freight in this way: The greater part of the bookings were made on or before April 7th, as I have said; only about $15,000 were made thereafter. All but a single one of these bookings were for sailings between April 5th and April 15th, and at the time they were made the Ada was supposed to be sailing at the sailing dates given in them. If the libelants are not content to accept as the limit of their cargo so much as remained on April 30th, when the Ada could in fact have sailed, because of the supposed change in their position after April 7th, they must certainly be content to accept that part of the total period before the notice of withdrawal became public. The one certainly inaccurate way of calculating this voyage is to take the whole of the month, in the face of the absolute proof that they could not hold the whole of their freight through that month. While it is an assumption to take any less period than the whole month, nevertheless it is an assumption of which the libelants cannot complain to suppose that the profits would have been the same, but for the withdrawal, as they would have been if the Ada had sailed on the 15th. We must,

even then, to reach the result that I shall, assume that, had she arrived on the 5th, there would have been no cancellations, which we do not know. The assumption so made is that the latter half of April would have been as good as the earlier half.

Making the assumption just stated while we allow all the bookings for a sailing before the 15th, we must eliminate item 24, made on the 14th for a sailing on the 22d, and item 38, for a sailing on the 27th, together with two other small items, which bring the total up to $15,000. The result of this is to assume that the cargo would have been worth $176,000. This includes the transfers from the Lady of Gaspe, which seem to me reasonably to be included.

It may, however, be urged in reply that to reason so is to ignore that between the 7th and the 15th the libelants were under the putative odium of the withdrawal, and that in that period they might have added to this cargo. This is, however, incorrect, because, of all the contracts in evidence, only one (item 26) had a sailing date less than 7 days after the booking, and that has 5 days. Obviously, then, there could have been no bookings, or substantially none, made after the 7th for the 15th.

Thus, making all the most favorable assumptions for the libelants, it seems to me obvious that we should not take their actual loss at more than $176,000, and I feel free, in view of this analysis and of the similar cargo for nearby sailings, to disregard Erickson's conclusion as less reliable evidence, notwithstanding the commissioner's acceptance of it.

This sum, however, I accept as the reasonable value of the cargo, although it is the full measure of the libelants' proven loss. There is no deduction necessary, in my judgment, under the rule of law with which I started. On the contrary, I think that the freights obtained by the libelants were no greater than any one ought to have expected at that time and place. The only single windfall or bonanza which might be open to question was the shipment of 275 tons of explosives; but it hardly needs argument that this was to be expected in such a bottom and at such a time. Therefore I find that the gross profits of the outward voyage would have been $176,000.

The next question is of the deductions to be made from this sum, which the libelants concede to be $76,500. Of these $3,500 were for port charges in and out of New York, $5,000 in Genoa, and $6,500 freight commissions and incidental expenses. It is urged that some of these, at least, should be prorated against the return freights. I do not understand, however, that these charges bore any relation to the amount of freight on the return voyage. They would have existed, no matter what the return freight was. It is true that the last item, $6,500, might vary with the return cargo; but no one can say from the record to what extent. The whole matter, therefore, turns upon whether there is any basis for an allowance for inward freight.

*The Future Return Voyage from Genoa.* There is no evidence of the inward freights, except F. Frankel's estimate that it would result in a gross return of $15,000, equal to the first voyage. The witness

supposed that $7,500 of freight was due at New York, though the account subsequently disclosed nearly $11,000. It seems, therefore, that the libelants had already collected at Genoa and Leghorn $7,500, and that the gross freight on that voyage was $18,500. I can scarcely make such an inference, however, without more basis, considering the power of the libelants to produce the exact facts. Assuming that the inward voyage netted $11,000, have we any ground for accepting F. Frankel's estimate that the next would have done so? Taken merely as an estimate, it seems to me clear that we have not. The witness made no attempt to show that he knew the values or conditions at Genoa. Yet the testimony, which might have been justified by adequate information, was not objected to, so far as I can find, and the libelants had good reason to suppose that it would not be challenged. Whether they could have supported it no one can tell, but they should have been advised that the respondents would insist that it was insufficient. That the ship would have earned some freight was practically certain. The amount would in any case necessarily have been an estimate, and there was at least some basis for supposing that the earlier voyage was an indication of what it would have been. When Frankel made that estimate, he testified to an opinion which, being possibly competent, should stand while unchallenged. I allow $11,000 for the inward voyage.

[2] *The Loss on the Zealandia.* This item arises in the following way. When the Ada was withdrawn, the libelants, finding themselves committed to various shippers for cargo to be shipped on the Ada, substituted the Zealandia in her stead. They succeeded badly, owing to the irritation of the shippers at being misled about the Ada. In consequence, the Zealandia was not filled, and earned a gross freight of $90,766.01, as against a freight of $125,000, which she could have earned upon the carriage of oil. As to this contract with the Standard Oil Company, though it was never reduced to writing, I think it sufficiently proved, and I shall assume that, had she not been withdrawn, she would have earned that sum gross.

As I have already indicated, it presses my credulity hard, especially in view of Herrmann's and Nichols' testimony, to suppose that, in such dearth of shipping as existed, the mere withdrawal of the Ada without any fault of the charterers should so have affected their power to fill the Zealandia; but the proof stands uncontradicted, with the exception of the witnesses just mentioned, that the cancellations were because of the withdrawal. Moreover, there would apparently have been no trouble on the face of it in calling those shippers who canceled to see whether any effort was made to secure them for the Zealandia, and why they refused. Upon such a record, whatever I may suspect, I do not feel at liberty to disregard proof which the commissioner has accepted. I shall therefore assume that the Zealandia was not filled because of the Ada's withdrawal.

The libelants support the claim to damages upon the theory that it was a necessary consequence of their effort to minimize damages. They say that they were suddenly faced with the necessity of saving, if they could, $190,000 and more of freights, and that it was prudent to sacri-

fice $125,000 to do so; indeed, it was even their duty to do so. Suppose, they assert, they had left the Zealandia idle at the wharf; suppose her freight had been only $10,000 or $50,000—could they have hesitated for a moment to take a chance? This, as a mere statement of the law applicable, is true enough; but it is clear, I think, that it has no relation to the facts. Not every effort to minimize the damages will serve, especially when it results in enhancing them. If the libelants here meant to surrender such a substantial advantage as the charter with the Standard Oil Company, they were bound to look before they leaped. Boulton says that he told all his shippers on April 7th or April 8th of the withdrawal, and while we know that this is not true, there is no excuse if he did not. In most cases it was possible to learn within a week whether they would transfer to the Zealandia or not. At least it was possible to learn whether enough would do so to sacrifice such a cargo as was already promised to her. There is no suggestion that the libelants were faced with a sudden choice, and had to decide whether or not to throw up the oil cargo before they could communicate with their shippers; yet that is the only situation which by any possibility could have justified fixing themselves with so large a loss. If they were actuated by other purposes, that is, to see that the Ada's shippers got carriage, cost what it may, that was not an effort to reduce damages, and the respondents are not responsible. They cannot be held because the relations between their charterer and his customers were such that he must sacrifice his immediate pecuniary interests to a continuance of friendship between them. Only in case the action was a fair exercise of judgment to make damages small can it be supported; it has not been shown to be that, and it is in my judgment too remote to constitute damages.

*The Sarnia and the General Damages.* In view of what has just been said, it is hardly necessary to add anything more in defense of the commissioner's ruling touching the loss of freight on the Sarnia and that most vague and speculative claim for general damages.

*The Net Freight Inward.* This item depends wholly upon the proper credits in the account. They are very numerous and very troublesome. All the disbursements were made, and were reasonable in amount, and the sole issue is of their necessity. The libelants insist that, if they had had the Ada, only a small part would have been incurred.

The first seven items are for Brenack's charges and of these Nos. 1, 4, and 6 are all included in the proper allowance for wharfage and discharge if the libelants had had the Ada, to be considered later; Nos. 2 and 3 were for labor in lightering, and depend for their necessity upon whether the libelants could have used Marten's wharf, as they had the right to do under their contract. Brenack says they could not, because it was too crowded; but Dinsmore, who was in charge, says that the ship could have been accommodated. The commissioner was right to believe him. All charges, therefore, occasioned by the change of the cargo to the Brooklyn pier, are on the respondents' account. Therefore I follow the commissioner, and disallow items 1, 2, 3, 4, and 6.

I allow of Dalzell's charges, instead of $60, $195, because I include towing to and from Robbins' dock. The rest seems to have arisen from the lighterage.

Of Perry, Ryer & Co.'s charges, items 10, 11, and 12, I allow, like the commissioner, $106.74; the rest was incidental to the lighterage.

The coal consumed at the wharf of Brady Bros., item 13, should be allowed at $3.50, and comes to $126. Item 14 is allowed at $8.40. I follow the commissioner.

The Journal of Commerce item is disallowed.

Nos. 17, 18, 19, and 20 do not appear to have been necessary; they are disallowed.

The sawdust charge I allow, but not the J. C. Muller charges, which I cannot find the reason for.

The coal at Bermuda would have cost $1,500. I follow the commissioner.

The protest charge I allow.

Item 25 I disallow.

It does not appear, from Barranco's testimony, that the double moving increased the cooperage charges. I allow them in full.

I disallow Stapleton's and allow Hennessey's charges.

I disallow item 30.

Items 32, 33, and 34 were incurred only because the Ada was at Brady's pier. I disallow them.

Items 35, 36, and 37 of Holz for wharfage and clerk hire must be considered as included in the credit to be given to the Ada for the putative costs of her wharfage and discharge, had the libelants had her. They are not allowable here.

The hire of lighters would not have been incurred. I disallow them.

The surveyor's charges, item 40, I suppose to be a part of the repairs, though I have not found mention of it in the record. In the absence of more evidence in regard to them I must disallow them.

The final question is of repairs, which were actually made to the extent of $9,000 and more. The libelants' liability to pay for these rests upon the charter, which provided that the owner should put the ship in seaworthy condition on delivery and the libelants should keep her so. When the respondents came to put in this item, they called Taylor, who took charge of jobs in the machine division of the dry dockers. He swore that the work was all ordered either by the chief engineer or the chief officer and captain. He then said that it was all necessary to make the ship seaworthy. Upon his recross-examination he certainly gave evidence, qualifying his first statement, which I read as meaning that the only necessary parts were the railings, the steering engine, the anchor windlass, the propeller and tail shaft, rewooding, new bolts, bush rewooded, and new wheel fittings; but he could not say how much of the whole this represented. On redirect examination the respondent tried to get him to go over the bill again, and probably to qualify his testimony by saying what other work was necessary to make the ship seaworthy. The commissioner refused to allow this inquiry, for certainly the most extraordinary reason, that it involved a cross-examination of one's own witness. The witness had

first said that all the repairs were necessary, and then that all were not, and it was so obviously fair to allow the contradiction to be cleared up that I cannot permit the matter to stand there. The respondents, unless the libelants concede the bill for repairs, may complete their proof upon this point before me. I am very far from satisfied that all the repairs were not necessary.

As to Judge Smith's order, it was irrelevant to the question. It is, of course, true that it limited the repairs to be done at that time, and apparently it was violated; but the order, had it tried to fix the repairs, except for the purposes of the attachment, would have been quite outside the powers of the court, since the cause was not then being heard on the pleadings. It was merely an interlocutory proceeding to limit the maritime liens which might embarrass the attachment. It would be extremely unjust to throw out $9,000 from the account on any such procedural point as the supposed impropriety of cross-examining one's own witness. After some experience in trials, I think I can say that I have never seen a case where the objection made for justice, unless a willing witness was being led. This item cannot, therefore, be disposed of upon the present record.

There is an added claim for the cost of watchmen. The Martens contract provided for one in the day and one at night, to be charged extra, the libelants to employ any more they needed. Kerwin says one was necessary at each hatch and two on the dock, and I find no contradiction of it. I shall allow one at each hatch, two on the dock in the day and one at night, seven in all, $14 a day. For 12 days this would be $168. The rest was caused by the lighters, or was unjustified.

Some credit must, of course, be allowed the Ada for what the libelants would have paid for wharfage and discharge. This rests on Boulton's testimony, which the commissioner accepted, and which, not being contradicted, I must accept also. The only point of doubt is whether to allow $125 or $100 a day. The modification in the contract Boulton swore to before Dinsmore was called, and he was not asked about it. I have no alternative but to accept it. Therefore I follow the commissioner in respect of these credits.

*Incidental Items.* The charges for the chronometer and the ice chest are certainly allowable, being part of the charter itself. There is scarcely any evidence regarding the payment of $500 to the master, except the testimony of Frankel barely that he advanced it. The charterers were to pay $3,000 a month, and, as I understand it, they did pay it in addition. The advance, therefore, was not part of this engagement, and is properly chargeable on account of the respondents. The item for lumber is somewhat speculative, it is true; but there is probability that it was in part used to fire the ship into Gibralter. The captain decided what coal should be taken on board at Baltimore, not the libelants. If the lumber was used as dunnage for the marble, it is on the account of the respondents. Having shown the lumber to have come to the respondents' possession, or some of it, anyway, it is on them to account for it, which they have not done. I accept the commissioner's allowance.

*The Payments of Hire under the Charter.* Both sides concede that the installment of $45,000, payable in April, must be set off against the recovery; a question arises about the last payment of $30,000, which the libelants rightly insist was conditional upon the delivery of the bill of sale. The charter was somewhat singular, in that the charterer, in consideration of the "hire," was not only to have possession of the ship, but a bill of sale on the last payment. This proceeding was brought originally to recover for the breach of the promise to let and for the anticipatory breach of the promise to deliver the bill of sale. Judge Smith, for reasons of jurisdiction, in effect severed the two causes of action, and that upon the anticipatory breach is now pending in this court at law. The possession of the vessel and the right to the profits from her were not conditional upon the final payment. This would, perhaps, not be relevant if the period had passed when the final payment must have been made, provided that it was unconditional. Since, however, the promise to make that payment was conditional upon the promise to deliver the bill of sale, anything which defeated the latter will defeat the former. Until it is determined that the promise to deliver the bill of sale is enforceable, it would be obviously unjust to enforce the promise to make the last payment, which was a part of the purchase price as well as "hire." The payment will not be charged in the account.

[3] *Interest.* The commissioner has not awarded any interest on the award for profits on the outward voyage, probably because the damages were unliquidated. At law in this circuit interest on such a claim as this, subject to set-offs, is not allowable. Stephens v. Phœnix Bridge Co., 139 Fed. 248, 71 C. C. A. 374. In equity (Pennsylvania Steel Co. v. N. Y. City Ry. Co., 198 Fed. 778, 117 C. C. A. 560) and in admiralty (Merritt & Chapman Derrick & Wrecking Co. v. Morris & Cummings Dredging Co., 137 Fed. 780, 70 C. C. A. 356) the matter lies in discretion. The last case was like that at bar in two respects, first, the presence of unwarranted claims, e. g., for the Sarnia and the general damages; and, second, in the large deductions that have been made in this court. Moreover, in so far as the rule depends, as it does somewhat, upon there being some sum which the person liable may tender, it is quite clear that no interest should have been awarded. I follow the commissioner in the exercise of his discretion. However, no interest should be credited to the Ada upon the payment of $45,000, as that, properly considered, is only an item in the account.

As a result no interest will be allowed until the date of the decree.

As respects costs the libelants will have a docket fee, and disbursements up to the interlocutory decree; thereafter, in view of the qualified outcome of the reference, each party will bear his own costs, and the commissioner's fee and the stenographer's charges will be borne equally.

My finding regarding the repairs prevents any decree from being entered, until that matter has been heard. I can take it up during the week of January 2, 1917.

## In re SUPERIOR JEWELRY CO.

(District Court, S. D. New York. December 14, 1916. Additional Opinion, January 12, 1917.)

1. BANKRUPTCY ⟸59—"ACT OF BANKRUPTCY"—FAILURE TO DISCHARGE LIEN.
The failure of an insolvent debtor to discharge a lien obtained through legal proceedings more than four months prior to the filing of a petition in bankruptcy against it, five days before the time fixed for sale of the property thereunder, does not constitute an "act of bankruptcy," although such time of sale was within the four months period.

[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.]

Additional Opinion.

2. EXECUTION ⟸113—LEVY—DATE OF LIEN—EFFECT OF ANCILLARY PROCEEDINGS.
A petition by an execution creditor, filed in a court of bankruptcy, alleging that the debtor has tangible personal property subject to levy, but that such levy cannot be made because the property is in possession of a trustee in bankruptcy in another proceeding, and praying that it be released, is equivalent to a bill in equity to remove an obstruction to the levy, and may be maintained, although the execution has not been returned nulla bona, and where the petition is granted, and the property surrendered, the lien of the subsequent levy thereon relates back to the time of the filing of the petition.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 241–248; Dec. Dig. ⟸113.]

In Bankruptcy. In the matter of the Superior Jewelry Company, alleged bankrupt. On motion to confirm report of referee recommending dismissal of petition. Report confirmed, and petition dismissed.

See, also, 232 Fed. 194.

The facts have been stipulated as follows:

"1. That the Superior Jewelry Company is a New York corporation, having been incorporated on or about the 2d day of May, 1914, and that its last office for the transaction of business was at 87 Nassau street, in the borough of Manhattan, city of New York.

"2. That heretofore, and on or about the 15th day of February, 1916, Messrs. Teitelbaum & Whitebook, the answering creditors, recovered judgment against the above-named alleged bankrupt in the sum of about $832.53, in the City Court of the City of New York, which is a court of record.

"3. That thereafter, and on or about the 15th day of February, 1916, an execution was issued out of said court, to the sheriff of the county of New York, against the property of the above-named alleged bankrupt on the judgment above mentioned, and the sheriff returned the said execution nulla bona on April 14, 1916.

"4. That prior thereto all the property of Superior Jewelry Company, consisting of jewelry, subject to levy within the county of New York, had been taken possession of by Nathan Hutner, as trustee of Louis Goldberg and Herman Sagman, adjudicated bankrupts in this court, and said property was in his possession on the 15th day of February, 1916, and up to and including the 27th day of September, 1916, when the sheriff of New York county took possession thereof pursuant to the order hereinafter mentioned.

"5. That on or about March 6, 1916, Messrs. Teitelbaum & Whitebook, the answering creditors herein, filed a petition in this court, praying that the

said property, belonging to the alleged bankrupt, be released from the custody of Nathan Hutner, the trustee of Goldberg & Sagman, and such proceedings were thereafter had that an order was entered in this court, made by Hon. Stanley W. Dexter, referee, on the 25th day of August, 1916, requiring the said trustee to relinquish possession of said property, and permitting the sheriff of the county of New York to make a levy upon said property so relinquished to satisfy the judgment of the answering creditors against the Superior Jewelry Company above referred to.

"6. That the sheriff of New York county, pursuant to said order, made a levy on said property, on or about the 27th day of September, 1916, and advertised said property for sale for October 4, 1916.

"7. On October 4, 1916, before the sale was effected, the petition in bankruptcy herein was filed on behalf of the petitioning creditors.

"8. The alleged bankrupt did not, within five days prior to the date set for the sale of its property, vacate the judgment or lien affecting the same.

"9. For the purpose of bringing up for decision the question relating to the alleged act of bankruptcy alone, it is conceded that the Superior Jewelry Company was insolvent on February 15, 1916, and continued so to be up to and including October 4, 1916."

David Haar, of New York City, for the motion.
Saul H. Immergluck, of New York City, opposed.

MAYER, District Judge (after stating the facts as above). The motion is to confirm the report of the referee in bankruptcy, who has recommended that the adjudication in bankruptcy be denied and the petition dismissed. The sole act of bankruptcy alleged is that:

"The above-named alleged bankrupt, within four months next preceding the filing of this petition, permitted, while insolvent, a creditor to obtain a preference through legal proceedings, and did not, five days before a sale of the property affected by such preference, vacate or discharge same."

[1] The petitioning creditors contend that, irrespective of the time when the lien was acquired by Teitelbaum & Whitebook, the act of bankruptcy was committed five days before the day upon which the sale was advertised to take place. In other words, the argument is that, even though the judgment was suffered outside of the four months period, and the lien attached outside of the four months period, the claim of the creditor can be defeated because the sale took place, or was about to take place, within the four months period, and the bankrupt did not vacate the sale nor discharge the preference. This, in my opinion, is not the law. The statute did not contemplate that the judgment obtained by a diligent creditor prior to the four months period, and the lien obtained likewise prior to the four months period, should be defeated merely because it was not possible to have the sale take place earlier than some date which fell within the four months period.

The sole question, therefore, is as to when the lien of Teitelbaum & Whitebook attached. It is quite clear that no lien attached as the result of the first execution, which, in due course, was returned unsatisfied. If the judgment creditors had an equitable lien prior to the four months period, then the second execution was, as the referee has held, "merely for the purpose of enforcing a pre-existing lien, unaffected by the subsequent bankruptcy." This leads to the final in-

quiry as to the legal quality of the petition of these judgment creditors, in which, on or about March 6, 1916, they sought to reach property of the judgment debtor (Superior Jewelry Company, Incorporated) then in the possession of Hutner as trustee of Goldberg & Sagman.

The referee has annexed to his report on adjudication a copy of his opinion in this application in the Goldberg & Sagman bankruptcy and has referred to the opinion of Judge Learned Hand (232 Fed. 194) in pursuance of which the subject-matter was remanded to the referee for further proceedings. By referring to the opinion of Judge Learned Hand it will be seen that he called attention to the failure of the petition to allege the return of the execution unsatisfied under the Teitelbaum & Whitebook judgment. The referee states that "the petition has been amended so as to allege the return of the execution unsatisfied," but he does not state when the petition was amended, and this may be an important point in determining whether the petition as amended may be regarded by analogy as a bill in equity, and, if so, the date when the equitable lien attached. While counsel have agreed that I may examine the papers in the Goldberg & Sagman proceeding, such a method is unsatisfactory, and I am unable, from the stipulation as to the facts, to determine the precise nature of the petition.

The matter will be returned to the referee for the purpose of making so much of the proceeding in the Goldberg & Sagman bankruptcy as is here relevant a part of this record, or, at the option of counsel, they may stipulate these facts and papers into the record before me, in order to avoid further expense and delay by returning the matter to the referee.

Additional Opinion.

[2] In an opinion filed December 14, 1916, I pointed out that it was necessary to have a further stipulation before it was possible to determine what was the effect in law of the petition of March 6, 1916. This stipulation has now been submitted and is a part of the record.

The petition of March 6, 1916, set forth the following: That on February 15, 1915, Teitelbaum & Whitebook obtained a judgment against Superior Jewelry Company, Incorporated, and Goldberg & Sagman, for $832.53; that execution on said judgment had been issued to the sheriff of the county of New York, but had not as yet been returned by him; on information and belief, that the trustee in bankruptcy of Goldberg & Sagman took possession of property which belonged to Superior Jewelry Company, Incorporated, and that this property consisted of various pieces of jewelry and diamonds; that Sagman, who was an officer of Superior Jewelry Company, Incorporated, had taken over all of the assets of Superior Jewelry Company, Incorporated, and that this transfer was without authority, without consideration, and without notice to creditors; that three days after this transfer from Superior Jewelry Company, Incorporated, to Goldberg & Sagman, a petition in bankruptcy was filed against Goldberg

& Sagman, and that the merchandise in question was in a vault of a safe deposit company.

The petition asserted that the trustee of Goldberg & Sagman had no right, title, or interest to the property and should be required to relinquish possession thereto either to Superior Jewelry Company, Incorporated, or to the sheriff of the county of New York, so as to permit the sheriff to make a levy under the execution filed with him on petitioner's behalf, and the petition asked for an order directing the trustee to relinquish possession of these assets of Goldberg & Sagman, either to the Superior Jewelry Company, Incorporated, or to the sheriff of the county of New York.

It will thus be seen that, at the time of the issuance of the execution, there was in existence the kind of property subject to execution and levy, if that property had been in the possession of Superior Jewelry Company. The sheriff, however, was unable to make such levy because the property was in custodia legis—an obstruction which it was necessary to cause to be removed before the sheriff could make his levy.

The referee dismissed the petition, but, on review, Judge Learned Hand held the petition good. Matter of Goldberg & Sagman, 36 Am. Bankr. Rep. 736, 232 Fed. 194. Judge Hand said:

"Any court, whether or not it be one of bankruptcy, having acquired jurisdiction of a fund for distribution, will prevent suits elsewhere, and draw to itself the decision of all questions arising in its disposition. * * * This is a proceeding strictly analogous to ancillary dependent bills in equity, arising where the court has sequestered corporate assets for distribution."

The order of the referee was reversed, and the cause remanded for further proceedings, with the observation:

"The petition is within the competence of the referee, to be disposed of on the merits precisely as though it were an original bill in equity before a court of competent jurisdiction."

The matter having thus been returned to the referee, he held, in an opinion dated August 21, 1916, that the prayer of the petition should be granted, and that the trustee of Goldberg & Sagman "should relinquish title to the property and allow the sheriff to make a levy." An order accordingly was made by the referee on August 25, 1916, which was later affirmed by the District Court. On July 28, 1916, counsel on behalf of Teitelbaum & Whitebook, the petitioner, stated that the sheriff has made a return of the execution under the Teitelbaum & Whitebook judgment, and "the return shows it has been unsatisfied, dated April 14, 1916, and that it was nulla bona against the Superior Jewelry Company."

The order of the District Court, affirming the order of the referee, requiring the trustee of Goldberg & Sagman to relinquish the property and to permit the sheriff to make his levy, was dated September 19, 1916. The sheriff made his levy on September 27, 1916, and advertised the property for sale for October 4, 1916; but on October 4, 1916, and before the sale was effected, the petition in bankruptcy

against Superior Jewelry Company, Incorporated, was filed on behalf of the petitioning creditors, who here press for an adjudication against said alleged bankrupt.

From the foregoing it will be noted that the amendment to the petition setting forth the return of the execution unsatisfied was made within the four months period, to wit, on July 28, 1916, whereas, the original petition was filed on March 6, 1916, outside of the four months period.

Judge Learned Hand had already decided that the procedure was correct, and had treated the petition as in the nature of a bill in equity, analogous with ancillary dependent bills arising where the court has sequestered corporate assets for distribution. The order subsequently of the District Court, affirming the order of the referee, requiring the relinquishment of the property so as to permit the sheriff's levy, stands unassailed, and thus the sole question remaining in the case is whether, in order to obtain a lien, it was necessary that the original petition should have contained the allegation that the execution had been returned unsatisfied—an allegation, of course, impossible to make, because at that time the execution had not been returned.

If such allegation were necessary, I am inclined to think that the amendment would not have helped, because in such event the return of the execution unsatisfied was necessary before the filing of the petition of Teitelbaum & Whitebook against the trustee of Goldberg & Sagman could operate as a lien.

Preliminarily, it must be remembered that the property, consisting of diamonds and jewelry, was of a character susceptible of levy. The assets in question were not equitable assets. The principles involved may be stated thus: If the debtor has not any tangible assets subject to levy, the judgment creditor can reach equitable assets; but, in such situation, execution must be returned unsatisfied, to show that the remedy at law has been exhausted. If, on the other hand, the debtor has tangible assets subject to levy, but there is some obstruction which must first be removed before levy can be made, the judgment creditor may file his bill in equity, or take some other appropriate proceeding analogous therewith, where the execution has not been returned. Chancellor Walworth, in Beck v. Burdett, 1 Paige's Ch. 305, at page 308 (19 Am. Dec. 436), discussed the principles here concerned, as follows:

"There are two classes of cases where a plaintiff is permitted to come into this court for relief, after he has proceeded to judgment and execution at law without obtaining satisfaction of his debt. In one case the issuing of the execution gives to the plaintiff a lien upon the property, but he is compelled to come here for the purpose of removing some obstruction fraudulently or inequitably interposed to prevent a sale on the execution. In the other, the plaintiff comes here to obtain satisfaction of his debt out of property of the defendant, which cannot be reached by execution at law. In the latter case, his right to relief here depends upon the fact of his having exhausted his legal remedies without being able to obtain satisfaction of his judgment. In the first case, the plaintiff may come into this court for relief, immediately after he has obtained a lien upon the property by the issuing of an execution to the sheriff of the county where the same is situated; and, the obstruction being

removed, he may proceed to enforce the execution by a sale of the property, although an actual levy is probably necessary to enable him to hold the property against other execution creditors or bona fide purchasers. Angel v. Draper, 1 Vern. 399, and Shirley v. Watts, 3 Atk. 200, are cases of this description. In the first, a fraudulent assignment was interposed to prevent a sale of the defendant's property on execution; and in the last case it became necessary to redeem a term for years in a leasehold property from a lien of a prior mortgage. In both these cases, the plaintiffs were allowed to come into equity for relief, before the executions were returned unsatisfied. McDermutt v. Strong, 4 Johns. Ch. 687, belongs to the other class of cases; for, although an attempt was made to levy the execution upon the defendant's interest in the vessel assigned, it is clear he had no interest which was a proper subject of seizure and sale on the execution. The issuing of an execution, or even a formal levy, can create no lien upon a chose in action, or a mere equitable interest in personal property, which is not liable to be sold on execution. In such cases, the actual return of the execution unsatisfied is necessary to give this court jurisdiction to decree satisfaction out of the equitable property of the defendant. Such is the construction recently adopted by the Legislature in such cases. R. S. pt. 3, c. 1, tit. 2, § 38. And a similar principle is adopted in that part of the Revised Statutes which enables creditors to reach the equitable interest of persons holding lands under contracts for the purchase thereof. R. S. pt. 2, c. 1, tit. 4, § 4. In all these cases, where the property is not liable to an execution at law, the plaintiff obtains no lien upon the property or fund, by the issuing or return of the execution. But it is the filing of the bill in equity, after the return of the execution at law, which gives to the plaintiff a specific lien. Per Lord Hardwicke in Edgell v. Haywood, 3 Atk. Rep. 357."

In Home Bank v. Brewster & Co., 15 App. Div. 338, 44 N. Y. Supp. 54, Mr. Justice Williams said:

"The plaintiff, by such judgments and the issue of executions thereon, secured liens upon the property of the corporation, then within the city and county of New York, and a preference in the payments of its judgments therefrom over other creditors of the insolvent corporation. The issue of the executions created liens upon such property of the corporation, even though no actual levy was made. Code Civ. Proc. § 1405. The plaintiff pursued its remedy by the recovery of its judgments and the issue of its executions, and, at the time the executions came into the hands of the sheriff, there was considerable property belonging to the corporation in the city and county of New York, but it could not be levied upon by the sheriff by reason of the existence of these fraudulent transfers, mortgage and general assignment. Two remedies were then open to the plaintiff. It might have awaited the return of the executions unsatisfied, and then have brought an action to sequester the property of the corporation under section 1784 of the Code of Civil Procedure, and have had such transfers, mortgage, and general assignment set aside, and thus have reached the property so transferred, mortgaged, and assigned for the satisfaction of its judgments, and in such action it might have had the relief, by way of appointment, of a receiver, seizure of all the property of the corporation, accounting by the defendants, and injunction; but in such an action against an insolvent corporation all the creditors of the corporation would have been entitled to come in and share equally with the plaintiff in the distribution of the property and assets of the corporation. Code Civ. Proc. § 1793. The general provisions of the Code, with reference to judgment creditors' actions, do not apply to such an action. Section 1879. Such an action, however, could not have been maintained, except upon the return of an execution unsatisfied in whole or in part (Code, § 1784), and there was no such return in this case. The plaintiff saw fit to bring this action in equity, based upon the issue of its executions and the liens secured thereby upon the property of the corporation, then actually within the city and county of New York, and seeking to remove the fraudulent transfers, mortgage, and

assignment, so far as they were clouds upon the title of the corporation to the property, in order that the plaintiff might then proceed to levy its executions upon such property and sell the same for the satisfaction of its judgments. This action was well and properly brought." [1]

Section 1405 of the New York Code, to which reference is made in the above-quoted opinion, reads as follows:

"Sec. 1405. *Personal Property Bound by Execution.*—The goods and chattels of a judgment debtor, not exempt, by express provision of law, from levy and sale by virtue of an execution, and his other personal property, which is expressly declared by law, to be subject to levy by virtue of an execution, are, when situated within the jurisdiction of the officer, to whom an execution against property is delivered, bound by the execution, from the time of the delivery thereof to the proper officer, to be executed, but not before."

In view of these authorities and Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, and Freedman's Savings & Trust Co. v. Earle, 110 U. S. 710, 4 Sup. Ct. 226, 28 L. Ed. 301, it seems to me sound, on principle, to hold that the petition of March 6, 1916, set forth facts which would have been sufficient to sustain a cause of action in equity for the relief asked for in the petition. Obviously, there was nothing else which the judgment creditor could do. He moved diligently to cause to be removed the obstruction which prevented the sheriff from making a levy on tangible assets, and, if the lien was good as of March 6, 1916, then, under Metcalf v. Barker, supra, the levy of September 27, 1916, was good. It may be further observed that the statutory four months preference period was not incorporated in the bankruptcy statute in order to defeat diligent creditors, who, at arm's length, pursue their remedies; and where, as here, prior to the four months period, judgment creditors have done everything which was in their power to do, equity will be keen to assist them and safeguard their rights, for it must not be forgotten, as was said in Bardes v. Hawarden Bank, 178 U. S. at page 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175:

"Proceedings in bankruptcy generally are in the nature of proceedings in equity."

As the sole allegation in respect of the act of bankruptcy was that the alleged bankrupt "within four months next preceding the filing of this petition permitted while insolvent a creditor to obtain a preference through legal proceedings, and did not five days before a sale of the property affected by such preference vacate or discharge same," it follows, in view of this and my previous opinion, that the conclusion of the referee was right and that the adjudication in bankruptcy must be denied, and the petition dismissed.

[1] This case was cited in Lopez v. Merchants' & Farmers' Nat. Bank, 18 App. Div. at pages 434, 435, 46 N. Y. Supp. 91; Koechl v. Leibinger & Oehm Brewing Co., 26 App. Div. at page 579, 50 N. Y. Supp. 568, and especially see Stetson v. Hopper, 60 App. Div. 277, 70 N. Y. Supp. 170.

## RIVERS v. LOCKWOOD.

## FOX et al. v. IGOE et al.

(District Court, E. D. South Carolina. January 5, 1917.)

1. RELEASE ⟸17(1)—SEAMEN.

Where, after salvage service has been performed, a full and fair disclosure of the amount of salvage received is made to the crew of the salving vessel, the extent of their rights is fully and fairly explained to them, and they are given an opportunity to consult with some disinterested third person, if they then make an agreement as to their share, and on its payment execute a release, they will be bound by the settlement; but, when such disclosure is not made, a release executed by a seaman, on payment to him of such sum as the owner sees fit, and especially where he is ignorant of his rights and of the value of salvage services, will not bar his right to maintain a suit to recover his proper share of the amount received.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 32; Dec. Dig. ⟸17(1).]

2. SALVAGE ⟸38—APPORTIONMENT BETWEEN VESSEL AND CREW.

The share of a salvage award to which a common seaman is entitled depends on the character of the service rendered, the danger to the crew, and the value of their individual services, as compared with those of the vessel.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 93–102; Dec. Dig. ⟸38.]

3. SALVAGE ⟸38—APPORTIONMENT BETWEEN VESSEL AND CREW.

The crews of tugs, which performed salvage services in several cases, *held* entitled to recover as their collective share, to be divided in proportion to their wages, from 10 per cent. to 20 per cent. of the salvage received by the tugs, the lower amounts where the service was chiefly one of towage, but paid for on a salvage basis, and the higher amounts in cases where the service was rendered to vessels on fire.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 93–102; Dec. Dig. ⟸38.]

In Admiralty. Suits by Alvin Rivers against Ella Ann Lockwood and by William Fox and others against James J. Igoe and others. Decrees for libelants.

J. P. K. Bryan, of Charleston, S. C., for libelants.
Alfred Huger, of Charleston, S. C., for respondents.

SMITH, District Judge. These two causes arise upon libels in personam. The libel in the case of Alvin Rivers v. Ella Ann Lockwood was filed on the 4th of August, 1916. The libel in the case of William J. Fox and others against James J. Igoe and others was filed on the 28th of October, 1916. The defendants in both cases have appeared and answered, and the causes, being at issue and ready for trial, came on to be heard. By agreement of counsel the testimony in the two causes was taken at the same time; the testimony to be considered as taken in both causes, and both causes were heard and argued at the same time. Both causes are instituted for purposes of recovering the share of salvage claimed to be due to libelants, who were part of the crews

of the tugs owned by the respondents, and the owners of which tugs received the salvage charged and paid for the services performed. There is no dispute as to the material facts; there is no dispute as to the amounts of money received by the respondents. With the exception of the case of one vessel, viz., the yacht Onawa II, the respondents admit that they were cases of salvage. In the case of the yacht Onawa II, the respondents deny that it was a case of salvage, and allege it was only a case of towage.

[1] Taking up first the case of Alvin Rivers against Ella Ann Lockwood, the owner of the steam tug Cecilia, the libelant claims his share of the salvage awarded in five cases, viz., the steamship Orion, salved about the 22d of December, 1914; second, the yacht Onawa II, salved about the 3d of January, 1915; third, the barge City of San Antonio, salved about the 3d of April, 1915; fourth, the yacht Neckan, salved about the 26th of June, 1916; fifth, the steamship Colorado and cargo, salved in October, 1915. The answer of the respondents admits salvage service to the steamship Orion, for which the respondents received net $11,693.82. It also admits salvage service to the barge City of San Antonio, for which respondents received net $702.20. It also admits the salvage service to the yacht Neckan, for which was received net $325, and admits, further, the salvage service performed to the steamship Colorado and cargo, for which was received net $18,939.30. The answer denies that any salvage service was performed in the case of the yacht Onawa II, but that simply a towage service was performed, for which the owner of the tug was paid $450. The answer further sets up that in each of the cases of the Orion, the City of San Antonio, and the steamship Colorado and cargo, the libelant had been paid after the salvage services were rendered the sum of $20 in each case, which sum he agreed to accept and did accept in full for his services as his proportion of salvage money. In the case of the yacht Neckan the respondent alleges that she is ready, and always has been, to pay the amount due the libelant, as a member of the crew, but the libelant has never given an opportunity to the salvors to pay the same, but, on the contrary, instituted these proceedings to recover his share of salvage even before the amount of salvage in that case was paid. From the testimony it appears that the libelant Alvin Rivers was a deckhand on the steam tug Cecilia at the time of the alleged salvage in all the above-mentioned cases. The testimony also shows that subsequent to the performance of the salvage service in each of the cases of the Orion, the City of San Antonio, and the steamship Colorado and cargo, the libelant did accept $20, and executed a written receipt for the $20 as being in full payment of his portion of salvage as rendered in the case. The first question in the case is as to the effect of these receipts, or any agreement embodied in them, operating as accord and satisfaction, so as to be a bar to any proceedings to recover more in this case.

The question as to the effect of an agreement as to the amount of salvage to be paid was considered by this court in the case of Conekin v. Lockwood, 231 Fed. 541. There this court discussed the question of the claim for salvage on the part of one of the crew of the tug Ce-

cilia for the salvage of the steamship Colorado and cargo, one of the very cases in which salvage is claimed in the present proceedings. In that case this court held that an agreement made in advance by a seaman with the master or owner of a vessel that he will accept one month's pay as his share in all cases of salvage would be wholly inoperative. The difference between that case and the present is that in that case the alleged agreement had been made in advance of any salvage service performed, while in the present case there has been produced and proven a written receipt embodying an agreement made subesquent to the performance of the service. It would not appear reasonable that there should be no way of adjusting the proportion of salvage to be paid to the crew except by coming into court. To hold that the effect of the decisions, and of section 4535 of the United States Revised Statutes (Comp. St. 1913, § 8324), was to prevent any seaman by any agreement or instrument, unless approved by the court, fixing the amount of the share of salvage to be paid him, would mean that no settlement of the kind could be had with the crew except upon application to the court. This would be unreasonable, as requiring unnecessary litigation, and further as holding that people, such as seamen, who are sui juris, and compos in all respects, should not be able to contract about a question of what proportion they are entitled to in a claim for salvage service performed. At the same time it is to be borne in mind that salvage is paid much as a matter of public policy, to stimulate effort; that the result of the public policy in this respect would be frustrated if a man were allowed carelessly or heedlessly or ignorantly to release his rights, so as he would not be stimulated by actually receiving, and those in his class would not be stimulated by knowing of the actual receipt by him of the full reward given by law for such service.

Sailors of the class of most of these libelants are a very ignorant and helpless class. They are wage-earners who in most cases are very much afraid of losing their job and wages, and are fit for no other employment, and likely under the dominion and compulsion of the officers under whose orders and in subjection to whose commands they habitually serve, and therefore likely to yield to their wishes in this respect. They have been termed the wards of the court of admiralty, and the meaning of this is that they are recognized as being so helpless and incapable from their generally ignorant and impoverished condition, and the floating character of the life, which leaves them seldom long in one place, and so unable to protect themselves, as the court of admiralty takes somewhat the same charge of them as the court of chancery does of infants, or as it did of married women. Where, after salvage service has been performed, a full and fair disclosure of the amount of salvage received is made to the members of the crew, and the extent of their rights is fully and fairly explained to them, and they are given an opportunity of hearing this and discussing it with some third party, such as a United States commissioner, or any lawyer representing them, or any unbiased third party, not in the employ of, or connected with, or under the influence of, the owners of the tug—where, after this, the members of the crew enter into a final

agreement accepting a stipulated sum for their share of the salvage, and receive that sum and execute a release, in the opinion of the court that ought to be given full consideration as normally effecting a final settlement of their claim. To hold otherwise would be to hold that the owners of the salving vessel, who receive the salvage compensation, would never be able to settle finally, however fair their intentions, without appealing to a court of competent jurisdiction to approve the settlement.

Under the circumstances of the present case, however, the court does not find that there was such a showing made and given to this libelant, Alvin Rivers, who is a colored man, but a seaman, and, like most colored seamen, ignorant, both of his rights and of the value of salvage services, as to operate as a bar in this case; and it is therefore ordered, adjudged, and decreed that the receipts set up and proven in this case, and the agreement thereby evidenced, are no bar to the recovery by the libelant Alvin Rivers of his proper share in the matters to which he may be entitled to salvage as alleged in the libel.

[2] Before taking up the specific salvage cases alleged in the libel, it should be further stated that in considering them the court is necessarily bound to consider what it is that operates most efficiently to effect the salvage success. This matter was alluded to in the case of Conekin v. Lockwood, above referred to. The individual effort of a common seaman in some cases of salvage may count for practically nothing. Take the case of a vessel in distress from the loss of her motive power, but at anchor in the open sea, and therefore more or less at risk. To take her in tow in fair weather and bring her into port is nothing but what a competent tug can do easily at any time, and in so doing no member on board of the tug is called upon to make any effort or run any risk that he would do otherwise than in the ordinary current course of his employment. Such cases, although perhaps salvage services, are termed salvage of a low order. It differs entirely, of course, where a vessel in distress may be stranded, and the weather may be stormy, and the salving vessel, the tug, risks both the safety of the tug and in so doing the safety of the crew, by performing the salvage service. So, also, may the salvage service of the crew be much greater in the case of fire on a boat, where the crew are called upon to go and perform service on or for the burning vessel, for the purpose of extinguishing the fire; there the individual efforts of the crew, in its relation to the efforts of the tug, are very much increased, although even in those cases the capacity of the tug to pump the water which will extinguish the fire is one of the main elements in effecting the success of the salvage. The rule of public policy before referred to is to stimulate vessel owners as well as seamen. It is most essential that for swift and efficient salvage there should be tugs dispersed in the different harbors along the coast of sufficient capacity and with the proper equipment to effect salvage rescues. The maintenance of such tugs is a matter of great expense. Unless the owners of such tugs are encouraged to keep them in condition and have them ready to risk on salvage ventures, all the willingness and effort of individual seamen would be unavailing. A crew may be procured at any port. A proper

seagoing tug is not to be found so readily, nor unless the stimulus for having them be sufficient.

[3] In the salvage cases, the first case alleged in the libel is that of the Orion. That was the case of a steamship loaded with cotton on fire in the harbor of Charleston, which was beached by the salving tugs, and the fire extinguished largely by the pumping performed by the tugs. It was nevertheless a case of a vessel on fire, in which the crew at any time might be called upon, if not actually called upon, to perform very dangerous service in risking themselves in places more or less filled with smoke, and subject to perils of that kind, and the object of the salvage rule is to stimulate them to obey orders promptly, and to risk themselves without question, when called upon to do so. The case is somewhat analogous to that of the Colorado, referred to in the case of Conekin v. Lockwood, except that the Colorado was more completely on fire, and subject to destruction by fire, and was at sea, 20 or 30 miles from the port of Charleston, and had to be towed in, whereas the Orion was in harbor, and was not by any means so under the dominion of the fire. Nevertheless, it was a case of fire, and the crew are entitled to consideration as such, and under all the circumstances of that case the court is of the opinion that the salvage should be divided 80 per cent. to the owner of the vessel, and 20 per cent. of the salvage amount of $11,693.82 to the crew, to be divided between them in proportion to their wages.

The next case referred to in the libel is the case of the Onawa II, salvage service on which is alleged to have been performed on the 3d day of January, 1915. In that case the Onawa II, a yacht whose motive power was gasoline, either ran out of gasoline, or had something the matter with her engines, so as to be unable to proceed, and anchored not very far from the entrance to the port of Charleston. The steam tug Cecilia, upon which Alvin Rivers was a deckhand, went out to her, took her in tow, and brought her in. For this the tug received $450, which the master, R. H. Lockwood, the husband of the owner of the tug, denies was received as salvage, but insists was received as towage. It, however, was very much in advance of what he would ordinarily have charged for towage services. If it was a salvage service, it was a salvage service of a very, very low order. It is true the master of the tug claimed and received as compensation a sum so much in excess of the usual towage compensation that it smacks of salvage. But the action of the master is not determinative. He may have received much more than he was entitled to demand. The question whether it was a salvage service must be determined by the court from the circumstances. The Onawa II was at anchor, and at no risk at the time, except the risk that all boats which have motive as distinguished from sail power are at, when disabled off the shore in the open sea, and the crew of the tug was called upon to do nothing—run no risk that they would not have run in the ordinary course of an ordinary tow. At the same time the owner of a vessel is not to be encouraged, while claiming salvage, to attempt to disguise it as towage. That might operate to defeat his crew's receiving that to which they are justly entitled. Under all the circumstances of the case the court is of the

opinion, in view of the comparatively small amount paid for the service, that the service in this case was not such a salvage service as to entitle the crew to more than 10 per cent., or $45, to be divided in proportion to wages received.

The next case is the case of the barge the City of San Antonio, which was towed in by the steam tug Cecilia, in connection with the steam tug Waban. The City of San Antonio was off the coast of South Carolina, not far from the port of Charleston, and leaking badly. The weather was not severe, or dangerous, and she was taken in charge by the two tugs, towed into the harbor of Charleston, put ashore just off the city of Charleston, and there pumped out. This also was a case of salvage which partook of a towage character, but was more accentuated as salvage than the case of the Onawa II. The vessel was a barge, without any motive power, was in danger of sinking, and the crew of the tug might have been called upon to make effort; she was salved mainly by the towage power of the tugs, in connection with their pumps. The court finds that the extra sum of $20 paid in this case by the owner of the tug to the libelant as and for his salvage service in this particular case represented the full proportion to which he would be entitled for what was done.

The next case set out in the libel is the case of the yacht Neckan, which under the circumstances of the case was also largely a towage case, and the court finds that of the sum of $325 net, received for the salvage services in the case, the crew would be entitled to 10 per cent., to be paid in proportion to their wages.

The last case set out in the libel is the case of the steamship Colorado, and in this case it is found that the amount to be allowed should be the same as that which was allowed in the same case of the same vessel in the case of Conekin v. Lockwood, before referred to; that is to say, 20 per cent. of the salvage, or the sum of $3,787.86, should be allowed to the crew, of which the proportion to be paid to the deckhand Alvin Rivers (who was the deckhand who ascended the stem of the Colorado) should be in the proportion fixed by that decision, so that he would receive $^4/_{46}$, or $329.36.

In the case of William Fox and others, as part of the crew of the steam tug Waban, against the owners of that tug, the court finds in like manner that the receipts set up as containing an agreement and satisfaction in full bar to the proceedings are inoperative to have that effect, and it is so decreed.

The specific salvage cases referred to in the libel in this last cause of Fox et al. v. Igoe are the cases of the steamship Orion, the barge City of San Antonio, the steamship Colorado, and an additional steamship, the British steamship Curaca, which was salved some time in the month of June, 1916. In considering the salvage to be allowed by the court in these cases, that is to say, in the case of the Orion, it is placed at the amount as fixed in the case of Alvin Rivers, viz., at 20 per cent. of the total salvage of $11,683.82 received by the Waban, except that, in the case of the libelant William J. Fox, it appears that he was under the influence of liquor that night, the night of the salvage services, and did not get to the scene of the performance of the salvage

service until long after they had begun, and after the most critical period was over, and therefore he should be entitled to receive as his quantum only one-half of the amount that his full wage proportion would be to the whole salvage.

With regard to the case of the City of San Antonio, it is found that an extra month's pay was full compensation to the crew of the Waban for their share of the salvage service in that case.

With regard to the case of the steamship Colorado, it is found that 80 per cent. of the total salvage of $18,939.30 should go to the owners of the tug Waban, and 20 per cent., or $3,787.86, to the crew, to be divided among the crew in proportion to wages.

In the case of the steamship Curaca, in that case the steamship Curaca was stranded near the north jetty, but outside of the jetties, off Charleston harbor, and at considerable risk. Under all the circumstances, it is found that there should be paid, out of the total salvage of $8,466.71 received, 80 per cent. to the owners of the tug, and 20 per cent. to the crew, to be divided among the crew in proportion to wages.

The costs of these proceedings shall be paid by the respondents in each case.

It is further ordered that it be referred to Daniel B. Gilliland, one of the standing masters of this court, to ascertain and report the amount to which each libelant may be entitled under the principles of this decree, after charging each, respectively, with the amounts heretofore paid in each case, and that he do report the same as soon as possible, and a formal decree will then be entered in each case for the amounts adjudged due to each libelant.

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## DUDLEY v. HAWKINS et al.

(District Court, S. D. Georgia, W. D. February 3, 1917.)

1. COURTS ⟸269—FEDERAL COURTS—DISTRICT IN WHICH SUIT MUST BE BROUGHT—DEFENDANTS IN DIFFERENT DISTRICTS.

   A suit for joint negligence and misconduct of national bank directors, being of a transitory nature, under Judiciary Act March 3, 1911, c. 231, § 52, 36 Stat. 1101 (Comp. St. 1913, § 1034), may, in a state having more than one federal court district, in each of which a defendant lives, be brought in either.

   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. ⟸269.]

2. BANKS AND BANKING ⟸254—NATIONAL BANKS—LIABILITY OF DIRECTORS—BILL BY RECEIVER.

   Bill by receiver of national bank against directors *held* sufficient to state civil liability, under Rev. St. § 5239 (Comp. St. 1913, § 9831), for knowingly violating or permitting violation of the national banking laws.

   [Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 950–957; Dec. Dig. ⟸254.]

In Equity. Bill for accounting and equitable relief by N. M. Dudley, receiver, against C. C. Hawkins and others. On motion to dismiss, filed by defendants. Motion denied.

This bill is brought by N. M. Dudley, receiver of the Americus National Bank, against the several defendants, who were directors of the bank. The receiver was appointed by the Comptroller of the Currency because of the failure of the bank. At that date the liabilities were $449,581.71. There were realized from the assets $245,000. In addition to this, there was an assessment levied on the stockholders of 100 per cent. After applying the assets and the assessment to the discharge of the obligations, the bank still remained indebted to the creditors and the innocent stockholders in the sum of $372,651.75. The bill alleges that the directors did not provide officers who were fitted for their duties. The president, one L. A. Lowry, was a resident of Chicago and a citizen of the state of Illinois, and did not give any attention whatever to the affairs of the bank, and did not even attend the meetings of the directors. In addition to this, while the by-laws required a bond of the active officers, of N. M. Lowry, the cashier, no bond whatever was required. Wheatley, the assistant cashier, was intrusted with the duties of that office. It is alleged that he was a young man of notoriously extravagant habits, and often intoxicated. These facts were known to the directors, who took no redressive action. As a consequence of their negligence and indifference, allowing the face value of all the assets, they were exceeded by the liabilities in the amount of $93,767.43. There was a defalcation in the latter amount. In addition to this, the officers and directors approved loans to insolvents. There are exhibits to the bill showing these loans and the amount of the loss incurred thereby. It is further disclosed that the cashier and assistant cashier were allowed to pay overdrafts of irresponsible persons. These amounted to $80,716.47. An itemized list attached to the bill discloses this fact. Also large loans were authorized in excess of the 10 per cent. limit fixed by the national banking law, with consequent loss in a large amount. Certain of these loans were to a director, C. T. Lowry. Notwithstanding this man was already indebted to the bank in the sum of $7,560, he was permitted to discount with the bank 31 other notes, aggregating the sum $26,028.60. All but two of the parties making these notes were tenants on his place. They were without financial responsibility, and had no means to pay the amount represented by the notes. This in itself was clearly in excess of the 10 per cent. of the capital and surplus of the bank, which has sustained the loss of the entire amount, in the aggregate $33,585.60. Illegal dividends were declared by meetings of the board of directors, at which the directors were present. The result of all this misconduct on the part of the directors, and much more set out in the bill, is that the creditors and shareholders not responsible have lost $372,651.75. An accounting is prayed, and it is alleged that there is no remedy at law. The bill waives answer under oath, and prays judgment against the directors liable. There is a prayer also for general relief.

This bill the defendants have moved to dismiss. The grounds of the motion are numerous: The want of equity; a complete and adequate remedy at law; failure to set forth specific incidents of negligence; vagueness in the allegations; a failure to identify the wrongdoers, or to specify responsible or particular directors; a misjoinder of causes of action, and a commingling of the same; a failure of specification to show responsibility. Upon these grounds the respondents pray that the bill should be dismissed, and a judgment whether they should be called on to make further answer. There are, in addition, motions to strike certain paragraphs of the bill, or parts thereof, and to demand itemized statements of assets. These are based upon the ground that there are no allegations to show what part of the amounts sued for would be due creditors, and what part to stockholders. Again, paragraph 7 of the bill attempts to state the duties of bank directors and officers in an erroneous way, and sets forth erroneous conclusions of law, and, generally, vagueness and indefiniteness, and insufficiency to entitle the plaintiff to the relief prayed. A similar motion is directed against paragraph 8 and paragraph 9. It is particularly objected that the allegations raise issues of fact, which are not cognizant in a court of equity, but which should be determined by a jury in an action at law.

Paragraph 10 is also the object of attack. It is insisted that the general allegation that the bank sustained loss of $20,000 or other large sum because

N. M. Lowry was not under bond is too vague and indefinite. So, also, with paragraph 11. This fails to allege, it is insisted, who made the loans by which the bank suffered loss, and that the itemized statement of such loans (Exhibit C) is insufficient pleading to show liability of the respondents. So, also, with paragraph 12, assigning liability for numerous overdrafts amounting to $80,716.47; and paragraph 13, charging liability for loss of $33,585.60, loaned to C. T. Lowry, a director. An equivalent criticism is directed to paragraph 14, in that it does not show which officer of the bank made the loans mentioned in the paragraph, or how the bank sustained loss by reason of the loans. As to paragraph 15, which assigns liability for the declaration of illegal dividends in the sum of $12,000, the defendants object that it does not appear that either of them knew that the bank was insolvent and that the dividends had not been earned. Paragraph 16 of the bill charges a liability against the respondents in the sum of $93,000; this upon the ground that the bank borrowed more money than authorized by section 5202 of the Revised Statutes (Comp. St. 1913, § 9764). This is assailed on the ground that the law specified does not make any provision for liability of directors for borrowing a greater sum of money than that authorized by it, and that no prayer for accounting could be based upon this charge. Paragraph 17, which charges loss because of negligence of the directors, in excess of $372,651.75, is assailed because it does not show how much has been lost by the bank, how much by the shareholders, and how much by the creditors, or what particular officer or director was responsible for said alleged loss.

The motion to dismiss concludes with a general attack on the twentieth paragraph and all the prayers of the bill, which, it is insisted, should be stricken because the plaintiff is not entitled, as matter of law or equity, to the relief prayed. In addition to this, each of the Lowrys have filed separate motions to dismiss. In the main they are, in substance, the same as the motions hereinbefore stated. The motion of J. S. Lowry denies the jurisdiction of the court, because he is a citizen of Terrell county, in the Northern district of Georgia. That of L. A. Lowry denies the jurisdiction, because he is a citizen of the state of Illinois. Counsel were heard upon the various motions to dismiss, and the court took them under advisement.

W. A. Dodson and Shipp & Sheppard, all of Americus, Ga., for plaintiffs.

Dupont Guerry, of Macon, Ga., and W. P. Wallis and Hollis Fort, both of Americus, Ga., for defendants Lowry.

Jordan & Lane and Miller & Jones, all of Macon, Ga., for other respondents.

SPEER, District Judge (after stating the facts as above). There seems to be no doubt that the bill must be dismissed as to L. A. Lowry, for the reason that he is a citizen of another state. Order may be taken to that effect.

[1] The contention of J. S. Lowry that the bill cannot be maintained here as to him, because he is a citizen of the Northern district of Georgia, is not well founded. This is a joint suit for joint negligence and misconduct of the directors of the Americus National Bank. Section 52 of the Judiciary Act (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. 1913, § 1034]), provides that:

"When a state contains more than one district, every suit not of a local nature, in the District Court thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the state, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. * * *"

So the motion of J. S. Lowry on this ground must be denied.

[2] The motion to dismiss upon the general grounds must be determined in view of the law fixing the liability of national bank directors for misconduct which may fairly be construed as willful and intentional neglect of their duties. A leading case on this subject is that of Briggs v. Spaulding, 141 U. S. 132–174, 11 Sup. Ct. 924, 35 L. Ed. 662. There the authorities were examined with great care, and the opinion was pronounced by Mr. Chief Justice Fuller. There was also a dissenting opinion rendered by Mr. Justice Harlan, in which Justices Grey, Brewer, and Brown concurred. It follows that the question in issue received the weightiest consideration. The opinion of the majority of the court may be condensed in this paragraph:

"In any view the degree of care to which these defendants [the directors] were bound is that which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that the restrictions of the statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is, therefore, ultimately a question of fact, to be determined under all the circumstances."

The more rigid rule is expressed in the dissent. It is in a quotation, on page 170 of 141 U. S., page 937 of 11 Sup. Ct. (35 L. Ed. 662), from the case of Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49:

"Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known, in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

The opinions in this case have received the consideration of other courts. Said District Judge Brawley, in Wheeler v. Aiken County Loan & Savings Bank (C. C.) 75 Fed. 785:

"It may be stated as a result of this examination that the law holds it to be the duty of directors to direct; that they are not mere figureheads; that they may commit the banking business to duly authorized officers, exercising ordinary care and prudence in their selection, but this does not absolve them from the duty of reasonable supervision, or shield them from liability for the wrongdoing of such officials, if, through gross inattention, such wrongdoing has been permitted or has escaped their notice. While not trustees, in a technical sense, some of the duties required of trustees are demanded of them; and if, through their supine negligence and inattention, the officers of the bank, by systematic neglect of ordinary precautions, or by fraud, bring it to ruin, which could have been prevented by that amount of vigilance and supervision which persons of ordinary discretion generally exercise as to their own affairs, such directors cannot escape responsibility."

Again, in the case of Robinson v. Hall, 63 Fed. 222–228, 12 C. C. A. 674, 679, the Circuit Court of Appeals of the Fourth Circuit, Circuit Judges Goff and Simonton, and District Judge Hughes presiding, affords much light. Said District Judge Hughes, rendering the opinion:

"In the case at bar we have an essentially different state of facts to consider. The frauds and irregularities which resulted in the ruin of the bank went on through a period of more than three years, during all of which time the defendant directors were in office. Many of these irregularities were not things of secret occurrence and sudden development. They were such as must have been known to the defendants, if they gave even the most casual attention to the affairs of the bank. The embezzlement of Bowden, the $45,000 loans to the Northrops and to Kerchner, and the losses resulting, were facts that could not have eluded the most cursory attention of the directors to their duties."

The decision of the court below sustaining demurrers was reversed, and the case directed to proceed on plenary proofs to a decree on the merits.

It is true that, the Supreme Court, in Yates v. Jones National Bank, 206 U. S. 158, 181, 27 Sup. Ct. 638, 644 (51 L. Ed. 1002), through Mr. Chief Justice White, declared that section 5239, Revised Statutes (Comp. St. 1913, § 9831), fixes the exclusive rule of such liability. The section provides:

"If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the comptroller of the currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

The learned Chief Justice points out that:

"Where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required; that is, that the violation must in effect be intentional."

In that case the wrong alleged was a misstatement in the making and publishing of the official reports of the condition of the bank. This case was reconsidered by the Supreme Court, in Jones National Bank v. Yates, 240 U. S. 556, 36 Sup. Ct. 429, 60 L. Ed. 788, Mr. Justice Hughes rendering the opinion; and the directors were held liable for knowingly participating in, or assenting to, the violation of the act.

In the case before the court the averments are such that we are driven to the conclusion that the case must be heard on full proof, in order that we may determine whether or not the misconduct and neglect of duty charged was in fact intentional or otherwise; that is to say, not only whether they knowingly permitted, assented to, and allowed the violation of the national banking law, but also whether the facts were such as to charge men in their position with such knowledge. The president selected was a resident of a distant state; no bond was required of the cashier; the assistant cashier was notoriously profligate; he was the principal agent of the bank; the officers and directors approved large loans to insolvents; the cashier and assistant cashier were allowed to pay overdrafts of irresponsible persons to the amount of $80,716.47. Large loans were authorized in excess of the 10 per cent.

limit on the capital stock; a number of those were to a director. Illegal dividends were declared at a meeting of the directors, where defendants were present. There is much else in the bill indicating such reckless mismanagement that inquiry whether the directors are chargeable with resulting loss seems demanded by equity. This is not an action by individual stockholders to redress individual injuries. It is brought, and the suit is properly filed, in equity.

For the purpose of this motion, all of the averments of the bill must be held to be true, and, taken all together, statements, charges, and prayers are so significant and apparently so meritorious that the duty of the court to overrule the several motions to dismiss seems imperative; and it will be so ordered.

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**Ex parte CHIN OWN et al.**

(District Court, W. D. Washington, N. D. February 2, 1917.)

No. 3513.

1. CONSTITUTIONAL LAW ⊜318—ADMISSION OF IMMIGRANTS—DUE PROCESS OF LAW.

   Due process of law does not necessarily require a judicial trial. Therefore Congress may intrust decision of an immigrant's right to enter to an executive officer, though denial of admission may deprive him of his liberty; the matter being purely one of legislative cognizance.

   [Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 949; Dec. Dig. ⊜318.]

2. ALIENS ⊜32(13)—RIGHT TO ENTER—DECISIONS OF COLLECTOR OF CUSTOMS—CONCLUSION OF ADJUDICATION.

   Under Act Feb. 20, 1907, c. 1134, § 25, 34 Stat. 906 (Comp. St. 1913, § 4274), declaring that in every case where an alien is excluded from the United States the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Labor, which section was a continuation of earlier similar enactments, a decision of the collector of customs, admitting a Chinese person to the United States as a native-born citizen, is not a conclusive adjudication, preventing subsequent deportation proceedings.

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

In the matter of the application of Chin Own, father, and Chin Gow, son, for a writ of habeas corpus. Writ discharged.

Beeler & Sullivan, of Seattle, Wash., for petitioners.

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

NETERER, District Judge. The petitioners, Chin Own and Chin Gow, are held by the Commissioner of Immigration under an order of deportation issued by the Secretary of Labor, and present a petition for a writ of habeas corpus—Chin Own alleging that he is a native-born citizen of the United States, returning after a temporary absence in China, and that Chin Gow is his son, born in China, and is coming

to this country with the father, and that they are denied permission to enter; that they are deprived of their liberty without due process of law, and were denied a fair hearing by the Commissioner of Immigration; that he was born in San Francisco, Cal., in 1876; that he removed to Seattle with his parents when five years of age, where he resided until 1891, when they removed to Boston, Mass.; that in 1896 his parents went to China, and the petitioner returned to Seattle, where he resided until 1900, in which year he went to China on a visit, and, returning, entered the United States at Port Townsend, Wash., on the 29th of November, 1902, going to Boston after a short stay in Seattle, where he resided until 1907, when he went to China, and is now returning, claiming his right to enter with his minor son.

It is contended by the petitioner Chin Own, first, that, being a citizen of the United States, he is being deprived of his liberty without due process of law, and that Congress may not intrust the decision of his right to enter to an executive officer, but that he is accorded the right to have his status adjudicated by a court of competent jurisdiction; second, that he was not accorded a fair and impartial hearing; and, third, that the finding of the collector of customs in admitting him as a native-born citizen in 1902 is res adjudicata. The status of Chin Gow, the son, is determined by the status of the father.

[1] The first contention of the petitioners is disposed of by the Supreme Court in U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, in which the court held that due process of law does not necessarily require a judicial trial, and that Congress may intrust the decision of an immigrant's right to enter to an executive officer, even though denial of admission may deprive him of his liberty. In this case the broad question was presented whether or not the decision of the Secretary of Commerce and Labor is conclusive, and the court held that Congress may exclude immigrants of a particular race, prescribe the terms and conditions upon which they may enter the country, establish regulations for sending them out, and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention, and that the decision of the department was final as to whether the immigrant belonged to the privileged class or not. On page 262, of 198 U. S., page 646 of 25 Sup. Ct. (49 L. Ed. 1040), Justice Holmes, speaking for a majority of the court, said:

"It is established, as we have said, that the act purports to make the decision of the department final, whatever the ground on which the right to enter the country is claimed—as well when it is citizenship as when it is domicile and the belonging to a class exempted from the exclusion act."

This court, in Ex parte Moola Singh, 207 Fed. 780, at page 782, said:

"The authority of the immigration officers and the jurisdiction of the courts depend upon power conferred by Congress. It is a matter of legislation. No discretion is vested in the courts. Congress has a right to legislate upon the subject, prescribe rules, fix limits, and confer authority where it deems wise, in legislating upon the subject at hand. The supreme authority is conferred upon the immigration officers. The jurisdiction of the court is limited to ascertaining whether the petitioners were denied a hearing."

Section 25 of the act of February 20, 1907 (34 Stat. pt. 1, p. 906), provides:

"* * * In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, *if adverse to the admission of such alien*, shall be final, unless reversed on appeal to the Secretary of * * * Labor. * * *" (Italics ours.)

The issue presented here has been before many other courts and has been passed upon in this circuit.

[2] Judge Wellborn, in U. S. v. Loo Way (D. C.) 68 Fed. 475, in disposing of the petitioner's right to enter, based upon residence in the United States from 1878 to 1892, returning to the United States in the latter year after a brief visit to China, and being then permitted to enter by the customs officials at San Francisco, and in 1893, being taken into custody, charged with being unlawfully within the United States, he contending that his entry was lawful, the right having been adjudicated by the collector of customs, at page 477, said:

"The books are full of cases in which the rights of Chinese persons to enter this country have been re-examined on habeas corpus, after denial of such rights by customs officials, and I have not been able to find an opinion by any court in which the authority for such re-examination is questioned."

The Circuit Court, Southern District of New York, in Re Li Foon, 80 Fed. 881, held that under Act Aug. 18, 1894, c. 301, 28 Stat. 390, the decision of the collector of customs in favor of the right of a Chinese alien to enter the country is not final, but is subject to re-examination by the court. At page 882 Judge Lacombe said:

"It is next contended that the decision of the deputy collector at Malone, N. Y. (acting as collector), permitting petitioner to enter the United States, * * * is a final adjudication upon petitioner's right to enter, and that, in view of such decision, the commissioner should have held that he was lawfully entitled to be and remain in the United States. * * * In Act Aug. 18, 1894, c. 301, 28 Stat. 390, Congress provided that 'in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed. * * *' This makes the decision a final adjudication only when adverse to admission. If the immigration or customs officer decides to allow the immigrant to enter, such decision has no more force as a controlling adjudication, when the question of right to be or remain in the United States comes before the court or commissioner, than it had under section 9 of the act of 1882, as amended in 1884, which was before the Supreme Court in U. S. v. Ah Lung [124 U. S. 621, 8 Sup. Ct. 663, 31 L. Ed. 591], supra."

Judge De Haven, in U. S. v. Lau Sun Ho (D. C.) 85 Fed. 422, held that the action of the immigration officers in permitting a Chinese alien to land in this country was not judicial, and the permission to enter has not the effect of a judgment entitling such person to remain in the United States, and at page 423 said:

"The order of the collector of customs, under which such person was permitted to land, is not even prima facie evidence of his right to remain in the United States, and the court, in such a proceeding, inquires into the truth of the matter, unembarrassed by such order of the collector."

Judge Maxey, in Mar Ging Guey v. U. S., 97 Fed. 576, at page 578, said:

"* * * The court will assume that, when the appellant was arrested for being unlawfully in the country, he was here by permission of the collector. But the action of the collector was not final. The court may still inquire whether the appellant was lawfully in the country, and, if unlawfully here, it is the duty of the court to deport him."

Mr. Justice Blatchford, for the court, in U. S. v. Jung Ah Lung, 124 U. S. 621, 8 Sup. Ct. 663, 31 L. Ed. 591, said:

"* * * The collector of customs of the district in which the vessel arrives shall proceed to examine such passengers. * * * But we regard this as only a provision for specifying the executive officer who is to perform the duties prescribed, and that no inference can be drawn from that or any other language in the acts that any judicial cognizance which would otherwise exist is intended to be interfered with."

The Supreme Court, in Li Sing v. U. S., 180 U. S. 486, at page 490, 21 Sup. Ct. 449, 451 (45 L. Ed. 634), said:

"But it is obvious, that it is only when the decision of the customs officer excludes an alien from admission that his decision is final. When his decision admits the alien, then the provisions of the act of July 5, 1884, are still applicable, which provide that, notwithstanding the contents of the certificate exhibited to the collector of customs, and their prima facie effect, 'said certificate may be controverted and the facts therein stated disproved by the United States authorities.' Accordingly, we agree with the courts below in holding that the judgment of the collector of customs at Malone did not conclude the commissioner, and that the latter had authority, under the statutes, to hear and determine the question whether Li Sing was entitled to remain within the limits of the United States."

In the Japanese Immigrant Case, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721, the court held that it was clearly apparent that Congress did not intend that the admission of an alien or his entry into the country should place him at all times thereafter entirely beyond the control or authority of the executive officers of the government, and that the entry must be taken subject to the condition that he might be sent out of the country by order of the proper executive officer, if he was found to have been wrongfully admitted within a given period.

The Supreme Court, in Pearson v. Williams, U. S. Commissioner of Immigration, 202 U. S. 281, 26 Sup. Ct. 608, 50 L. Ed. 1029, held that the Secretary of Commerce and Labor had a right, under section 21 of the Act of March 3, 1903 (32 Stat. 1218, c. 1012), to order the deportation of an alien as having come to this country under a contract to perform labor, after a second hearing before a board of special inquiry, although there had previously been a special inquiry pursuant to section 25 of the act at the time of landing, before the same persons and upon the same issues. This section provides for the appointment of an examining board, to determine whether an alien shall be allowed to land or be deported, and provides that "the decision of any two members of a board shall prevail and be final," subject to appeal to the Secretary of Commerce and Labor, whose decision shall be final. The court, at pages 284, 285 of 202 U. S., page 610 of 26 Sup. Ct. (50 L. Ed. 1029), said:

"* * * The board is an instrument of the executive power, not a court. It is made up, as we have mentioned, of the immigrant officials in the service, subordinates of the Commissioner of Immigration, whose duties are declared to be administrative by section 23. Decisions of a similar type long have been recognized as decisions of the executive department, and cannot constitute res judicata in a technical sense. * * *"

The Circuit Court, Southern District of New York, in Ex parte Stancampiano (C. C.) 161 Fed. 164, held that a finding that an immigrant arrested for deportation under Immigration Act Feb. 20, 1907, 34 Stat. 905, is not subject to deportation, does not render that question res judicata. Judge Ward, at page 165, said:

"The immigration authorities are clothed with executive, and not with judicial, duties. The finding of the Secretary of Commerce and Labor is not a technical res adjudicata. * * *"

Judge Morrow, for the Circuit Court of Appeals, in Haw Moy v. North, 183 Fed. 89, 91, 105 C. C. A. 381, 383, speaking of the act of February 20, 1907, said:

"It is further contended by the appellant that the officers of the Department of Commerce and Labor having investigated her alleged right to land and enter the United States as a citizen thereof, and having admitted her upon that claim, her alleged right has been adjudicated, her status has become fixed, and she cannot be arrested and again subjected to an investigation with respect to that question. The officers of the Department of Commerce and Labor had jurisdiction to investigate the question of appellant's citizenship. * * * Section 25 of the Immigration Act of February 20, 1907, provides that the decision of the immigration officers in excluding an alien from admission into the United States is final only when the decision is adverse to the right of an alien to such admission. Under that section the decision was not final, as it is alleged to have been in her favor, but was conditional for the period of three years provided in the statute."

And Judge Gilbert, for the same court, in Lew Quen Wo v. United States, 184 Fed. 685, at page 688, 106 C. C. A. 639, 642, said:

"It is urged that the order of the Commissioner of Immigration admitting the appellant into the United States estops the government to deny the legality of his entry, and constitutes a bar to this proceeding, and reference is made to the language of the opinion in Chin Yow v. United States, 208 U. S. 8 [28 Sup. Ct. 201, 52 L. Ed. 369], in which the court sustained the finality of the decision of the immigration officers upon a hearing concerning the right of a Chinese to land in the United States, and said that thereafter the merits of the case were not open. But that case, and other decisions of the Supreme Court, go no further than to hold that the right of a Chinese applying for admission into the United States is determinable by the proper immigration authorities, and that their decision, when adverse to the applicant, and the hearing has been properly had, and the applicant's remedy has been exhausted upon an appeal to the Secretary of Commerce and Labor, is final, and there is no right of recourse to the courts. * * * There is no statutory provision that the decision, if favorable to the applicant for admission, shall be final. The decisions have been to the contrary. * * *"

In Sire v. Berkshire et al. (D. C.) 185 Fed. 967, it was held that the duties of immigration officers are administrative, and that their decisions are those of the executive department of the government, and the order admitting an alien cannot operate as res judicata in subsequent proceedings.

In Lim Jew v. U. S., 196 Fed. 736, 744, 745, 116 C. C. A. 364, 372, the Circuit Court of Appeals of this Circuit said:

"The action of the Commissioner of Immigration in ordering the defendant admitted into the United States was not res judicata as against any further action of the board of immigration looking to a deportation of the defendant, as being unlawfully within the country. * * * As was said in Li Sing v. United States, supra, 180 U. S. 486 [21 Sup. Ct. 449, 45 L. Ed. 634], under a statute identical in effect with the present act, the court conceding the conclusive effect of the findings and judgment of executive officers of the government when made so by statute, as had been previously determined: 'It is only when the decision of the customs officer excludes an alien from admission that his decision is final.'"

None of the petitioners' contentions have any basis in fact, nor support in law. The provisions of section 25 of the act of February 20, 1907, in issue here, have been brought forward from the earlier enactments upon the same subject, and have uniformly inspired a harmonious construction on the part of the courts, and all against the contention made in the petitioners' behalf. The record in this case is conclusive of the fact that an eminently fair hearing was accorded to the petitioners, and every opportunity was afforded to establish citizenship.

The writ is discharged, and the petitioners remanded to the Commissioner of Immigration.

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## THE PHILADELPHIA.

(District Court, E. D. Pennsylvania. January 9, 1917.)

No. 23.

1. COLLISION ⊂⊃87—STEAMER AND PILOT BOAT—PRACTICE IN DISCHARGING PILOT.

It is proper and usual to discharge a pilot from the lee side of the vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 178; Dec. Dig. ⊂⊃87.]

2. COLLISION ⊂⊃87—STEAMER AND PILOT BOAT—PRACTICE IN DISCHARGING PILOT.

It is proper and frequent practice for the pilot to decide from which side he will leave the ship, and to make his arrangements accordingly.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 178; Dec. Dig. ⊂⊃87.]

3. COLLISION ⊂⊃87—STEAMER AND PILOT BOAT—PRACTICE IN DISCHARGING PILOT.

It is proper and the usual practice, in discharging pilots, for the vessel having the pilot aboard to lay to and stay stopped, making in so doing the side from which the pilot has arranged to leave the lee side.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 178; Dec. Dig. ⊂⊃87.]

4. COLLISION ⊂⊃87—STEAMER AND PILOT BOAT—PRACTICE IN DISCHARGING PILOT.

It is proper and customary for the pilot boat to do whatever maneuvering is necessary to take off the pilot, and for the other vessel to stay stopped and do nothing.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 178; Dec. Dig. ⊂⊃87.]

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5. COLLISION ⟸87—STEAMER AND PILOT BOAT—PRACTICE IN DISCHARGING PILOT.

It is a proper and frequent course for the pilot boat, if under steam when she approaches another vessel to take off her pilot on the weather side, to go astern and round up on the lee side; but there is nothing improper in her coming to on either side, the choice being a matter of convenience only.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 178; Dec. Dig. ⟸87.]

6. COLLISION ⟸102—STEAMER AND PILOT BOAT—MUTUAL FAULTS.

A steamship and a pilot boat approaching to take off the steamer's pilot both *held* in fault for a collision between them; the pilot boat being in fault for miscalculating the conditions under which she attempted to make a turn, so as to come around on the starboard side of the steamer, and the steamer in permitting her bow to swing to starboard as the pilot boat was making the turn.

[Ed. Note.—For other cases, see Collision, Dec. Dig. ⟸102.]

In Admiralty. Suit for collision by Gustav Claude, master and part owner of the steamship La Flandre, and as bailee of her cargo, against the steam pilot boat Philadelphia. Decree for libelant for half damages.

Howard M. Long, of Philadelphia, Pa., for libelant.
Lewis, Adler & Laws, of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. This controversy grows out of a collision. The place was just outside of the Overfalls Lightship at the entrance to Delaware Bay. The time was about 2:30 o'clock p. m. on May 9, 1915. The weather was clear, the sea smooth, with no wind to hamper the proper handling of either vessel, plenty of sea room in which to maneuver, and no vessels or other obstructions to interfere. From such a very general outline statement the fact of collision would suggest some unexpected and unforeseen happening or fault in the handling of one or both vessels. If to this outline is added the further fact that one of the vessels was a steamship about to discharge her pilot, and the other was a pilot boat ready to take the pilot off, and there was nothing to account for the collision, other than the handling of the vessels, an anticipated finding of culpability somewhere would be compelled. If the further fact developed that the steamship had been brought to a stop, and nothing remained to be done, except for the pilot boat to round up near the steamship, so that the pilot could be taken off in a yawl, and that in rounding up the pilot boat ran into the steamship, an explanation of the mishap, if not due to the fault of the pilot boat, would be demanded.

There is just this prima facie case made out against the respondent. It is evident that the explanation must be looked for in the particular detail facts, and not in the broad ones. It is not difficult to visualize the movements of each vessel down to almost the immediate moment of the collision. Each was looking for and expecting the other. What was to be done was known to each. What was done on board each vessel is not in dispute. The testimony of the witnesses respecting

what took place is in accord, except as to the movement of the steamship in fact, and what movement would have resulted from the way in which she was handled. The difficulty which confronts the libelant is to reconcile the particular (and in this sense the minor) things which, according to the weight of the evidence, did happen with the main facts for which the libelant contends. The difficulty which confronts the respondent is to find any exculpating features in the particular facts which will overcome the condemnation involved in the main facts.

The following statement, although perhaps not entirely accurate, is one over which there is no substantial dispute: The pilot boat was made out by the steamer when the vessels were from four to six miles apart. When first sighted, the pilot boat bore off the steamer's port bow, but her position was practically dead ahead. The order to stand by was given, and the course of the steamer was changed so as to make the pilot boat bear off the steamer's starboard bow. A course of S. S. E. kept her so.

There are obvious advantages in the pilot leaving the ship from the lee side, and this is usual. The wind was about N. N. W., and as this was nearly a following wind, either side might have been made the lee side. Whatever difference there was favored making the port side the lee side. The pilot so decided, and the ladder was there slung. The order to stand by was followed at 2:10 with an order to slow down, and this at 2:18 with an order to stop, and this at 2:22 with full speed astern, and this almost at once (entered as of 2:23) with stop. The expectation on the part of every one aboard the steamer was that the pilot boat would pass on the starboard hand, come around under the steamer's stern, and range alongside the steamer on her port side. This expectation was a very natural one on their part, and this course would have been an entirely proper one for the pilot boat to have taken. From the viewpoint of the steamer, the orders given resulted in her speed being reduced from 8 or 8½ knots to 6, and from that to a half knot, or at most a knot (when her engines were reversed), and then to a dead stop. Her heading during this time had not changed from S. S. E. From the further viewpoint of the steamer, the pilot boat came up on the starboard hand, ported her helm, and instead of coming around the steamer's stern, and ranging alongside on the port side (as those aboard the steamer expected her to do), she put her helm hard aport and attempted to make the turn short of the steamer, so as to round up on the starboard side. Coming at the speed at which the pilot boat was moving, there was not room for this maneuver, and the collision was brought about.

The libelant, on this version of the facts, presents this plain case—the steamer brought to a stop with the port side made the lee side, and preparations made to discharge the pilot from that side, and the pilot boat colliding with her in the attempt to round up alongside. The case as thus made out would be free from all difficulties in affixing the blame, except for the circumstance that it is impossible to understand how the collision could have been brought about in this way, consistently with certain other features which the weight of the evidence shows to have been present. Whatever the real facts are, the weight of the

evidence establishes that the pilot boat approached on a course parallel (in reverse) to that of the steamer; that she did not port her helm until she was abeam of the steamer (somewhere between just forward of amidship of the steamer and off the steamer's quarter); that the pilot boat was moving at the rate of 7 knots; that she struck the steamer head-on a right-angle or nearly right-angle blow at a point about 50 feet aft of the steamer's stem. Add the facts that the steamer was about 280 feet and the pilot boat about 148 feet long, and it becomes impossible to account for what happened, if the steamer did not go astern or swing her bow to starboard.

The place of contact seems to be established beyond question. The clear weight of the evidence is toward the finding of the blow being a right-angle blow. It follows that one of four things must be: The pilot boat must have made her turn as she was approaching the steamer; the steamer must have had sternway on; the bow of the steamer must have swung to starboard, thus putting her athwart the course of the pilot boat as the latter came around; or some new element accounting for what happened must be brought in. Wherever the truth may be found, the case as presented entitles the respondent to a finding that the pilot boat did not change her course until she came abeam or abaft the beam of the steamer. The libel itself avers this, and all the testimony bears it out. There is nothing in the evidence or in the circumstances to justify a finding that the steamer was going astern. The only circumstance, other than those stated, is that the man at the wheel of the pilot boat realized the imminence of the collision just before it occurred, and that he dropped the wheel and reversed his engines to full speed astern, so far checking his headway that the pilot boat was almost stopped, and immediately backed away from the steamer.

These latter facts were not introduced for the purpose, nor is there any suggestion, in the evidence or in the argument, that they account for the collision consistently with the steamer not having changed her course. The respondent asks for a finding that she did change her course, not only because no other explanation will explain the collision, but also because of the evidence introduced that the effect of reversing the engines of the steamer would be at once to throw her head to starboard.

The theory of the defense, based upon such finding, is that it was the duty of the steamer to come to a stop; that it was the duty and right of the pilot boat to do all the maneuvering, including the side of the steamer from which the pilot was to be discharged; that the pilot boat was properly handled with this end in view; that she allowed herself ample room in which to make the turn; and that it would have been made with success, except for the unwarranted and unexpected act of the steamer in reversing her engines, by which her head was swung to starboard across and directly in front of the pilot boat as she came around.

The exculpating feature of this defense is involved in the prophecy that the pilot boat would have come around clear of the steamer, and

the consequent averment of due care in attempting to bring her around within the space allowed. This is based upon the evidence that the courses of the two vessels were an eighth of a mile apart, and that the pilot boat, running under one bell, was making seven knots, and could be safely turned within that distance. This finding we are unable to make. There was nothing in what was required to be done to justify the pilot boat in not giving herself ample room. Proper space is inconsistent with the fact of the collision, even after making the most liberal allowance for the extent to which the space was narrowed by the swing of the steamer. There is no such certainty as to what space there was as to justify much reliance upon opinion testimony. Distances on water are proverbially hard to estimate with anything like accuracy. The evidence itself is not convincing. It merely goes to the extent that the pilot boat could be turned in a space of 760, or even 600, feet or less. This is, of course, qualified by the statement that to turn her in a limited space her engines must be properly handled. The testimony of several of the witnesses contains the significant qualification that the boat could be brought around within the given space, not that she did come around under the given conditions.

The conclusions reached, with such discussion as they call for, are stated in numbered paragraphs:

[1] 1. It is proper and usual to discharge the pilot from the lee side.

[2] 2. It is a proper and frequent practice for the pilot to decide from which side he will leave the ship, and to make his arrangements accordingly.

[3] 3. It is proper and the usual practice, in discharging pilots, for the vessel having the pilot aboard to lay to and stay stopped, making in so doing the side from which the pilot has arranged to leave the lee side.

[4] 4. It is proper and customary for the pilot boat to do whatever maneuvering is necessary to take off the pilot, and for the other vessel to stay stopped and do nothing.

[5] 5. It is a proper and frequent course for the pilot boat, if under steam when she approaches the other vessel on the weather side, to go astern and round up on the lee side. There is nothing, however, improper in the pilot boat coming to on either side of the other vessel. Whether she comes to on one side or the other is wholly a matter of convenience, and to facilitate reaching the side of the other vessel in a skiff or yawl to take off the pilot. In the present case, which side of the steamer was made the lee side is of no importance, and has no significance, other than its bearing upon the movements of the vessels. Either side might have been made the lee side. The pilot on the steamer was justified in arranging to leave from the port side, and in making that the lee side, and in expecting the pilot boat to round up under the steamer's stern. The pilot boat, however, was equally justified in deciding to come to on the starboard side of the steamer. The only effect in itself of the pilot boat coming to on the one side or the other would have been the taking of the yawl boat around the steamer, or shifting the steamer's ladder from one side to the other. The only

significance this feature has is the extent, if any, to which it bears upon whether the steamer held her position or swung her head to starboard.

[6] 6. The pilot boat is found in fault in miscalculating the conditions under which she attempted to make the turn, so as to come around on the starboard side of the steamer, and the collision and consequent damages were primarily due to this.

7. The weight of the evidence, as shown in the proofs, favors a finding (and it is accordingly so found) that the bow of the steamer swung to starboard just before the collision, thereby contributing to the extent of the damages. This is based upon the finding before made that under the pleadings and the proofs the pilot boat did not begin her swing to starboard until the vessels were about abeam, and that the vessels at the moment of collision were about in a right-angle position, and that the steamer was struck about 50 feet from her stem. The only theory which would justify a finding that the steamer had not changed her heading is that the pilot boat ported her helm before she reached a point abreast of the steamer, and this fact we are not at liberty to find under the averments of the libel and the testimony of the witnesses. The degree to which this fault of the steamer contributed to the collision or the consequent damages cannot be determined otherwise than by an equal apportionment.

8. An interlocutory decree, in accordance with these findings, that the libelant recover one-half its damages, with full costs, may be entered.

The libelant has offered no explanation of how the pilot boat, not starting to round up until she was abeam of the steamer, could have struck the steamship far forward, and a head-on right-angle blow, if the steamer was stopped and her head had not swung toward the course of the pilot boat.

The only answer to respondent's theory of the collision is to challenge the fact of a head-on or right-angle blow, and to assert a glancing or side swiping blow. A more plausible explanation of what happened would be supported by an averment that the pilot boat made her turn as she was coming up abreast of the steamship and before she was abeam. As before observed, however, whatever the facts may be, the respondent cannot be denied its right to the findings made under the pleadings and the evidence. The libel avers that the pilot boat was abeam before she made the turn, and that the collision was a head-on right-angle one. All the testimony asserts the first fact, which is the really controlling one, and several witnesses testify to the second, and this second fact is convincingly attested by the effect of the collision upon each vessel, and particularly upon the pilot boat, which had no marks upon her (although freshly painted), except upon the extreme edge of her stem. A further theory might be evolved that the steamer had properly swung her head to starboard for the purpose of making her port side the lee side. To support any theory which is consistent with the two facts which are too well established to be doubted, viz. that the pilot boat struck the steamship a right-angle blow and struck her near the bow of the steamer, the libel and the evidence would both have to be recast, or to be ignored. This the trial court cannot do.

The conclusions reached are in accord with the doctrine stated in Spencer on Collisions and the rulings in The Washington, 92 U. S. 31, 23 L. Ed. 600, The Alaska (C. C.) 33 Fed. 107, and The Anegar, 123 Fed. 473, 59 C. C. A. 277, to which we have been referred.

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TOMKINS v. PATERSON et al.

(District Court, W. D. Washington, N. D. January 26, 1917.)

No. 3402.

1. PLEADING ⟸93(1)—INCONSISTENT DEFENSES—RIGHT TO PLEAD.
Under the code system of pleading in force in Washington, inconsistent defenses may not be pleaded.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 189, 190; Dec. Dig. ⟸93(1).]

2. PLEADING ⟸93(2)—INCONSISTENT DEFENSES—DENIAL OF CONCLUSION.
In an action to recover the penalty for importing an alien contract laborer, denial by defendant of the allegation that plaintiff was within the prohibition of the act is a denial of a conclusion which is not inconsistent with an affirmative defense.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 189, 190; Dec. Dig. ⟸93(2).]

3. PLEADING ⟸362(2)—MOTION TO STRIKE—PLEADING GOOD IN PART.
A motion to strike denials from the answer as being inconsistent with the affirmative defense which was directed at all the denials collectively, not at the specific denials separately, must be denied, where some of the denials were consistent with the affirmative defense, though others were inconsistent therewith.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1148–1151; Dec. Dig. ⟸362(2).]

At Law. Action by J. A. Tomkins against J. V. Paterson and another. On motion to strike from defendants' answer the affirmative defense, or to compel defendants to elect whether to stand on their denial or on their affirmative defense. Motion denied.
See, also, 238 Fed. 879.

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 a penalty provided by section 5 of the Act of Congress of February 20, 1907, c. 1134, 34 Stat. 900, as amended March 26, 1910 (chapter 128, 36 Stat. 263 [U. S. Comp. St. 1913, §§ 4244, 4247, 4250]), and alleges that, while a resident of British Columbia "laboring at his trade as a mechanical engineer" near Vancouver, British Columbia, the defendants engaged him as a mechanical engineer at the wage of $300 a month, and he entered the employment of the defendant at Seattle, Wash., and further states:

"That at all of said times plaintiff was a skilled laborer, to wit, being a mechanical engineer and not one of the classes of persons exempted under the terms of the last two provisions of the act of February 20, 1908, an act to

regulate the immigration of aliens into the United States, and the act amendatory thereof, approved March 26, 1910. * * *"

The defendant has filed an answer in which all of the allegations on the part of the plaintiff are denied specifically, except that the allegation with relation to British citizenship is denied upon information and belief. By way of affirmative defense the defendant then alleges:

"That the plaintiff did not belong to one of the classes of persons prohibited from entering the United States by said act of Congress, or otherwise; that plaintiff belonged to the recognized learned profession, and all services performed by him for the defendant Seattle Construction & Dry Dock Company were such professional services; that other unemployed professional or skilled labor or service of like kind as that performed by plaintiff for the defendant Seattle Construction & Dry Dock Company could not be found in this country; that plaintiff was engaged and employed by said defendant at Seattle, Wash., to work for it at its plant in said city."

The plaintiff has moved to strike from the answer the affirmative defense, on the ground that it is inconsistent with the denials in the answer, and, in the alternative, to require the defendants to "elect whether they will stand upon their denials or upon their said affirmative defense set forth in the answer."

The plaintiff contends that the pleas in the answer are inconsistent and cannot stand; that under the code system of pleading, which is that of Washington, the office of pleas in confession and avoidance is performed by defenses of new matter, and that such plea can only obtain when the party admits the truth of a material allegation made by the adverse party and avoids liability thereon by affirmative statements and proof of matters which destroy the effect of the allegations admitted.

[1] Inconsistent defenses may not be pleaded under the rule adopted by the Supreme Court of Washington. Seattle Nat. Bank v. Carter, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177; Allen v. Olympia L. & P. Co., 13 Wash. 307, 43 Pac. 55; Lamberton v. Shannon, 13 Wash. 404, 43 Pac. 336; and Corbitt v. Harrington, 14 Wash. 197, 44 Pac. 132. The object of a lawsuit is to elicit the truth with relation to a controversy between the parties and which is the subject of the action. The object of the pleadings is to aid in such elicitation and determination. Hart-Parr Co. v. Keeth, 62 Wash. 464, 114 Pac. 169, Ann. Cas. 1912D, 243. The crucial test, then, is: What are the defenses set up so inconsistent that if one is true the other is false? In the denials the defendants deny that the plaintiff was employed; that he was a resident of British Columbia; that he did come to the defendants in violation of the act in question; and, in the affirmative defense, say that plaintiff was not prohibited from entering the United States; that he did work for the defendant; and that, at the time that he worked for the defendant, men of his skill and attainment could not be found in the United States to work in the defendant's plant. The Supreme Court of Washington with relation to inconsistent defenses (Seattle Nat. Bank v. Carter, supra, 13 Wash. at page 286, 43 Pac. at page 333) said:

"This theory carried to its logical result would permit a defendant who was sued upon a promissory note to allege nonexecution, want of considera-

tion, and payment. Under such allegations, he would be permitted to swear that he never executed the note; that he did execute the note, but that it was without consideration; and that he did execute the note, that the consideration was good, but that he had paid the same. Such a practice as this would not only be farcical, but absolutely wrong and immoral and an encouragement of perjury."

Mr. Justice Gray, in Glenn v. Sumner, 132 U. S. 152, at page 156, 10 Sup. Ct. at page 41 (33 L. Ed. 301), said:

"The sufficiency and scope of pleadings, and the form and effect of verdicts, in actions at law, are matters in which the Circuit Courts of the United States are governed by the practice of the courts of the state in which they are held."

The expression of Justice Gray was as to the effect of a general verdict of a jury upon all of the issues presented in the several answers, and the court held the state practice would apply.

Mr. Justice Pitney, in Spokane & Inland Railroad Co. v. Campbell, 241 U. S. 497, at page 502, 36 Sup. Ct. 683, 686 (60 L. Ed. 1125), said:

"Whether under the conformity act (Rev. Stat. § 914),[1] the trial court was required to adhere to the state practice, governing the effect of the general verdict and the special findings, may not be free from doubt"—and, among other cases, cited Glenn v. Sumner, supra.

Judge Hallett, Hummell, Adm'r v. Moore (C. C.) 25 Fed. 380, held that inconsistent defenses could be pleaded under the Colorado statute, and cited People v. Lothrop, 3 Colo. 428, "in which it is held that inconsistent defenses may be interposed under section 64 of the Code * * *" of Colorado.

The authorities cited by the defendants do not sustain their contention. Loveland v. Jenkins-Boys Co., 49 Wash. 369, at page 372, 95 Pac. 490, at page 492, was tried before the writer in the court below, and on appeal the Supreme Court, in affirmance, said:

"Pleadings are construed according to their legal effect, and it is not a legal execution of a contract to procure the maker's signature thereto by trickery and fraud, and, when a person so defrauded is sued upon the purported contract, he may properly deny its execution and plead affirmatively the fraud practiced upon him by which he was induced to apparently execute it."

The signature of the defendant in that case was obtained by a confusion of papers and a statement that they desired to secure its correct address for the purpose of consigning goods purchased under an oral contract. The other cases cited are based upon matter of similar import.

[2] The rule of inconsistent defenses should be applied with great caution, as sometimes it is necessary to make a denial which is in reality a denial of a conclusion instead of a fact. The state court, in Hart-Parr Company v. Keeth, supra, 62 Wash. at page 467, 114 Pac. at page 170 (Ann. Cas. 1912D, 243), said:

"It is doubtless true that, under the letter and the spirit of the Code, as announced by the court and cited by appellant, there is no classification of answers or defenses as at the common law; that pleas in abatement and at bar may be joined; and that defendant can, and should, unite all the defenses he has in one answer. But all these privileges are subject to the vital require-

[1] Comp. St. 1913, § 1537.

ment that the defenses must not be inconsistent; that is to say, that the establishment of the truth of one defense must not establish the falsity or impossibility of the other. * * *"

[3] An examination of the allegations of the complaint and the denials and the affirmative matter impresses the reader that whether defendant violated the acts in question is a denial of a conclusion rather than a fact, as is also the denial that plaintiff was not prohibited from entering the United States. The specific denials which are inconsistent and the establishment of the truth of which would establish the falsity or impossibility of the affirmative defense are the employment of the plaintiff by the defendant, and his residence in British Columbia. The motion of the plaintiff is not directed to the specific denials separately, but to all of the denials collectively, and, some of the denials being consistent, the motion of the plaintiff to strike must be denied. The specific denial as to employment, I think, must give way to the affirmative allegation alleging employment. There is nothing apparent in this case which can jeopardize the rights of either party by denial of the motion.

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## KIDD v. THOMAS A. EDISON, Inc.

(District Court, S. D. New York. February 10, 1917.)

1. PRINCIPAL AND AGENT ⟸102(1)—AUTHORITY OF AGENT—IMPLIED AUTHORITY.

An agent, authorized to engage a singer for a series of recitals to be given in connection with phonograph records of her voice to show the quality of reproduction, has apparent authority of an agent to engage singers for ordinary recitals, and can bind the principal to pay such singers, notwithstanding a restriction on his authority, not known to the singer, that he could contract for only such recitals as the dealers in the records would arrange and pay for.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 274, 347; Dec. Dig. ⟸102(1).]

2. PRINCIPAL AND AGENT ⟸92(1)—LIABILITY OF PRINCIPAL—NATURE.

The liability of a principal for the acts of his agent within the scope of his employment does not depend on consent by the principal or estoppel to deny consent, but is a survival from the ideas of status, which is now preserved from motives of policy.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 245, 592; Dec. Dig. ⟸92(1).]

At Law. Action by Mary Carson Kidd against Thomas A. Edison, Incorporated. On defendant's motion to set aside, on exceptions, a verdict for plaintiff. Motion denied.

This is a motion by the defendant to set aside a verdict for the plaintiff on exceptions. The action was in contract, and depended upon the authority of one Fuller to make a contract with the plaintiff, engaging her without condition to sing for the defendant in a series of "tone test" recitals, designed to show the accuracy with which her voice was reproduced by the defendant's records. The defendant contended that Fuller's only authority was to engage the plaintiff for such recitals as he could later persuade dealers in the records to book her for all over the United States. The dealers, the defendant said, were to agree to pay her for the recitals, and the defendant would then guar-

antee her the dealers' performance. The plaintiff said the contract was an unconditional engagement for a singing tour, and the jury so found.

The sole exception of consequence was whether there was either any question of fact involved in Fuller's authority, or a fortiori whether there was no evidence of any authority. In either event the charge was erroneous, and the defendant's exception was good. The pertinent testimony was that of Maxwell, and was as follows: He intrusted to Fuller particularly the matters connected with the arranging of these "tone test" recitals. He told him to learn from the artists what fees they would expect, and to tell them that the defendant would pay the railroad fares and expenses. He also told Fuller to explain to them that the defendant would book them, and act as booking agent for them, and would see that the money was paid by the dealers; in fact, the defendant would itself pay it. He told him to prepare a form of contract suitable for such an arrangement with such artists as he succeeded in getting to go into it, and that he (Maxwell) would prepare a form of booking contract with the dealers. He told him to prepare a written contract with the artists and submit it to him (Maxwell), which he did. He told him that he was himself to make the contracts with the artists by which they were to be booked, that he was not to bring them to him (Maxwell), but that he should learn what fees they would demand, and then confirm the oral agreement by a letter, which would serve as a contract.

This is all the relevant testimony.

Joseph M. Hartfield, of New York City, for plaintiff.
Herman S. Hertwig, of New York City, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). [1] The point involved is the scope of Fuller's "apparent authority," as distinct from the actual authority limited by the instructions which Maxwell gave him. The phrase "apparent authority," though it occurs repeatedly in the Reports, has been often criticized (Mechem, Law of Agency, §§ 720–726), and its use is by no means free from ambiguity. The scope of any authority must, of course, in the first place, be measured, not alone by the words in which it is created, but by the whole setting in which those words are used, including the customary powers of such agents. Lowenstein v. Lombard, Ayres & Co., 164 N. Y. 324, 58 N. E. 44; Lamon v. Speer Hardware Co., 198 Fed. 453, 119 C. C. A. 1. This is, however, no more than to regard the whole of the communication between the principal and agent before assigning its meaning, and does not differ in method from any other interpretation of verbal acts. In considering what was Fuller's actual implied authority by custom, while it is fair to remember that the "tone test" recitals were new, in the sense that no one had ever before employed singers for just this purpose of comparing their voices with their mechanical reproduction, they were not new merely as musical recitals; for it was, of course, a common thing to engage singers for such recitals. When, therefore, an agent is selected, as was Fuller, to engage singers for musical recitals, the customary implication would seem to have been that his authority was without limitation of the kind here imposed, which was unheard of in the circumstances. The mere fact that the purpose of the recitals was advertisement, instead of entrance fees, gave no intimation to a singer dealing with him that the defendant's promise would be conditional upon so unusual a condition as that actually imposed. Being concerned to sell its records, the venture might rightly be regarded as undertaken on its own account, and, like similar enterprises, at its own cost. The natural surmise would cer-

tainly be that such an undertaking was a part of the advertising expenses of the business, and that therefore Fuller might engage singers upon similar terms to those upon which singers for recitals are generally engaged, where the manager expects a profit, direct or indirect.

[2] Therefore it is enough for the decision to say that the customary extent of such an authority as was actually conferred comprised such a contract. If estoppel be, therefore, the basis of all "apparent authority," it existed here. Yet the argument involves a misunderstanding of the true significance of the doctrine, both historically (Responsibility for Tortious Acts: Its History, Wigmore, 7 Harv. L. Rev. 315, 383) and actually. The responsibility of a master for his servant's act is not at bottom a matter of consent to the express act, or of an estoppel to deny that consent, but it is a survival from ideas of status, and the imputed responsibility congenial to earlier times, preserved now from motives of policy. While we have substituted for the archaic status a test based upon consent, i. e., the general scope of the business, within that sphere the master is held by principles quite independent of his actual consent, and indeed in the face of his own instructions. Of federal cases the following are illustrative: Insurance Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617; Insurance Co. v. McCain, 96 U. S. 84, 24 L. Ed. 653; Gt. Northern Ry. v. O'Connor, 232 U. S. 508, 34 Sup. Ct. 380, 58 L. Ed. 703; Butler v. Maples, 9 Wall. 766, 19 L. Ed. 822 (obiter); Dysart v. M., K. & T. Ry., 122 Fed. 228, 58 C. C. A. 592; Lamon v. Speer Hardware Co., 198 Fed. 453, 119 C. C. A. 1; Foster v. C., C., C. & St. L. Ry. Co. (C. C.) 56 Fed. 434. These were, it is true, all cases in which the third person took some action upon the faith of the agent's authority, and it is possible to speak of them as though they were cases of estoppel, but in truth they are not. It is only a fiction to say that the principal is estopped, when he has not communicated with the third person and thus misled him. There are, indeed, the cases of customary authority, which perhaps come within the range of a true estoppel; but in other cases the principal may properly say that the authority which he delegated must be judged by his directions, taken together, and that it is unfair to charge him with misleading the public, because his agent, in executing that authority, has neither observed, nor communicated, an important part of them. Certainly it begs the question to assume that the principal has authorized his agent to communicate a part of his authority and not to disclose the rest. Hence, even in contract, there are many cases in which the principle of estoppel is a factitious effort to impose the rationale of a later time upon archaic ideas, which, it is true, owe their survival to convenience, but to a very different from the putative convenience attributed to them.

However it may be of contracts, all color of plausibility falls away in the case of torts, where indeed the doctrine first arose, and where it still thrives. It makes no difference that the agent may be disregarding his principal's directions, secret or otherwise, so long as he continues in that larger field measured by the general scope of the business intrusted to his care. Blumenthal v. Shaw, 77 Fed. 954, 23 C. C. A. 590; Palmeri v. Manhattan Railroad, 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632; Quinn v. Power, 87 N. Y. 535, 41 Am. Rep. 392.

The considerations which have made the rule survive are apparent. If a man select another to act for him with some discretion, he has by that fact vouched to some extent for his reliability. While it may not be fair to impose upon him the results of a total departure from the general subject of his confidence, the detailed execution of his mandate stands on a different footing. The very purpose of delegated authority is to avoid constant recourse by third persons to the principal, which would be a corollary of denying the agent any latitude beyond his exact instructions. Once a third person has assured himself widely of the character of the agent's mandate, the very purpose of the relation demands the possibility of the principal's being bound through the agent's minor deviations. Thus, as so often happens, archaic ideas continue to serve good, though novel, purposes.

In the case at bar there was no question of fact for the jury touching the scope of Fuller's authority. His general business covered the whole tone test recitals; upon him was charged the duty of doing everything necessary in the premises, without recourse to Maxwell or any one else. It would certainly have been quite contrary to the expectations of the defendant, if any of the prospective performers at the recitals had insisted upon verifying directly with Maxwell the terms of her contract. It was precisely to delegate such negotiations to a competent substitute that they chose Fuller at all.

The exception is without merit; the motion is denied.

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## KOHLHAMER et al. v. SMIETANKA, Internal Revenue Collector.

(District Court, N. D. Illinois, E. D. January 31, 1917.)

No. 803.

1. EQUITY ⇐66—DOING EQUITY.

One seeking to enjoin collection of penalties for nonpayment of internal revenue taxes has not, as is required of one seeking equity, done equity, not having paid or tendered the taxes admitted to be due.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 188–190; Dec. Dig. ⇐66.]

2. INJUNCTION ⇐19—PREVENTION OF MULTIPLICITY OF SUITS.

The court is not justified in taking jurisdiction of an injunction suit, on the ground of avoiding a multiplicity of suits, because of the many persons of the class represented by plaintiffs, where, at most, so far as appears, there are but two entitled to relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 18; Dec. Dig. ⇐19.]

3. INTERNAL REVENUE ⇐45—PENALTIES—ENJOINING COLLECTION.

Rev. St. § 3224 (Comp. St. 1913, § 5947), prohibiting suit to enjoin collection of any tax, applies to the penalty which Act Oct. 22, 1914, c. 331, 38 Stat. 764, to increase internal revenue, by section 23 provides shall be assessed and collected as other penalties incurred under internal revenue laws are assessed and collected; Rev. St. § 3176 (Comp. St. 1913, § 5899), one of the administrative provisions of law by reference made part of the act, providing that the amount fixed as a penalty shall be added to the tax and collected as part of it.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 109–113; Dec. Dig. ⇐45.]

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4. INTERNAL REVENUE ⊂=45—ASSESSMENT OF PENALTIES.
Under section 23 of Act Oct. 22, 1914, to increase internal revenue, declaring part of such act all administrative provisions of law, including that relating to assessment of taxes, the internal revenue collector has authority under Rev. St. § 3182 (Comp. St. 1913, § 5904), to make assessment of penalties arising out of the act.
[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 109–113; Dec. Dig. ⊂=45.]

5. INTERNAL REVENUE ⊂=45—PENALTIES—RELIEF FROM.
One is not relieved from the penalty provided by section 23 of Act Oct. 22, 1914, to increase internal revenue, for failure to pay the tax, by section 22, making his default, when accompanied by criminal intent, a misdemeanor.
[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 109–113; Dec. Dig. ⊂=45.]

In Equity. Suit by Robert W. Kohlhamer and others against Julius F. Smietanka, Internal Revenue Collector. Temporary restraining order denied.

Henry S. Robbins, of Chicago, Ill., for complainants.
Charles F. Clyne, U. S. Atty., and Joseph B. Fleming, Asst. U. S. Atty., both of Chicago, Ill., for defendant.

EVANS, Acting District Judge. Plaintiffs seek to restrain defendant, the United States Collector of Internal Revenue for the district in which Chicago is located, from proceeding to collect from them, by distraint, large sums of money as penalties for failures to pay the stamp tax on sales, agreements to sell, and agreements of sale, imposed by section 22 of the act to increase the internal revenue, enacted October 22, 1914 (38 Stat. 759, c. 331). In support of their prayer for relief, plaintiffs showed that defendant, in his official capacity, was seeking to collect the 200 per cent. penalty provided by section 23 of the act, and that notices and demands had been served upon plaintiffs, of which the following is illustrative:

Form 17.

| | |
|---|---|
| Tax ..... | $ 4,313.65 |
| 200% penalty | 8,313.30 |
| | $12,940.95 |

United States Internal Revenue.
F. C. Jan. 13–16.

Regular Tax.

Notice and Demand for Tax Assessed.

List for month of Sept. 1916.
.....Division.

United States Internal Revenue.
Office of the Collector,
First District of Illinois.

Nov. 17, 1916.

To Wm. K. Copenhaver, 69 Board of Trade:
You are hereby notified that a tax, under the internal revenue laws of the United States, amounting to $12,940.95, the same being a tax upon S. T. on sales for the period ending 1916, has been assessed against you by the Commissioner of Internal Revenue and transmitted by him to me for collection.

Demand is here made for this tax, which is due and payable to the person designated below on or before November 27, 1916, such payment to be made in the manner set forth on the reverse side of this notice and demand. If this tax is not in my hands for deposit before the close of business on the day above specified, it will be my duty, under the law, to collect the same together with five per centum additional, and interest at one per centum per month until paid.

Payment may be made to Julius F. Smietanka, Collector of Internal Revenue, 426 Federal Building, Chicago.

As to one of the plaintiffs the bill alleges that he is—

"willing to accept as a proper tax and willing to pay said sum of $4,313.65, but said complainant has not paid same because the defendant insists also upon the payment of a further sum of $8,627.30 as a penalty," etc.

The defendant, by means of affidavits, asserted that the plaintiffs and many other members of the Board of Trade collected large sums of money from customers for taxes necessarily required in the consummation of certain transactions, but that the moneys collected from the customers were retained by the brokers; that the government discovered the failure of the brokers to pay the stamp tax on such transactions in August, 1916, and that the penalties, the collection of which plaintiffs seek to restrain by this action, were imposed partly by reason of this failure to thus turn over the moneys as collected. Section 23 of the act reads as follows:

"That all administrative, special, or stamp provisions of law, *including the law relating to the assessment of taxes*, so far as applicable, are hereby extended to and made a part of this act, and every person, firm, company, corporation, or association liable to any tax imposed by this act, or for the collection thereof, *shall keep such records and render, under oath*, such statements and returns, and shall comply with such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may from time to time prescribe, and every such person, firm, company, corporation or association who evades or attempts to evade any of the taxes imposed by this act, or shall fail to truly account for and pay all taxes collected by them under this act, or any regulations issued thereunder, shall be subject to a penalty of double the amount of the taxes evaded or attempted to be evaded or unlawfully withheld, to be assessed and *collected as other penalties incurred under internal-revenue laws are assessed and collected*, and for * * * expense connected with the assessment and collection of the taxes provided by this act there is hereby appropriated $200,000," etc.

Defendant alleged that his examination of the business conducted on the Board of Trade showed that a large number of the members of this particular class, other than plaintiffs, had not paid taxes when due upon transactions which were admittedly subject to a tax, and that in many of the cases investigated members had retained the money collected from customers for the purpose of paying stamp taxes. In justice to many members of the Board of Trade it should be said that the last statement in the foregoing paragraph applied only to a part of the membership, and that this action to restrain the collection of penalties was by only a part of the total membership.

The foregoing facts prevent plaintiffs from squarely presenting the question which their counsel ably argued.

[1, 2] The intervention of a court of equity is sought to avoid a multiplicity of suits. It appears, however, that the class for which

the plaintiffs attempt to act are not all similarly situated. In fact, the plaintiffs named in this act, four in number, are not in the same position so far as their right to invoke the jurisdiction of a court of equity is concerned. Certainly one, and probably two, of the four plaintiffs, have no standing in a court of equity. Asking relief of a court of equity, the plaintiff must come with clean hands. Seeking equity, he must do equity. Having admitted that he has failed to pay the government a tax past due, one of the plaintiffs must be denied the relief here sought. People's Bank v. Marye, 191 U. S. 272, 282, 24 Sup. Ct. 68, 48 L. Ed. 180; Supervisors v. Stanley, 105 U. S. 305, 26 L. Ed. 1044; National Bank v. Kimball, 103 U. S. 732, 26 L. Ed. 469.

The Supreme Court in State Bank R. R. Tax Cases, 92 U. S. 616, 23 L. Ed. 663, said:

"Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them. * * * It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed."

It appears that another plaintiff has collected money from customers for the purchase of revenue stamps, which he now witholds, while the government asserts, under the oath of one of its officers, that all plaintiffs and all members of the class for which plaintiffs assume to speak, have thus far failed to pay all of the taxes properly chargeable against them. Eliminating those who must be denied all relief, it is impossible to determine whether there remain a sufficient number, so similarly situated as to justify the court in taking jurisdiction in order to avoid a multiplicity of suits. Certainly the court is not warranted in acting on this ground, when but two parties only are entitled to relief.

[3, 4] The defendant further contends that section 3224, R. S. (Comp. St. 1913, § 5947), prevents this court from enjoining the assessment and collection of the penalties in question. Section 3224 reads as follows:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

Plaintiffs deny the application of this section to the case at bar, supporting their argument by the decision in Bornio v. Stockdale, Fed. Cas. No. 1662; the contention being that a proceeding to collect a *penalty* is not a proceeding to "assess or collect a tax." An examination of the many cases bearing upon this question, the last being Dodge v. Osborn, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. Ed. 557, convinces the court that Congress intended to deny all relief by injunction to taxpayers who felt aggrieved by the act of officers intrusted by the government with the duty of determining and collecting taxes—general, special, or

stamp taxes. The remedy to recover back a tax after it has been paid was provided by Congress as the exclusive remedy. Congress, by this section, sought to avoid delays in collecting its revenue which, if unavoided, would interfere with the administration of governmental affairs.

In the case of Calkins et al. v. Smietanka, as U. S. Collector of Internal Revenue, et al. (this day decided) 240 Fed. 138, this court concluded that under section 3182, R. S. (Comp. St. 1913, § 5904), the Internal Revenue Collector had authority to make assessments of all taxes due and arising under the act to increase the internal revenue, enacted October 22, 1914. For the reasons stated in this opinion, it follows that the same officer has authority to make assessments of penalties arising out of the same act. In the same opinion this court held that section 3224, R. S., prevented a court from enjoining the Internal Revenue Collector from collecting such a tax or making an assessment of the tax. It follows, therefore, that unless the assessment of a penalty stands upon a different basis from the assessment of a tax, the plaintiffs must be denied relief by virtue of this section.

While it is true that section 3224 does not specifically include "penalties" as such, those here sought to be collected are such an integral part of the tax and so interwoven into the tax as to be a part of it. Section 3176, R. S. (Comp. St. 1913, § 5899), being one of the administrative sections referred to in section 23 of the act under consideration, provides that the amount fixed as a penalty shall be "added to the tax," and "collected at the same time and in the same manner," *and as a part of the tax*, etc.

Section 410 of the Act of September 8, 1916 (39 Stat. 792, c. 463), which repeals nearly all of the act of October 22, 1914, provides that the provisions of said act (referring to the act of 1914) "shall remain in force, * * * for the imposition and collection of all penalties or forfeitures which have accrued or may accrue in relation to any of such taxes." Of what did Congress speak when it referred to the provisions for the imposition and collection of penalties? Obviously to section 23, which provides that:

"Every such person, * * * who evades or attempts to evade any of the taxes imposed by this act, * * * shall be subject to a penalty of double the amount of the taxes evaded, * * * *to be assessed and collected as other penalties incurred under the internal revenue laws are assessed and collected.*"

Construing these sections with the general administrative act, a portion of which is quoted above, taken from section 3176, R. S., the court concludes that the penalty in the present case is a part of the tax, the assessment and collection of which are governed by section 3224.

[5] Plaintiffs further contend that, in reference to the particular tax under consideration, section 23 of the act of 1914 does not apply. In other words, it is claimed Congress did not provide for the imposition of a penalty for failure to pay the tax, but instead made the default a misdemeanor punishable by fine and imprisonment. But provision for punishment by fine and possible imprisonment for failure

to promptly pay a tax will not relieve plaintiff from the payment of the tax. United States v. Stevenson, 215 U. S. 191, 30 Sup. Ct. 35, 54 L. Ed. 153.

Again, from an examination of the two sections it appears that penalties are imposed for failure to pay the tax. But the failure to pay the tax does not make the offender guilty of a misdemeanor, unless the defaulting party acts "with intent to evade" the act.

The court concludes that the plaintiffs are not relieved from the penalty provided by section 23 of the act, because of the provision in section 22 which makes their default, when accompanied by criminal intent, a misdemeanor.

Plaintiffs' application for a temporary restraining order must be denied, and the order heretofore entered must be vacated.

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## In re SALMON.

## Ex parte SALMON.

(District Court, S. D. New York. November 29, 1916.)

1. LIMITATION OF ACTIONS ⟸163(1)—PAYMENT ON BARRED DEBT.

A payment, if clearly intended to be made on an outlawed debt, as where there was no other debt, is sufficient, as between the parties, to take it out of the statute, without any further acknowledgment from which a new promise may be inferred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 642; Dec. Dig. ⟸163(1).]

2. BANKRUPTCY ⟸178(2)—PAYMENT ON BARRED DEBT—VOID "INCUMBRANCE."

The promise arising from payment on an outlawed debt by one knowing of his inevitable insolvency, defeating the defense of limitations, a valuable right, which will pass to his creditors, is an "incumbrance," within Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (Comp. St. 1913, § 9651), declaring void against creditors incumbrances of property by one within four months prior to bankruptcy proceedings, with intent to defraud his creditors, or any of them; his intent arising from his knowledge of the conditions, and knowledge by the holder of the debt not being necessary.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 267, 269, 270; Dec. Dig. ⟸178(2).

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

In Bankruptcy. In the matter of Charles Salmon, bankrupt. From an order of the referee expunging his claim, Hamilton H. Salmon, executor, appeals. Affirmed.

This is an appeal from an order of a referee in bankruptcy expunging the claim of Hamilton H. Salmon, as executor of Hamilton H. Salmon, deceased, in the sum of $25,295.66, with interest of $34.771.88, making $60,067.54, which claim was filed against the estate of the bankrupt for moneys lent from time to time between March 1, 1890, and May 18, 1896. Payments were made upon this claim, also, from time to time; the last payment being on June 3, 1896, for $175. On January 27, 1916, the day before the petition in bankruptcy was filed against the bankrupt, he came to the office of the claimant, who was his brother, and brought with him a note for $123.09, in his own favor, executed

by Bernstein & Co., and indorsed by him. This note he delivered to the claimant, and asked that he put it to his credit, adding that he was having a hard time to finance himself. The claimant had repeatedly asked the bankrupt for payment when he saw him, but never had received anything between the dates in question. The claimant is willing to restore the payment received on account, but wishes the claim allowed. The referee expunged the claim because the payment was not sufficient to toll the statute of limitations.

Williams, Folsom & Strouse, of New York City, for claimant.
Blau, Zalkin & Cohen, of New York City, for trustee.

LEARNED HAND, District Judge. [1] The payment was certainly enough to take the case out of the statute as between the bankrupt and Hamilton H. Salmon. It makes no difference that the debt was barred (Brooklyn Bank v. Barnaby, 197 N. Y. 210, 90 N. E. 834, 27 L. R. A. [N. S.] 843), so long as the payment was certainly intended to be applied to the debt (Lawrence v. Harrington, 122 N. Y. 408, 25 N. E. 406). The language cited by the referee was originally taken from Crow v. Gleason, 141 N. Y. 489, 493, 36 N. E. 497, where it was in place because there was no evidence that the payment was intended to apply to the debt; but it must not be understood as holding that any payment, if intended to apply upon the debt, is not an adequate acknowledgment from which the new promise may be inferred. The only proper question is whether the payment was clearly intended to apply upon the debt; the rest follows as of course. Harper v. Fairley, 53 N. Y. 442, 444; Jefferson County Bk. v. Dewey, 181 N. Y. 98, 106, 73 N. E. 569. As there was no other debt between the parties, and as the bankrupt asked to have the note applied to his credit, there can be no possible question that he intended to make a part payment.

[2] The question is whether this effect is different, in view of the bankrupt's impending insolvency and his knowledge of that fact, which is not disputed. Taken merely as a payment on the debt, the situation may be thought to be the familiar one of a preference, and it may be right to say that, unless the creditor knew of the insolvency, the payment will stand, though that question is not up for decision, and is not itself free from difficulty. But the important aspect here is the new promise which is inferred from the payment. Was that feature affected by the insolvency of the bankrupt? I have found only two cases dealing with the question—In re Banks (D. C.) 207 Fed. 662, 665, in which Judge Ray makes the question turn upon the creditor's knowledge of the insolvency, there having been a payment; and In re Blankenship (D. C.) 220 Fed. 395, where Judge Bledsoe allowed a written acknowledgment to revive the debt, the creditor being ignorant of the bankrupt's financial condition.

I cannot agree that a bankrupt, finding himself in a desperate financial position, may revive an outlawed claim by a written acknowledgment or a part payment. If the situation is looked at without the usual fiction, such an act creates anew the obligation quite as much as though the bankrupt on the eve of bankruptcy were to execute a bond without consideration in a jurisdiction where no consideration is necessary to support a bond. The result is no different if the usual fiction is accepted under which the payment is taken as evidence of a new promise to

pay the indebtedness. Under that theory it still remains equally true, as in the case of a bond, that the new promise alone recreates the obligation. Such a promise seems to me to fall within the term "incumbrance" in section 67e of the Bankruptcy Act, and within the word "charge" of section 35 of the New York Personal Property Law (Consol. Laws, c. 41). By it alone the assets of the bankruptcy are charged with an obligation which was either nonexistent before, or against which there was a valid defense, it makes no difference which.

Such being the result of the payment, the only remaining question is of intent. That the payment results in diminishing the fund available to other creditors is obvious, since by hypothesis the debtor who is insolvent, receives no new consideration. If, in addition, he knows of his inevitable insolvency, he knows that this result must follow, and he intends it, though it may not be his actuating motive. But it is argued that, though the payment defeats pro tanto his other creditors, it is only for the benefit of another creditor, who should be still recognized as such in spite of his debt's being subject to a complete defense.

Yet, even if one preserves the most orthodox theory and regards the debt as still existing, subject to its defense, a theory full of vicious casuistry, the defense to the debt still remains a valuable right, which will pass to the bankrupt's creditors. The whole presupposition of the rules against fraudulent conveyances is that from the time a debtor knows that he is insolvent he holds all his property subject to the interests of his creditors. While he may continue its management in the genuine interest of both them and himself, he loses all right to diminish its value to them. Certainly there is no reason why his disability should not extend to the destruction of any defense he may have to an otherwise valid claim. It is true that the defense of the statute of limitations has at times been called unconscionable; but that view does not now prevail, nor is there the least reason in policy why it should. The case at bar is a good instance of the injustice of treating the defense of the statute as different from any other defense, since a debt like this, outlawed by more than three times the statutory period, cannot in the nature of things have been expected by the parties to continue as an obligation with the usual coercive sanctions. By the time of the bankruptcy it was certainly meant only as a moral obligation, and it would be highly unjust now to allow it by a mere device to reassume its place among other debts which were supposed to have all the sanctions of law.

In this aspect it is unnecessary to consider whether or not the creditor, Hamilton H. Salmon, was put on inquiry as to the bankrupt's insolvency, the distinction taken in Re Banks, supra, because the question is only whether the bankrupt may gratuitously destroy a part of his estate, i. e., a valid defense, in the interest of a third person, and to the prejudice of his creditors. The case is analogous to a voluntary transfer in fraud of creditors, where it is never necessary to show that the transferee had notice. Young v. Heermans, 66 N. Y. 374, Beecher v. Clark, 12 Blatchf. 256, Fed. Cas. No. 1,223.

The order is affirmed, and the petition dismissed.

## In re MALLARI.

(District Court, D. Massachusetts. October 30, 1916.)

No. 6778.

1. ALIENS ⊜61—CITIZENSHIP—ALL PERSONS—PHILIPPINE ISLANDERS.
Naturalization Law (Act June 29, 1906, c. 3592) § 30, 34 Stat. 606 (Comp. St. 1913, § 4366), authorizes the admission to citizenship of all persons, not citizens, who owe permanent allegiance to the United States, and who may become permanent residents of any organized territory of the United States. Rev. St. § 2169 (Comp. St. 1913, § 4358), which originally formed a part of Naturalization Act July 14, 1870, c. 254, § 7, 16 Stat. 256, as amended by Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 318, provides that the provisions of the title shall apply to aliens who are free white persons and to aliens of African nativity and persons of African descent. The purpose of section 30, as shown by the congressional records, was to open American citizenship to citizens of Porto Rico and the Philippines, which were acquired as a result of the Spanish-American War, there being no way in which residents of such territory, whatever their race, could be admitted to citizenship in the United States, because they were not aliens. *Held* that, as section 30 declares that it shall apply to all persons, it includes residents of the new possessions who are neither white persons nor of African nativity or descent; the restrictions in section 2169 obviously being intended to apply only to aliens.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119–122; Dec. Dig. ⊜61.]

2. ALIENS ⊜68—CITIZENSHIP—PROCEEDINGS.
Act July 26, 1894, c. 165, 28 Stat. 123 (Comp. St. 1913, § 4356), relating to the admission to citizenship of aliens honorably discharged from service in the navy without the required declaration of intention and residence, does not apply to a citizen of the Philippine Islands who served in the navy and was honorably discharged; such person being entitled to apply for naturalization only under Naturalization Law, § 30 (Act June 29, 1906), the requirement of which as to declaration of intention and residence must be complied with.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⊜68.]

In the matter of the petition of Francisco Mallari for naturalization. Petition denied.

George W. Anderson, U. S. Atty., of Boston, Mass.
James Farrell, Chief Naturalization Examiner for New England, of Boston, Mass.

MORTON, District Judge. The petitioner is a native of the Philippine Islands. Both his father and mother were Filipinos. He is a citizen of the Philippine Islands and resided there until he enlisted in the United States navy. He is not a "white person" nor of African nativity or descent. The principal question is whether he can be admitted to citizenship in the United States.

[1] The answer to this question depends upon whether section 30 of the Naturalization Laws (Act June 29, 1906, 34 Stat. 598) is re-

stricted by the provision of R. S. § 2169, to free white persons or persons of African nativity or descent. Section 30 provides in substance that:

"All the applicable provisions of the naturalization laws * * * shall apply to and be held to authorize the admission to citizenship of *all persons* [italics mine], not citizens, who owe permanent allegiance to the United States and who may become residents of any * * * organized territory of the United States."

It is required of such persons that they shall make a declaration of intention to become a citizen at least two years prior to admission and must have resided within the jurisdiction of the United States owing such permanent allegiance for five years.

The act of which section 30 forms part was obviously intended to cover fully the subject of naturalization. It repealed various sections of the Revised Statutes; but it did not repeal section 2169, which originally formed part of the naturalization act of 1870 as amended in 1875, and which provides that:

"The provisions of this title shall apply to *aliens* [italics mine] being free white persons and to aliens of African nativity, and to persons of African descent."

Until the passage of section 30, supra, only persons described in section 2169 could be naturalized.

The history of section 30 is, broadly speaking, as follows: As a result of the Spanish-American War, the United States acquired certain territory, the inhabitants of which were held to be neither aliens nor citizens of the United States. There was then no way in which such persons, whatever their race, could be admitted to citizenship here, because they were not "aliens"; and section 2169 extended the benefit of our naturalization laws only to aliens. This left a large class of persons, of various races, who owed allegiance to the United States, but who were incapable of obtaining citizenship here, and were more unfavorably treated by our laws than aliens from foreign countries. To meet this situation section 30, supra, was passed. It originated in an amendment offered by Senator Foraker when the bill (H. R. 15442) was under discussion in the Senate. (See Congressional Record, vol. 40, pt. 10, p. 9359, June 27, 1906.) It was then stated by Senator Foraker that this amendment had special reference to Porto Rico and the Philippine Islands. The discussion in the Senate clearly shows that that was the understanding which the Senate had of it. (For the legislative history of the bill, see Congressional Record, same volume, pp. 9360, 9381, 9407, 9505, 9576, 9680, 9691, 9777, and 9807.) In offering the amendment Senator Foraker stated that it had been passed by the Senate of the preceding Congress (the 58th); and there is an interesting discussion of it in Congressional Record, vol. 38, pt. 2, p. 1254 et seq. (See, too, Id. pp. 1657, 1754, and 1880.) The point now under consideration seems not to have been clearly brought to the attention of Congress. In the 59th Congress Senator Lodge presented a report entitled "Naturalization of Residents of the Philippine Islands," etc. (59th Congress, First Session, Senate Document

336); but the provision of the bill then under consideration—which was not passed—was so different on the point under discussion as not to throw much light on the present question.

The congressional debates on the matter may, I think, be fairly summarized by the statement that Congress evidently had clearly in mind to open American citizenship to citizens of Porto Rico and of the Philippine Islands, and did not have in mind any limitation on that right based on race or nativity, nor any distinction between citizens of those dependencies in respect to their right to become citizens of the United States. The language of section 30, "all persons," etc., is plainly broad enough to include the petitioner. It may well be that Congress would think it wise to impose certain limitations of race or nativity on the right of aliens to become citizens, which it would not think proper to impose on persons already owing allegiance to the United States and citizens of its dependencies. It seems to me that section 2169, relating as it does wholly to aliens, is not one of the "applicable provisions of the naturalization laws" referred to in section 30, relating only to non-aliens, and that its racial restrictions apply only to aliens, and not to the persons specified in section 30.

It follows that upon a showing of residence, as prescribed in section 30, the petitioner would be entitled to admission to citizenship here. This conclusion is in accord with the opinion of Attorney General Bonaparte (27 Op. Atty. Gen. 12), with In re Monico Lopez (Supreme Court, District of Columbia, December 13, 1915), and with the position taken by the Department of Justice in advising the Bureau of Naturalization. (See letter of Mr. Davis, Solicitor General, to Secretary of Labor, Jan. 4, 1916.) In Re Alverto (D. C.) 198 Fed. 688, a different interpretation was placed upon the statute in question; but the actual result in that case may be supported on other grounds.

[2] The petitioner does not, however, attempt to show compliance with the provisions of section 30 in reference to declaration of intention and residence. He bases his petition on the act of July 26, 1894, relating to "aliens honorably discharged from service in the navy," which does not require such declaration or residence. This act was passed before section 30, supra. Section 30 extends to the persons included therein all applicable provisions of the naturalization laws as they then stood in 1906; but, upon the persons so reached, it imposes its own conditions, which they must meet in order to avail themselves of its benefits. For these reasons the present petition must be denied.

## In re CRISP.

(District Court, E. D. Tennessee, N. D. February 5, 1917.)

No. 1787.

1. BANKRUPTCY ⟸475—VOLUNTARY PROCEEDINGS—OATH OF POVERTY—COST OF PUBLICATION.

Bankr. Act July 1, 1898, c. 541, § 51a (2), 30 Stat. 558 (Comp. St. 1913, § 9635), authorizing a petition in voluntary bankruptcy to be filed without the prepayment of the filing fees, when accompanied by the petitioner's affidavit that he is without, and cannot obtain, the money to pay such fees, relates only to the statutory fees of the officers as compensation for their services, not to expenses incurred by them, and such oath does not relieve a petitioner from his obligation under General Order in Bankruptcy No. 10 (89 Fed. vi, 32 C. C. A. vi) to furnish indemnity, when required, to enable the requisite notice to creditors to be published.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 885; Dec. Dig. ⟸475.]

2. BANKRUPTCY ⟸475—VOLUNTARY PROCEEDINGS—DISMISSAL—WANT OF PROSECUTION.

Where a petitioner in voluntary bankruptcy, without excuse or mischance appearing, fails to indemnify the referee, when required, for the cost of publishing notice to creditors in time to enable such notice to be published and the meeting held, his petition may be and should be dismissed for want of prosecution.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 885; Dec. Dig. ⟸475.]

3. BANKRUPTCY ⟸475—VOLUNTARY PROCEEDINGS—DISMISSAL—STATUTES—NOTICE.

The provisions of Bankr. Act July 1, 1898, c. 541, §§ 58a, 59g, 30 Stat. 561, as amended by Act June 25, 1910, c. 412, §§ 9½, 10, 36 Stat. 841 (Comp. St. 1913, §§ 9642, 9643), that no application for the dismissal of a voluntary or involuntary petition in bankruptcy shall be entertained until 10 days' notice has been sent to creditors of the proposed dismissal, relate only to dismissals on application of a party in interest, and do not apply to the dismissal of a voluntary petition on initiation of the court for the bankrupt's failure to take the preliminary steps necessary to bring the creditors before the court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 885; Dec. Dig. ⟸475.]

In Bankruptcy. In the matter of the voluntary proceedings of Frederick Ambrose Crisp, bankrupt. On referee's certificate recommending that the petition be dismissed for want of prosecution. Petition dismissed.

G. H. Mynatt, of Knoxville, Tenn., for bankrupt.
W. J. Donaldson, of Knoxville, Tenn., pro se.

SANFORD, District Judge. The referee, on January 25, 1917, filed a certificate showing, in substance: that Crisp, on November 23, 1916, filed his voluntary petition in bankruptcy, accompanied by an affidavit of poverty and without prepayment of the statutory filing fees,

and was adjudged a bankrupt on November 24, 1916; that his schedules disclosed no assets out of which any expenses of the proceeding may be paid; that, there being no funds out of which to pay the expense of publishing notice of the first meeting of creditors required by section 58b of the Bankruptcy Act, the referee, to whom the case had been referred, and who was required to give such notice under section 58c of the Bankruptcy Act, forthwith made demand on the bankrupt for indemnity against such expense, with notice that in default thereof, recommendation would be made that the petition be dismissed; that notwithstanding this and a subsequent demand on the bankrupt for such indemnity, he has failed to furnish the same; that the thirty days within which section 55a of the Bankruptcy Act requires the first meeting of creditors to be held, except in case of mischance, has long since expired; and that as no action has or can be taken in the matter, the proceeding has reduced itself to a frivolous and vexatious state: and he therefore recommends that an order be made dismissing the bankrupt's voluntary petition herein. Due notice of this certificate has been given to the bankrupt, who has not appeared in opposition thereto, either in person or by attorney, or shown any mischance or other excuse for failing to furnish the required indemnity, or made any application for an extension of time therefor.

[1, 2] Section 51 a (2) of the Bankruptcy Act, which authorizes a petition in voluntary bankruptcy to be filed without prepayment of the fees of the clerk, referee and trustee, commonly called the filing fees, when accompanied by the petitioner's affidavit that he is without, and cannot obtain, the money to pay such fees, relates only to the statutory fees to be paid to the clerk, referee and trustee as compensation for their services, and has no reference to the expenses incurred by the officers of the court in the bankruptcy proceedings. In re Matthews (D. C.) 97 Fed. 772. And see In re City Contracting Co. (D. C. Hawaii) 30 Am. Bankr. Rep. 133, 150. By the 10th General Order in Bankruptcy (89 Fed. vi, 32 C. C. A. vi) it is specifically provided that before incurring any expense in publishing or mailing notices, traveling, procuring the attendance of witnesses, or perpetuating testimony, the clerk, marshal or referee may require, from the bankrupt or other person in whose behalf the duty is to be performed, indemnity for such expense; and that the money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administration. It is, in view of these provisions, entirely clear that the filing by a voluntary bankrupt, under section 51 of the Bankruptcy Act, of the oath of poverty in lieu of the prepayment of the statutory filing fees, does not relieve him from the obligation, under the 10th General Order, of furnishing indemnity, when required, before the referee incurs any expense in publishing or mailing notices of the first meeting of creditors. And clearly, where such bankrupt, without excuse or mischance appearing, fails to indemnify the referee, when required, within such time as will enable the requisite notice to creditors to be published and mailed, the first meeting of creditors held, and the administration of the estate proceeded with,

his petition in bankruptcy may, and in my opinion should, be dismissed for want of prosecution. See Buck v. Felder (D. C. Tenn.) 208 Fed. 474, and the cases therein cited as to the authority of a court of equity to dismiss a cause for want of prosecution; and In re Jones (D. C. Tenn.) 209 Fed. 717, and the cases therein cited, as to the conduct of proceedings in bankruptcy in accordance with the practice in equity.

[3] It is furthermore clear that the provisions of sections 58a and 59g of the Bankruptcy Act, as amended by sections 9½ and 10 of the Act of June 25, 1910, c. 412, 36 Stat. 838, that no application for the dismissal of a voluntary or involuntary petition shall be entertained until ten days notice has been sent to creditors of the proposed dismissal, when read together, relate only to dismissals upon application of a party in interest, and do not apply to the dismissal of a voluntary petition, upon the initiation of the court, and for the protection of its officers from the continuance of merely futile proceedings, on account of the bankrupt's own failure to take the preliminary steps necessary to bring the creditors before the court. See, by analogy, clause 4 of the 35th General Order in Bankruptcy (89 Fed. xiv, 32 C. C. A. xiv), providing for the dismissal of such petition, at any time, "after notice to the bankrupt," for failure to obey an order requiring him to pay statutory filing fees that he then has or can obtain, which makes no provision for notice to creditors in such case.

A decree will accordingly be entered dismissing the bankrupt's voluntary petition for want of prosecution.

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## THE SALUTATION.

(District Court, S. D. New York. June 19, 1916.)

TOWAGE ⊜11(9)—LIABILITY FOR LOSS OF TOW—NEGLIGENCE OF TUG.

The master of a tug, who, after lying in a harbor for 10 hours because the weather was threatening and he expected a storm, left and passed out into Long Island Sound with five boats in tow, without inquiring for the reports of the Weather Bureau, which had within a few hours sent out two storm warnings, or paying any attention to its signals, which he could have seen, and in the face of a very low and long falling barometer, *held* chargeable with negligence, which rendered the owner liable for the loss of four boats in the tow, which he was shortly afterward obliged to cut loose.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 22; Dec. Dig. ⊜11(9).]

In Admiralty. Suits by Cleary Bros. and by the Providence-Washington Insurance Company against the steam tug Salutation. Decrees for libelants.

Nelson Zabriskie, of New York City, for Cleary Bros.

James J. Macklin, of New York City, for Providence-Washington Ins. Co.

Herbert Green, of New York City, for the Salutation.

HOUGH, District Judge. On the 1st of March, 1914, the Salutation encountered such a storm, shortly after passing eastward beyond Stratford entrance, Long Island Sound, that her master ordered all the men and women in a tow of five boats to gather on that boat which had the most freeboard, and cut loose the other four, which shortly foundered. One action is brought on behalf of the hull and cargo of the boat Quinn, and the other by the insurers of the cargo on the other three, which three belonged to interests practically identical with the claimants.

While it is alleged in respect of the Quinn that the weather was not so bad as to justify cutting her adrift, she being new and very seaworthy, the only point deemed necessary to consider is whether the Salutation was justified, under existing conditions of wind, weather, and warning, in leaving Bridgeport harbor at 12:30 p. m. March 1, 1914. The tug had come up from New York harbor with eight boats, three of them destined for Bridgeport. She arrived at Bridgeport before 3 o'clock on the morning of March 1st. She lay there until her departure at 12:30.

On the preceding day (February 28th) cautionary storm signals had been hoisted all along the coast, and particularly had the storm flag been put out on a flagstaff looking out over the Bridgeport harbor. This flag was flying when the Salutation came into Bridgeport harbor, and inquiry at the station of any official observer would have told an interested captain that the warning was against "shifting gales." Before 4 a. m. the master of the Salutation was on shore at Bridgeport and reported his whereabouts by telephone to the home office in New York. While he had come into Bridgeport primarily to deliver the boats consigned there, he remained in port for nearly 10 hours, waiting upon the weather, which he himself regarded as threatening until shortly before his departure. He did not observe the storm signal; he made no inquiry as to what the New York office might know about the weather, and has frankly testified (in substance) that he usually preferred his own weather wisdom to that of the government service.

At 10:38 a. m. of March 1st an additional storm warning was received by the New Haven observer, who immediately communicated the same by telephone to the office of the New Haven Towing Company, a concern identified in interest, if not identical, with the owners of the Salutation. It was thus possible for those who controlled the tug to know and send word to the master that there had been two storm warnings, varying somewhat in terms, sent out within 24 hours; but the land offices of the tug owners apparently entertained the same contempt for official warning as did Captain Kniffen. When from this kind of evidence one turns to the opinions of seafaring men, so far as revealed by the testimony herein, the usual contradiction is found; but this much is clear: Not only the master of the Salutation, but the captains of two other tugs which came into Bridgeport harbor just as the Salutation went out, thought that there was to be a storm; but, having regard to the direction of the wind, they believed it would

come from the west, and with a gale from that direction they regarded the tow of the Salutation as able to stand a storm astern, and therefore deemed it proper to go from Bridgeport to New Haven.

But the same reasoning did not apply to the tow of the other two tugs, i. e., the Resolute and the Keeler, because they had weaker and older boats than those in the Salutation's tow. Thus it stands admitted that a storm was expected, and only the direction thereof was wrongly guessed at.

But there is one other very old source of marine information which was consulted by the masters who have testified, viz. the barometer. The barometer had begun to fall on the 28th, and fell rapidly all the morning of March 1st. It is admitted that the glass had been going down to the knowledge of Captain Kniffen for nearly if not quite 18 hours before he left Bridgeport; and when he left it was very low, and by the time he returned minus his tow it had reached a depression almost unexampled in the history of the Weather Bureau. It is asserted that experience shows that barometrical depression frequently signifies nothing more than fog or rain, and does not always herald a storm. This is doubtless true; but it is common knowledge that the natural and normal result of the atmospheric disturbance which produces barometric depression is a violent agitation of the air, to wit, wind and storm.

It therefore stands confessed that the Salutation went out of Bridgeport harbor in intentional ignorance of anything and everything the Weather Bureau advised, in the expectation of a westerly storm, and in the face of a very low and long-falling barometer. The legal inquiry is whether such actions as this constitute reasonable prudence. In my opinion, even without the Weather Bureau warnings, the condition of the barometer and the acknowledged expectation of storm from the west were enough to render it proper to stay in port. But it was also negligence not even to inquire for the official weather reports. No man has a right to put his own opinion against the result of many years of experience. I entirely agree with the language of The E. V. McCaulley, 90 Fed. 511, 33 C. C. A. 620, and with the remarks of the court therein the language of Lacombe, J., in The Victoria, 95 Fed. 184, 37 C. C. A. 40, is entirely consistent.

The libelants may take decrees as prayed for, together with costs.

## In re CAPITAL PAINT CO.

(District Court, N. D. California, First Division. November 17, 1916.)

No. 9552.

BANKRUPTCY ⊂=348—CLAIMS—PREFERENCE—WAGES.

One who had been employed by a bankrupt corporation as its president and manager, but whose duties as such were merely nominal, because of the small size of the business, his principal duties being those of clerk and salesman, is entitled to a preference for his claim for wages.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. ⊂=348.]

In Bankruptcy. In the matter of the Capital Paint Company, bankrupt. On petition by the trustee to review an order of the referee allowing the claim of T. E. McShane as a preferred claim for wages. Order affirmed.

Louis P. Dunkley, of San Francisco, Cal., for trustee and petitioner.
L. T. Hatfield, of Sacramento, Cal., for claimant.

DOOLING, District Judge. The referee allowed the claim of T. E. McShane for $300 as a preferred claim for wages. The trustee has brought the matter to this court by petition for review. The trustee insists that McShane was president and manager of the bankrupt corporation, and that as such he could not be a preferred creditor. The claimant contends that he was employed primarily as a clerk, and that while he was president of the corporation, as well as manager thereof, his duties as such were merely nominal. The findings of the referee, as certified to the court, are as follows:

"It appeared from the testimony introduced by said claimant that he was president and manager of the Capital Paint Company; that he also acted in the capacity of clerk in the store of said company under an agreed salary of $200 per month; that he worked in the store of said corporation as a clerk; that at times he traveled in the capacity of salesman for said bankrupt; that he also drove a delivery wagon for said company; that he worked continuously for said bankrupt from 7 o'clock in the morning until 6 o'clock in the evening; that his services as manager were nominal; that the business was not of sufficient size to support a manager, as that term is usually applied; that the claimant was obliged to discharge the duties as manager (to the extent that a manager's services were required), in addition to his duties as clerk; that it was necessary that some one be manager who understood the paint business and would work for the corporation in the capacity of clerk; that he was hired as clerk, for the reason that he was an expert salesman and had a thorough knowledge of the paint business, and in addition thereto he was made manager, for the reason that the company could not pay another person a salary for the small services such position required."

The trustee questions the correctness of these findings, but the testimony on which they are based is not found in the record as brought here. Under such circumstances, the findings of the referee cannot be disturbed, and, as they support the order allowing as prior the claim for $300 for wages earned by McShane in the capacity of clerk, such order must be affirmed; and it is so ordered.

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

## SMITH et al. v. COPIAH COUNTY et al.

(District Court, S. D. Mississippi. June 14, 1916.)

1. HIGHWAYS ⟸113(1)—CONSTRUCTION—CONTRACTS—MISTAKE.
Where a contract for the construction and graveling of roads, which designated gravel pits along the right of way, declared that plaintiffs had satisfied themselves by personal visit and examination of the work to be done, and that they should not dispute or complain of statements or preliminary estimates of the engineer, or assert that there was any misunderstanding with regard to the depth of excavation or embankment to be made, or the nature or amount of material to be furnished or work to be done, there was no warranty implied from the contract, estimates, or specifications that suitable gravel would be found in all of the places designated.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348, 351, 355; Dec. Dig. ⟸113(1).]

2. HIGHWAYS ⟸113(1)—CONSTRUCTION—CONTRACTS—OVERHAUL.
Where a contract for the construction and graveling of a road provided for payment per thousand feet in excess of one mile for overhaul of gravel hauled, the overhaul should be calculated from the center of gravity of the pit or place where the haul is made and the center of gravity of work on which distribution of the haul is made, and from the average haul, which is arrived at by adding the minimum haul to the maximum and dividing by two, the distance of one mile should be deducted, which leaves the average distance for which overhaul charge should be made.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348, 351, 355; Dec. Dig. ⟸113(1).]

3. CONTRACTS ⟸284(4)—PERFORMANCE—DECISION OF ENGINEER.
Where a contract for the construction and graveling of a road declared that in case of ambiguity of expression or doubt the engineer's decision should be final, the decision of the engineer as to doubtful matters of construction is binding on the parties in the absence of fraud or gross mistake.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1326; Dec. Dig. ⟸284(4).]

4. HIGHWAYS ⟸113(1)—CONSTRUCTION—CONTRACTS.
Where the contract for the construction and graveling of a highway provided that all clearing and grubbing should be paid for as an extra at a unit price for each acre actually cleared and grubbed, the contractor is not entitled to payment of a stipulated sum for each acre it is necessary to clear and grub, regardless of the extent of clearing and grubbing each particular acre.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 348, 351, 355; Dec. Dig. ⟸113(1).]

5. DAMAGES ⟸121—BREACH OF CONTRACT.
Where road contractors wrongfully abandoned their agreement, the county, etc., is entitled to recover from them all additional cost for the completion of the work.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 306-308; Dec. Dig. ⟸121.]

6. DAMAGES ⟸140—LIQUIDATED DAMAGES—RIGHT TO RECOVER.
Where road contractors abandoned their work, and it was subsequently completed by their successors long after the time fixed for completion,

the county is not entitled to liquidated damages for delay in completion at the rate of $20 per day, where such damages amount to $12,600; the amount being disproportionate to the breach.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 404, 405; Dec. Dig. ⊂=140.]

Bill by Charles D. Smith, W. L. Smith, and R. L. Leonard against Copiah County, Miss., and others, who cross-complained. Decree as prayed for in cross-bill of defendants.

Decree affirmed 239 Fed. 432, —— C. C. A. ——.

Caruthers Ewing, of Memphis, Tenn., and R. N. Miller, of Hazelhurst, Miss., for plaintiffs.

J. S. Sexton and H. J. Wilson, both of Hazelhurst, Miss., for defendants.

NILES, District Judge. Plaintiffs, a partnership composed of C. D. Smith, W. L. Smith, and R. L. Leonard, all of Memphis, Tenn., some time in 1911, entered into a contract with the road commissioners of Copiah county, Miss., to construct and gravel certain roads in said county. Plaintiffs, under the contract, proceeded with the work for several months, until such difference arose between the parties that plaintiffs abandoned the work. Afterwards plaintiffs filed their bill against Copiah county, its board of supervisors, and the road commissioners of district No. 1 of said county, seeking an injunction restraining defendants from instituting any action at law against them by reason of the abandonment of the work, a cancellation of the contract upon the grounds that it had been entered into by misrepresentation of defendants or under a mutual mistake as to the location of the gravel, and a decree against defendants for whatever amount might be found due plaintiffs on an accounting to be determined by the appointment of a special master.

Substantially as shown by the bill, it is contended upon the part of plaintiffs that in making their bid and entering into the contract they accepted as true the representation, made in the specifications, that suitable and satisfactory gravel would be found at the pits as located on the profile attached to the specifications; that the location of the gravel pits in road building was a vital matter as affecting the cost of building; and that the engineer of the road commissioners, during the progress of the work, would not accept, as suitable, gravel from a number of these pits, and also no gravel was found in a great number. This so enhanced the cost of the work to plaintiffs, they demanded that defendants pay all added cost which resulted from gravel not being found at the places designated in the specification, which demand was refused.

Plaintiffs insist that, had gravel been found as designated, there would have been little, if any, overhaul, and as plaintiffs fixed in their bid an extremely low overhaul charge, they were thus subjected to serious hardship. Thereupon there arose a difference between the parties over the construction of the "overhaul" item in the contract, plaintiffs contending that an average distance of more than one mile

from pits (the overhaul allowance being for 1,000 feet in excess of one mile) was to be ascertained by adding the length of haul from each pit and dividing the result by the number of pits from which such hauls had been made, thus getting the average, and that to ask in excess of one mile the overhaul charge attached.

Plaintiffs further contend that they were to receive so much per acre for "cleaning and grubbing," and that this charge attached to every acre which it was necessary to clear and grub, regardless of the extent of clearing and grubbing on any particular acre.

Defendants answered, denying the averments of the bill, and filed a cross-bill seeking relief for added costs in completing the roads occasioned by plaintiff's abandonment of the work before completion, together with a certain sum as liquidated damages, at so much per day, dating from the contract with plaintiffs for completion and the day upon which it was actually completed, also upon a certain overpayment to plaintiffs on clearing and grubbing.

Plaintiffs filed an answer to the cross-bill, denying its averments. On the issue made by the pleadings, proof was taken, and the entire cause is now before the court for decision.

Under the contract, defendants were to furnish plaintiffs, free of charge,

"rights of way, borrow pits, waste ground, and gravel quarries that may be necessary in the construction of this work, and to pay plaintiff in the manner provided under the specifications the following unit prices for all work done under the said plans and specifications:

| | | |
|---|---|---|
| For clearing and grubbing..... | $50.00 | per acre |
| For earth excavation (free haul) 200 ft..... | .21 | per cu. yd. |
| For each 100 ft. overhaul..... | .01½ | per cu. yd. |
| For gravel surfacing, complete, including quarrying, loading, hauling (one mile average) placing, rolling, spreading and preparation of subgrade..... | .22½ | sq. yd. (finished measure) " |

A further clause provides:

"Overhaul for all gravel hauled on any one road an average distance of more than one mile, from pits, for each one thousand feet in excess of one mile, 7 cents per cubic yard."

The contract further provided that:

"Parties of the second part [plaintiffs] agree that they have satisfied themselves by personal visit and examination of the work to be done under this contract, and the plans and specifications of the George Company, engineers, Memphis, Tenn., and that they shall not at any time dispute or complain of statements or preliminary estimates of the engineer, or assert that there was any misunderstanding with regard to the depth of excavation or embankment to be made, or the nature or amount of material to be furnished or work to be done," etc.

In the specifications, made a part of the contract, the page of "Contents" embraces "Engineers' Estimate Gravel Pits," referring to Appendix B, page 1, which is headed "Gravel Pits.' On the page preceding there appears the words, "List of Gravel Pits." Under "Gravel Pits" there follows some 45 or 50 "pits" or locations containing gravel,

of a quality good, bad, and indifferent; quite a number of the locations being made indications, appearances, and probabilities, the locations usually giving the name of the owner.

C. D. Smith, the senior partner in plaintiff's firm, was the ruling spirit, and thus states their cause of complaint, which is really the only question before the court: He says that plaintiffs were able and willing to complete the contract, and at the contract price, if the gravel pits had been located as stated in the specifications, and that the real difference between the parties, which resulted in the abandonment of the work, was the right of the contractors to rely on the location of the gravel pits. The dispute as to the correct construction of the clause relating to "overhaul" follows, also as to the "grubbing and clearing."

Upon the question of location of gravel pits, it is contended on the part of the plaintiffs that a bidder on the road contract, to quote plaintiffs' counsel,

"would naturally have understood, and was entitled to understand, that the gravel from the particular pits designated on the specifications would be suitable for the purpose and satisfactory to the engineer. By the mere act or fact of designating at specified points and places gravel pits, the engineer, in effect, asserted that he had examined these pits and that the gravel found therein was of that quantity which would fill the requirements of the proposed contract and plans and specifications thereto attached. He was to judge of the quality of this gravel, and, by designating that gravel was to be found in certain pits and at certain places, he in effect designated that particular gravel as that which could be used by the plaintiffs in constructing the road and highway. It is no answer to say that unsuitable and unfit gravel was in one or more of these pits. Gravel, unless fit and suitable, was not being dealt with at all. It was no more intelligent to designate unfit gravel as located at a particular place than for the engineer to have designated pumpkin seed to be encountered at a particular point or place. When he designated a gravel pit, in legal effect he designated a pit containing gravel which would answer the purposes and fulfill the requirements of the contract."

Continuing:

"* * * Not only did the engineer certify to the preserve of suitable and satisfactory gravel in each designated pit, but when he went further, to say how much gravel was in each particular pit, he clothed the statement with an air of certainty and a degree of care as to investigation that it might not otherwise have had."

And the reason the gravel pits were so designated was to influence bidders by furnishing information upon which they could rely.

Defendants take the position that plaintiffs did not rely on the statements in the specifications with reference to gravel pits and location as a warranty that the pits designated contained gravel answering the purposes of the contract, for the reason that the agreement of the road commissioners was to furnish gravel quarries, and did not undertake to name or locate the same, any more than it undertook to name and locate the rights of way, borrow pits, etc., and that under the "Summary of Work under These Specifications" plaintiffs were only required to "furnish gravel in pits"; that the gravel pits described in the specifications were only the engineer's estimates, and the description as to quality, quantity, and ownership should have shown any

prudent bidder that they were mere estimates; and, finally, that bidders were amply protected by an overhaul clause against failure of the gravel at any point designated on the estimates; furthermore, that plaintiffs had personally visited the scene, and satisfied themselves of the work to be done, and agreed not to dispute or complain of statements or preliminary estimates of the engineer, or that there was any misunderstanding in regard to the materials furnished or work to be done.

From the record, it appears that at least one member of plaintiffs' firm could not be likened to a "shrinking debutante" as applied to high society in the contracting world, as for 27 years he has been engaged in railroad construction, subway building, municipal work, and road building, bequeathing to posterity, as monuments to his constructive talent and ability, many of our largest railway systems, subways, and roads. Associated with him were his two partners, also experienced in the contracting field. This firm, at least the two Smiths, C. D. and W. L., were so prominent in their chosen field that counsel for both parties "agreed" that this firm is "one of the largest in the Southern States."

Defendants were experienced business and professional men, and were advised and represented by their engineer. This engineer, Mr. George, had had considerable experience and occupied an honorable position in his profession.

[1] From an examination of the contract between the parties, taking into consideration the experience of plaintiffs, the circumstances surrounding and leading up to the entering of the contract, it is difficult for the court to take the view that plaintiffs entered into it under a mistake or misrepresentation, or that there is any warranty, implied from the contract, estimates or specifications, that suitable gravel would be found in the places designated, but that plaintiffs did satisfy themselves by personal visit and examination, agreed to abide by it, and entered into the contract with open eyes. Nor have plaintiffs established their contention that the engineer and one of the commissioners assured them, before the contract was let, that practically all the gravel would be within a one mile haul.

[2] The overhaul provision of the contract has been heretofore quoted, and the position taken by plaintiffs as to their construction of same. Defendants' engineer, Mr. George, upon this point testifies as follows:

"As I read the specifications which I made to cover this job, I don't see how there could be any question as to what was meant. Overhaul is a matter of contract; there are several different methods in figuring it, some popular with the engineers on some railroads, and other methods with others; that's entirely a matter of contract as to which method is used; the method I have always used, and I tried to explain clearly, and I think that I did, in these specifications, is to calculate the center of gravity of pit or place from which the haul is made, and the center of gravity of work on which distribution of the haul is made, then deduct from this average haul, the average haul which was arrived at by adding the minimum haul to the maximum haul and divide by two, deducting 5,280 feet (or one mile), which then leaves the distance, the average distance, haul for which an overhaul charge could be made. Of course, the deducting of the free haul of 5,280 feet (or one mile) does not mean that the overhaul would not be paid on that mile as well as the others; this is taken

care of by the fact that the average haul of center of gravity is calculated on the entire work, and then the free haul deducted afterwards. I would like to bear out this interpretation. I would like to refer you to page 3 of the detail specifications carrying this work, in which I have very carefully explained how overhaul for earth work should be computed, and this explanation is the same as I have given before. The general wording of the gravel overhaul is the same as for earth overhaul, the only difference being that I do not go quite so fully into an explanation of just how the details of this computation should be handled; but the gravel overhaul, immediately following the earthwork overhaul, it should be apparent to any one that they are to figure the same way. Further, no engineer would undertake to bid on a road job of work, one system of figuring overhaul for his earth work and an entirely different and reverse system of figuring for gravel work."

[3] The court is convinced of the correctness of the position of the engineer just above quoted. In addition, it would seem from the contract that plaintiffs would be bound by the engineer's decision, which provides that:

"In case of ambiguity of expression in the specifications or doubt as to the correct interpretation of the same, the matter shall be submitted to the engineer, whose decision shall be final and binding on both the client and contractor."

It is undoubtedly the law that, where parties agree upon a third party to finally determine questions between them, they are bound, except in case of fraud or gross mistake. Williams v. Mt. Hood R., etc., 57 Or. 251, 110 Pac. 490, 111 Pac. 17, Ann. Cas. 1913A, 177. "Recent cases reaffirm the well-settled rule that where parties to a working contract designate a person who is authorized to determine questions relating to its execution, and stipulate that his determination shall be final and conclusive, both parties are absolutely bound by his determination of those matters which he is authorized to determine, except in case of fraud, or such gross mistake on his part as would necessarily imply bad faith or a failure to exercise an honest judgment." Memphis Trust Co. v. Brown-Ketchum Iron, 166 Fed. 398, 93 C. C. A. 162, citing numerous other cases in note to Williams v. Mt. Hood R., etc., supra.

In the case at bar plaintiffs and defendants designated Mr. George, the engineer, to determine this and like questions. His decision, therefore, was final, except gross mistake or fraud be shown. Certainly there appears not the slightest trace of fraud and no determination which can be characterized as gross mistake.

[4] Coming down to the difference arising in the construction of the "grubbing and clearing" clause of the contract, it was provided in the specifications that:

"All clearing and grubbing shall be paid for as an 'extra,' and the contractor shall bid a unit price per acre for each acre actually cleared and grubbed."

Continuing:

"Trees, saplings, and brush shall be cut close to the ground, all stumps and large roots shall be grubbed from roadways and slopes of cuts, from ditches, from new channels for waterways, if required."

A consideration of the above clauses of the contract, together with the record evidence, is convincing to the court that the engineer cor-

rectly interpreted them and that this contention of plaintiffs is without merit.

Upon a careful review of the pleadings and proof in this case, with the liveliest desire that all parties interested be accorded their rights, mindful of the antagonistic private and public interests involved, realizing that plaintiffs, through adverse weather conditions and perhaps a too hasty preliminary examination of the work, seemingly intrusted to subordinates in its beginning, have suffered some hardships, the court has given the case the attention it merited, endeavoring to lessen, if possible, their losses. The conclusion, however, cannot be escaped that plaintiffs were not justified in abandoning their contract, upon the grounds as stated in the bill of complaint. This conclusion is amply fortified, indeed, made certain, by defendants afterwards having the roads completed by other contractors under the same contract, and construed as defendants construed the contract with plaintiffs. From the foregoing it appears to the court that plaintiffs are not entitled to the relief as prayed in their bill. Such being the case, it follows that cross-complainants must be relieved.

[5] It is considered that any and all additional costs, for completion of plaintiffs' contract, arising from its abandonment, should be assessed against them. These amounts have been stated in the cross-bill and appear to be just and reasonable. From the sum of these amounts, there should be deducted, or plaintiffs given credit for, any amount now retained by defendants on account of estimates, or such amount as was justly due plaintiffs for work allowed and duly approved which is shown to be.

[6] As to the item of $12,600 claimed by defendants as liquidated damages, or damages at the rate of $20 per day from the day fixed by the contract when complainants were to complete the work and the day on which it was actually completed by their successors, the court is of opinion that this forfeiture, in connection with the relief suggested above, is disproportionate to the breach, and should not be allowed.

Let a decree issue in accordance with the foregoing.

SMITH et al. v. COPIAH COUNTY et al.

COPIAH COUNTY et al. v. SMITH et al.

(Circuit Court of Appeals, Fifth Circuit. February 5, 1917.)

No. 2953.

Appeal and Cross-Appeal from the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Bill by Charles D. Smith, W. L. Smith, and R. L. Leonard against Copiah County and others, who cross-complained. From the decree, plaintiffs appeal, and defendants cross-appeal. Affirmed.

For opinion below, see 239 Fed. 425.

Caruthers Ewing, of Memphis, Tenn., for appellants and cross-appellees.

J. S. Sexton and H. J. Wilson, both of Hazlehurst, Miss., for appellees and cross-appellants.

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

PER CURIAM. From our examination and consideration of the record in this case we do not find that the appellant, complainant in the court below, shows any case for the reformation, rescinding, or cancellation of the contract in suit. The reasons given by the District Judge, in which we mainly concur, fully support the decree rendered. On the cross-appeal we concur with the District Judge in disallowing the liquidated damages claimed.

The decree appealed from is affirmed, and, as both parties appealed, using the same transcript, the costs in this court are equally divided.

## FIRST NAT. BANK OF MEMPHIS, TENN., v. TOWNER.

(Circuit Court of Appeals, Sixth Circuit. February 6, 1917.)

No. 2866.

1. BILLS AND NOTES ⟸242—PLEDGES ⟸19—LIABILITY OF PARTIES—INDORSER BEFORE DELIVERY.

Under Negotiable Instruments Act Tenn. (Acts 1899, c. 94) § 63, providing that a person placing his signature upon a note, otherwise than as maker, drawer, or acceptor, is deemed an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity, an indorser before delivery is liable only as indorser, not as joint maker; and the payee of a note given by one corporation and indorsed by an individual and another corporation, without anything to show that the indorsers were bound in any other capacity, cannot retain collateral pledged to secure that note, with the right to retain it to secure any other obligation, to secure notes given by the other corporation, even if it could do so in case the two corporations were joint makers.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 542, 547, 548, 550, 551; Dec. Dig. ⟸242; Pledges, Cent. Dig. §§ 58–63; Dec. Dig. ⟸19.]

2. CORPORATIONS ⟸484(1)—POWERS—LENDING CREDIT.

A corporation organized to buy, gin, manufacture, and sell cotton, cotton seed, and its products, and empowered to borrow money and issue notes or bonds on the faith of the corporate property, but whose powers were limited by a provision that by no implication or construction should it be deemed to possess any powers except those expressly given or necessarily implied from the nature of the business for which the charter is granted, has no implied power to lend its credit to another corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815; Dec. Dig. ⟸484(1).]

3. BANKS AND BANKING ⟸182—LOANS—PERSONAL LIABILITY—USER OF MONEY.

Where money loaned by a bank to one corporation was used for another corporation, both corporations being controlled by the same stockholder, such use did not make the latter corporation a debtor to the bank, since, when the money was loaned, it became the absolute property of the first corporation, and the rule of equity allowing money to be followed applies only where the money has the character of a trust fund.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 702; Dec. Dig. ⟸182.]

4. BANKS AND BANKING ⟸179—COLLATERAL SECURITY—BONA FIDE PURCHASER—KNOWLEDGE OF TITLE.

Where the controlling stockholder of two corporations authorized a bank to retain the bonds of one as security for the debts of the other, the bank cannot claim the bonds against the creditors of the latter after bankruptcy as a bona fide purchaser from the stockholder, notwithstanding his claim that he owned the bonds, where the bank had full knowledge of the entire transaction, and knew that such claim of ownership was based on a supposition that the controlling stockholder owned both corporations, since it could not take advantage of that clear mistake of law.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 667–683; Dec. Dig. ⟸179.]

5. PLEDGES ⟸9—BONA FIDE PURCHASER—CONSIDERATION—DEBT OF ANOTHER.

The acceptance of a new note for the antecedent debt of a corporation is not consideration for the pledge of bonds of another corporation, which

had no authority to lend its credit, by the controlling stockholder of both corporations, since it did not move to the corporation issuing the bonds, and the bank cannot claim to be a purchaser of those bonds for value.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 20; Dec. Dig. ⊂⊃9.]

6. BANKRUPTCY ⊂⊃155—RIGHTS OF TRUSTEE—CANCELLATION OF BONDS—FRAUD.

A trustee can, for the benefit of the creditors of a bankrupt corporation, have canceled the bonds of the corporation, and a trust deed securing them, held by one to whom they had been pledged for a debt which had been paid, and who was retaining them as security for the debt of another corporation, for which they could not be held, though there was no fraud alleged, and the bank in good faith believed that it was entitled to hold them.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂⊃155.]

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

Suit by R. P. Towner, trustee in bankruptcy of the Reliance Cotton Company, against the First National Bank of Memphis, Tenn., to require the bank to surrender to the trustee for cancellation certain negotiable bonds and a deed of trust securing them. Decree for complainant, and defendant appeals. Affirmed.

T. K. Riddick, of Memphis, Tenn., for appellant.

St. John Waddell, of Memphis, Tenn., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This appeal is from a decree in effect requiring the bank, appellant, to surrender to appellee, as trustee in bankruptcy of the Reliance Cotton Company, a corporation, for cancellation, certain negotiable bonds and a deed of trust securing them, which had been issued and delivered by the bankrupt. The basis of the decree is a finding in substance that, although the bonds had been received by the bank in pledge to secure a loan it made to the Reliance Company and the loan had been fully paid, the bank, erroneously believing it had the right so to do, continued to hold the bonds to secure past-due indebtedness of another and distinct corporation, the Memphis Cotton Oil Company.

The two companies so concerned were Tennessee corporations, the Memphis Company having been organized in 1902 and the Reliance Company in 1905. At the times here in question, B. B. Harvey owned all the shares of stock in both of these companies, except a sufficient number to qualify three persons additional to himself as directors in each company; and the stockholders and directors of each company were the same persons. On July 21, 1913, the stockholders of the Reliance Company met and instructed the directors "to issue $40,000 first mortgage bonds of the company" and to secure them by a trust deed conveying the property of the company located in the states of Tennessee, Mississippi, and Missouri. On the same day the board of directors "authorized and directed" the president and secretary to

execute this trust deed and the bonds in accordance with forms set out in the minutes of the meeting. After the instruments were executed, the president of the company placed the bonds in the hands of B. B. Harvey to "realize money on them * * * for the Reliance Company." It is not shown who delivered the deed of trust, though it appears to have been recorded in the several counties in the states in which the property of the company was located. A promissory note in the name of the Reliance Company for $10,000 and these bonds as collateral security therefor were delivered to the bank by B. B. Harvey. It is agreed in the record that the note was "made by the Reliance Cotton Company, indorsed by B. B. Harvey and the Memphis Cotton Oil Company," that it was discounted October 13, 1913, that the proceeds were "credited to the account of the Memphis Cotton Oil Company," and that the note "has been paid."

When these bonds were directed to be issued, the Memphis Company was largely indebted to the bank and was also in need of more money. The bank was not willing to make further loans to the Memphis Company upon its own credit, nor upon the bonds which it had previously issued and delivered in pledge to the bank, nor upon the additional individual indorsement of B. B. Harvey. In these circumstances the president of the bank suggested to B. B. Harvey a plan for obtaining additional security and money through the Reliance Company; and this plan was the one adopted and carried out, as stated, through the instrumentality of that company. But when the company's note was paid, its bonds were neither returned, nor were they or the trust deed canceled. Instead, the bonds were retained by the bank as further security for notes held by it against the Memphis Company, and this was done with the sanction of B. B. Harvey. It is not claimed that the Reliance Company authorized this later use of the bonds, unless it did so through the execution of its note before mentioned. We shall now consider the grounds upon which the bank seeks to justify its retention of the bonds; and it is to be borne in mind throughout that the bank's rights are to be determined with reference to those of the bankrupt's creditors.

1. *The form of the $10,000 note.* The note of the Reliance Company provided that "upon the discharge of this obligation" the bank might deliver the instrument (including, of course, the collaterals) to the maker, but that the bank should "have the right to retain the same to answer any other obligation, note, etc., * * * just as if specially pledged under an agreement in the exact terms of this." The right thus reserved plainly had reference to some instrument which the Reliance Company was obligated to pay; but, apart from the bonds themselves, when the note was paid the bank held no obligation, certainly no express obligation, of the Reliance Company, and it has not held any since. It is insisted, however, for reasons presently to be stated, that the foregoing provision of the Reliance Company's note empowered the bank to retain the bonds to secure notes executed and delivered to it by the Memphis Company as maker. It may be well to notice here what notes of the Memphis Company were held by the bank at the time the Reliance Company's bonds were applied in pledge

to secure them. The date of payment of the Reliance Company's note was May 15, 1914, and on the following July 27th the Memphis Company's indebtedness to the bank was consolidated into three notes in its favor for $22,000 each. These were demand notes, signed by the Memphis Company as maker, and indorsed by that company and B. B. Harvey. Harvey placed in pledge to secure them $80,000 face value of bonds of the Memphis Company and the bonds now in question of the Reliance Company; and Harvey testified that this was the first time the Reliance Company's bonds were pledged by him "for the debts" of the Memphis Company. The Memphis Company was afterwards declared bankrupt, though the date of adjudication does not appear, and these notes were then unpaid. Two of the notes have since been paid, and, excepting a balance of about $9,000, also the third note, through proceeds derived from a sale made by the bank of the Memphis Company's bonds. Now, as we interpret the argument that the Reliance Company's bonds might, under the provision of its note, be held to secure all or any of these notes of the Memphis Company, it is twofold: (a) As to the manner in which the Reliance Company's note was executed; and (b) a claim that the Memphis Company's debts to the bank may be treated as really the debts of both corporations.

[1] As respects the first of these grounds, all that appears touching the execution of the Reliance Company's note is that it was "made by the Reliance Company, indorsed by B. B. Harvey and the Memphis Cotton Oil Company." It is said that the Memphis Company, as well as Harvey, indorsed the note before delivery, and so became a joint maker, and, as we understand counsel, that the above quoted provision of the note is broad enough to justify retention of the bonds of the Reliance Company to secure the debts of its joint maker—the Memphis Company. Assuming, though it is not distinctly shown, that the Reliance Company's note was indorsed before delivery, as stated, the contention of counsel overlooks the fact that before this transaction occurred the Uniform Negotiable Instruments Act was adopted in Tennessee. While counsel correctly state the rule concerning the effect of such indorsements which prevailed in Tennessee (not to speak of other jurisdictions) prior to the adoption of the act referred to, yet the decisions cited in support of the rule were themselves rendered before the enactment of the statutory rule.[1] According to section 63 of the Negotiable Instruments Act, passed in 1899, the Memphis Company as well as Harvey was simply an indorser, since nothing is shown which "clearly indicates by appropriate words" an "intention to be bound in some other capacity" (Acts Tenn. 1899, p. 152, and see sections 64 to 68); and the statutory rule thus distinctly prescribed may safely be regarded as applicable here. Pharr v. Stevens (1911) 124 Tenn. 669, 673, 674, 139 S. W. 730. True, in that case Bank v. Busby, 120 Tenn. 652, 13 S. W. 390, decided three years earlier, was

[1] The decisions so cited are Bank v. Lumber Co. (1898) 100 Tenn. 479, 47 S. W. 85; Morrison Lumber Co. v. Lookout Mountain Hotel Co. (1893) 92 Tenn. 6, 20 S. W. 292; Providence Assurance Society v. Edmonds (1895) 95 Tenn. 53, 31 S. W. 168; Logan v. Ogden (1898) 101 Tenn. 392, 47 S. W. 489.

distinguished; but as there is no proof in the instant case which tends to show that either of the indorsers intended to be bound in any other capacity than as an indorser, each would be so considered under both of those decisions. If, then, it were conceded that under the provision in question of the note the pledge of either of two joint makers might be retained to secure a debt of the other, it would by no means follow that this could rightfully be done as respects a debt of an indorser; no such claim is even suggested.

[2] We may now turn to the second ground of counsel's insistence: That the Memphis Company's debts to the bank were really the debts of both corporations. Here again the form of the note is relied on, at least in part. Admittedly the notes of the Memphis Company were not signed by the Reliance Company. It is not intimated that the Reliance Company received all the money which the bank parted with on the faith of the Memphis Company's notes; and to hold that the Reliance Company is chargeable with all these debts would be to affirm that the company had power to make itself answerable for debts, at least in some substantial amount, of the Memphis Company. The question hence arises whether the Reliance Company could guarantee, or pledge its bonds to secure, debts of the Memphis Company. This must depend upon the powers vested and limitations imposed by the Reliance Company's charter. The purposes of the company's incorporation are:

"Buying, ginning, manufacturing, selling and merchandising baled cotton, seed cotton, cotton seed, cotton seed products, feed, and fertilizers produced from same and other substances, and other articles of commerce of general manufacture which come within the line of said business."

The company was empowered "to borrow money and issue notes or bonds upon the faith of the corporate property"; but all the powers of the company were limited as follows:

"By no implication or construction shall the corporation be deemed to possess any powers except those hereby expressly given or necessarily implied from the nature of the business for which the charter is granted."

Thus the Reliance Company acquired no express power under its charter to lend its credit to another corporation; and, as was said in Ward v. Joslin, 186 U. S. 142, 149, 22 Sup. Ct. 807, 809 (46 L. Ed. 1093):

"It must be assumed that the general rule is applicable that such companies have no implied power to lend their credit." [2]

[2] The familiar rule that one corporation is impliedly prohibited from guaranteeing or otherwise agreeing to pay the debts of another has prevailed so generally as fairly to warrant omission of citations in its support, though it may be well here to call attention to the following: Humboldt Min. Co. v. American Manuf'g, Mining & Milling Co., 62 Fed. 356, 361, 362, 10 C. C. A. 415, and citations (C. C. A. 6), in which Judge Taft distinguished Marbury v. Land Co., 62 Fed. 335, 10 C. C. A. 393, decided at the same session; In re Liquor Dealers' Supply Co., 177 Fed. 197, 199, 200, 101 C. C. A. 367 (C. C. A. 7), where the fact that the corporate officer specially empowered to conduct the transaction owned most of the stock in the two corporations concerned was held not to invest the guaranteeing corporation with "authority to exceed its powers wherein the interests of creditors and the public are involved";

[3] However, there is one feature of Harvey's testimony which might at first view be thought to avoid this rule, and upon the theory that at least a portion of the bank's claim against the Memphis Company, which is in form the debt of that company, is in reality the debt of the Reliance Company. Harvey testified that the money received "from these different notes" was used for both corporations, and that as he "owned the whole thing" he did not "think it necessary to keep a separate account." It is to be inferred that the notes he refers to included alike the notes of the Memphis Company and the note of the Reliance Company, but since the latter note has been paid it may safely be eliminated from the consideration of this portion of Harvey's testimony. Accepting as correct his testimony concerning the use made of the money obtained on the Memphis Company's notes, it fails to connect the Reliance Company with the bank. The most that can be said of this testimony is that it gives rise to an inference that the Reliance Company became indebted to the Memphis Company, but neither this testimony nor anything contained in the record justifies a further inference that there was an intent to secure any such indebtedness through the pledge of the Reliance Company's bonds.

It is not pretended, much less shown, that any of the money represented by the notes of the Memphis Company was loaned by the bank upon any promise or request of the Reliance Company, or upon any understanding between the bank and either of the companies, or even with knowledge on the part of the bank, that the money was to be used for the benefit of the Reliance Company. The bank, therefore, must avoid the general rule that one person cannot make another his debtor without that other's consent. The law, it is true, will in certain cases imply the existence of a contract where the facts do not, and upon the principle that one may not enrich himself unjustly at another's expense; but this principle can afford the bank no claim against the Reliance Company. All the money obtained upon the notes of the Memphis Company was parted with by the bank upon the faith of that company's promise and the pledge of its own bonds, and thus, since no fraud is either alleged or proved, the Memphis Company's title to the money became absolute; whatever portion of this money, and the amount is not shown, Harvey may have used for the benefit of the Reliance Company, was therefore money of the Memphis Company and not of the bank; accordingly the bank cannot invoke the rule that allows money to be followed in equity, for that rule is confined to cases in which the money has the character of a trust fund. Peters

Mapes v. German Bank of Tilden, 176 Fed. 89, 90, 99 C. C. A. 609 (C. C. A. 8), by Judge Sanborn; Kellogg-Mackay Co. v. Havre Hotel Co., 199 Fed. 727, 733, 118 C. C. A. 165 (C. C. A. 9); In re Prospect Worsted Mills, 126 Fed. 1011, 1014 (D. C.), per Lowell, J.; Elevator Co. v. Memphis & Charleston Railroad Co., 85 Tenn. 703, 706, 5 S. W. 52, 4 Am. St. Rep. 798; and the applicability of this rule to railroad corporations was not only affirmed in Louisville, etc., Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 567, 19 Sup. Ct. 817, 43 L. Ed. 1081, but such a guaranty or any contract to give one, unless authorized by statute, was stated to be "beyond the scope of the powers of the corporation, and strictly ultra vires, unlawful and void, and incapable of being made good by ratification or estoppel."

v. Bain, 133 U. S. 670, 693, 10 Sup. Ct. 354, 33 L. Ed. 696; Brennan v. Tillinghast, 201 Fed. 609, 613, 120 C. C. A. 37 (C. C. A. 6); Cole v. Bates, 186 Mass. 584, 587, 72 N. E. 333. The bank's position thus amounts to a contention that it can maintain a claim against the Reliance Company upon the theory that the law implies a right in favor of a creditor against those persons who may be indebted to his debtor; but clearly there is no principle of law that will sanction any such theory, for the express contract between the creditor and his own debtor leaves no room for an implied contract between the creditor and his debtor's debtor. King of Spain v. Oliver, Pet. C. C. 276, 288, Fed. Cas. No. 7,813 (C. C.), decided by Mr. Justice Washington on circuit. It is impossible, therefore, to deduce any relation of debtor and creditor, either of an equitable character or otherwise, between the bank and the Reliance Company.

It results from all the foregoing considerations that the above-quoted provision of the Reliance Company's note, however broadly interpreted, furnishes no justification for the retention of the bonds.

2. *Harvey's stock ownership in the Reliance Company gave him no title to the bonds.* It is claimed that B. B. Harvey repeatedly stated to the bank and the bank believed that he owned these bonds; it is not shown, nor is it very important, just when these statements were made, though it appears that they were in fact made. The only basis for this assertion of Harvey or for the belief of the bank, as the president of the bank evidently knew, was Harvey's stock ownership in the Reliance Company. In the course of his direct testimony Harvey said in respect of the two corporations in question:

"I figured one was in the right-hand pocket and the other in the left."

Again:

"Q. You heard Mr. Omberg [president of the bank] state you were the owner of the bonds? A. That was true; I owned the corporations and owned the bonds. Q. You made the statement you owned the bonds? A. Yes, sir; I didn't hesitate, because I owned the corporations. Q. That was your idea of the whole thing? A. That was my idea; it was my property."

Moreover, the president of the bank testified in his cross-examination:

"Q. Now, at the time you got them, you knew they were the Reliance Cotton Company bonds? A. We also thought we knew they belonged to Mr. Harvey, individually. Q. Mr. Omberg, didn't you understand that, or didn't you suppose that, from the fact that Mr. Harvey was the owner or the principal stockholder in the Reliance Cotton Company—in fact, owned practically all of it? A. Yes; Mr. Harvey himself told us he was practically the sole owner Q. And he assumed, and you assumed, that made him the owner of the bonds of the corporation? A. He had possession of the bonds, negotiable bonds, and he put them up. I don't know that we questioned the title to them. They were negotiable, in his hands, and payable to bearer. Q. You knew how they were issued, and the purpose for which they were issued, when they were issued? A. Yes; the whole thing was done with our knowledge."

It is not clear whether the learned counsel for the bank claim that Harvey's ownership of stock in the Reliance Company operated to invest him also with the ownership of the bonds; it is to be inferred from the record that counsel disavowed this theory in the court be-

low. However this may be, Harvey could not acquire title to the bonds in this way. We shall assume for present purposes that the Reliance Company was duly organized under and according to the laws of Tennessee, for nothing to the contrary is suggested. We have already stated the purposes of the corporation. Its authorized capital stock was $100,000, divided into shares of $100 each. At the first meeting of the incorporators five persons subscribed for 800 shares, B. B. Harvey and W. M. Black each for 398 shares, two persons each for 1 share, and W. W. Barbour (who was president of the company at the time the bonds in question were issued) for 2 shares. Harvey subsequently purchased the shares of Black, but the other 4 shares are apparently outstanding. None of the small shareholders paid for his stock, though no reason appears why these holders could not be required to pay for their shares. Further, a subscriber for stock in a private corporation, even a director of the company, may obtain title to his stock by gift, or hold it upon a trust, and still be legally qualified to act, the one as a stockholder and the other as a director; both are to be regarded, certainly in a case like this, as corporate stockholders, and the director also as a corporate official. Kardo Co. v. Adams, 231 Fed. 950, 965, 146 C. C. A. 146 (C. C. A. 6); Salomon v. Salomon & Co., [1897] A. C. 22, 46. Directors and officers of the company were chosen annually from the time of the organization of the corporation at least until July 21, 1913, when the bonds and deed of trust in question were required by the stockholders and board of directors to be issued. While the date on which the company was adjudicated bankrupt is not shown in the record, concededly the case under review was begun and the decree entered upon the theory that the bankruptcy of the corporation had been judicially declared. In view of these facts, it is plain that the corporate organization, the legal entity, was preserved at least throughout the period of the present transactions.

It is settled that a corporation, the artificial being, not the stockholding body, owns the property; that the corporation alone can transfer the property, or charge it with liens, or the like; and that the corporation can act only through prescribed agencies, and subject to the limitations imposed by law. Humphreys v. McKissock, 140 U. S. 304, 312, 11 Sup. Ct. 779, 35 L. Ed. 473; Gottfried v. Miller, 104 U. S. 521, 528, 26 L. Ed. 851; Porter v. Pittsburg Bessemer Steel Co., 120 U. S. 649, at 670, 7 Sup. Ct. 741, 30 L. Ed. 830; Woodruff v. Shimer, 174 Fed. 584, 586, 98 C. C. A. 430 (C. C. A. 3); American Preservers' Co. v. Norris, 43 Fed. 711, 714, and citations (C. C., per Thayer, J.); Fitzgerald v. Missouri Pac. Ry. Co., 45 Fed. 812, 818 (C. C., per Caldwell, J.); Electric Ry. Co. v. Jamaica & B. R. Co., 61 Fed. 655, 678, 679 (C. C., per Townsend, J.); In re Roanoke Furnace Co., 166 Fed. 944, 952 (D. C., by present Circuit Judge McPherson); Rough v. Breitung, 117 Mich. 48, 54, 75 N. W. 147; England v. Dearborn, 141 Mass. 590, 591, 6 N. E. 837. This doctrine prevails where even the entire capital stock is owned by a single person, and this, too, in Tennessee, where the present corporation was created. Parker v. Bethel Hotel Co., 96 Tenn. 252, 275, 277, 34 S. W. 209, 31 L. R. A. 706; and see Porter v. Pitts-

burg Bessemer Steel Co., supra, 120 U. S. at page 670, 7 Sup. Ct. 741, 30 L. Ed. 830; Woodruff v. Shimer, supra, 174 Fed. at pages 585, 586, 98 C. C. A. 430; Fitzgerald v. Missouri Pac. Ry. Co., supra; England v. Dearborn, supra; Baldwin v. Canfield, 26 Minn. 43, 53, 58, 1 N. W. 261, 276; Wheelock v. Moulton, 15 Vt. 519, 521; City of Louisville v. McAteer (Ky.) 81 S. W. 698, 1 L. R. A. (N. S.) 766. It must follow that the absolute ownership of the bonds in question was in the corporation itself until they were delivered in pledge to the bank to secure payment of the company's note for $10,000, and that upon payment of the note the company's ownership of the bonds and its right to their exclusive possession again became absolute, unless it can be said that through their negotiable quality (in connection with Harvey's asserted ownership of them, as before pointed out) the bank acquired a right to apply them as security for the Memphis Company's debt.

[4] 3. *The bank, in retaining the bonds as security for the Memphis Company's debt, is not a holder in due course.* It is earnestly contended that the bank is entitled to rely on the negotiable character of the bonds and Harvey's asserted ownership of them to sustain its alleged right to retain them in pledge. This takes no account of the bank's knowledge of the origin of the bonds, or of the accomplishment of the object of their issue before their retention to secure the Memphis Company's notes. We have seen that the president of the bank testified in reference to the transaction and the bonds as follows:

"Q. You knew how they were issued, and the purposes for which they were issued, when they were issued? A. Yes; the whole thing was done with our knowledge."

It was found by Judge McCall that, as respects the use of these bonds to secure debts of the Memphis Company, the bank did not obtain them in due course; and we think this conclusion is sustained by the record. The bank knew that the Reliance Company had issued the bonds to secure its own note, and the bank dealt with the company as the owner of the bonds; this was inconsistent with any idea that the bonds were owned by Harvey. The real basis for Harvey's assertion and the bank's assumption (or belief, if it may be so called) that he was the owner of the bonds was the supposition of each that he owned the corporation. No other conclusion is reconcilable with the admissions of Harvey and the evident knowledge of the bank's president; but it scarcely is necessary to say that the bank cannot take advantage of this clear mistake of law.

[5] Further, even if it were important, the Reliance Company received no consideration at the time its bonds were applied in pledge to secure notes of the Memphis Company. It is argued that the previous loans to the Memphis Company, which were consolidated and represented by demand notes when the bonds were last pledged, were a sufficient consideration to sustain this pledge; but the consideration (assuming that such a transaction amounted to one) moving to the Memphis Company was not a consideration upon which the Reliance Company could lend its credit, if in truth any consideration would uphold such an agreement. Inevitably then, the bank fails in two essential particulars to show that it is a "holder in due course" within the

meaning of the Tennessee Negotiable Instruments Act: In the first place, it did not take the bonds "for value"; and, secondly, it had notice of the "defect in the title" of Harvey to the bonds. Acts Tenn. 1899, p. 150. The question, therefore, does not arise, upon which counsel place so much stress, whether in view of the negotiable character of the bonds it can be said that the bank was put upon notice as to Harvey's title; for the truth is the bank knew it was withholding bonds of the Reliance Company, not bonds of Harvey, to secure debts of the Memphis Company. As respects the Reliance Company the pledge was ultra vires and void. Hence the knowledge of the bank was fatal to the transaction; it was, indeed, quite as fatal as if the transaction had been conceived and executed with intent to defraud the Reliance Company, or as if the issue and first pledge of the bonds had been made with a like purpose; for, after all, knowledge of fraud is but one of the grounds for denying to holders of negotiable instruments the status of a holder in due course. We may add that in view of these facts Judge McCall was right in holding that the instant case cannot be effectively distinguished in principle from the decision of this court in Germania Safety Vault & Trust Co. v. Boynton, 71 Fed. 797, 801, 19 C. C. A. 118, 121, where, in speaking of negotiable corporate bonds that had been pledged to secure the debt of another, the late Mr. Justice Lurton said:

"Its [the company's] obligations entered into for that purpose would be void in the hands of one who took them with notice."

See, also, Hatch v. Johnson Loan & Trust Co., 79 Fed. 828, 836 (C. C.); Wheeler v. Home Savings Bank, 188 Ill. 34, 38, 58 N. E. 598, 80 Am. St. Rep. 161.

The decisions themselves upon which counsel rely in support of their claim that the negotiable character of the bonds warrants the retention in issue here, as, for example, Murray v. Lardner, 69 U. S. (2 Wall.) 110, 121, 17 L. Ed. 857, recognize the rule that no protection is furnished to persons dealing in negotiable instruments with notice of facts affecting the validity of the transactions. And see King v. Doane, 139 U. S. 166, 173, 11 Sup. Ct. 465, 35 L. Ed. 84.

[6] Attention should here be called to counsel's insistence that fraud is not specifically alleged or proved in respect of any of the transactions presented and, on the contrary, that the evidence shows honesty of purpose on the part of both the bank and Harvey. Nor can it escape attention that the case does not present any question of preference under the bankruptcy law; it may be assumed, though it does not appear in the record, that the transactions in issue occurred more than four months prior to the commencement of the bankruptcy proceeding. We do not regard either this contention of counsel or the date of the bankruptcy as material in a case like this. It is enough to know, since it appears in the evidence, that the Reliance Company has creditors; that this company was dealing, on the one hand, with persons who must here be assumed to have just claims against it; and that Harvey, on the other hand, was undertaking to dispose of the property of the company in substantial part, if not in whole, through pledge of the company's bonds to secure a debt not of that company but of the Memphis Com-

pany. Considering the rights, then, of the respective parties who are here making claims to the bonds, the bank, although in possession of the bonds, is neither a creditor nor pledgee of the Reliance Company, while the trustee is claiming surrender and cancellation of the bonds for the benefit of acknowledged creditors of that company, the bankrupt; in other words, the bank holds the bonds without right, while the trustee has, through operation of law, succeeded to the title of the bankrupt to the bonds. Bankruptcy Act July 1, 1898, c. 541, § 70, 30 Stat. 565 (Comp. St. 1913, § 9654). And, since the bonds are not "in the custody of the bankruptcy court," he must also be "deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631); Massachusetts Bonding & Ins. Co. v. Kemper, 220 Fed. 847, 851, 136 C. C. A. 593 (C. C. A. 6). It follows that the effect of the bank's retention of the bonds was wrongfully to convert them to its use, and that the trustee is entitled to have them, as also the trust deed, surrendered for purposes of cancellation.

The decree will be affirmed, with costs.

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## FT. PITT COAL & COKE CO. v. DISER et al.

(Circuit Court of Appeals, Sixth Circuit. February 6, 1917.)

No. 2889.

1. BANKRUPTCY ⟸219—PARTNERSHIP—EFFECT OF ADJUDICATION.

The adjudication in bankruptcy of a partnership on a ground involving its insolvency, includes a determination that the applicable portions of the separate estates of the partners, as well as the partnership estate, are in the proceeding to be subject to the payment of the partnership debts, regardless of whether all or any of the partners themselves are adjudged bankrupt, so that it is within the jurisdiction of the court of bankruptcy to pass on the acts of individual partners in promising to pay and in securing on their individual properties a partnership debt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 356; Dec. Dig. ⟸219.]

2. BANKRUPTCY ⟸165(2)—PARTNERSHIP—PREFERENCES—ACTS OF PARTNERS.

For insolvent partners of an insolvent firm, within four months of petition in bankruptcy against the firm, to secure a firm creditor on their separate estates, under the guise of treating him as their private creditor, is a preference; it involving the wrongful use of assets equitably belonging to all the joint creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸165(2).]

3. BANKRUPTCY ⟸219—PARTNERSHIP—MARSHALING ASSETS.

The court, in proceedings in which a partnership alone is adjudged bankrupt, may, even if acts of partners in securing a firm creditor on their individual properties do not amount to technical preferences, set them aside under its power, given by Bankr. Act July 1, 1898, c. 541, § 5g, 30 Stat. 547 (Comp. St. 1913, § 9589), to marshal the assets of the partnership estate and the individual estate, so as to prevent preferences and secure the equitable distribution of the property of the several estates.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 356; Dec. Dig. ⟸219.]

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

Petition by Oscar Diser, trustee in bankruptcy, against the Ft. Pitt Coal & Coke Company and others. From an adverse decree, the named company appeals. Affirmed.

G. T. Ohl, of Youngstown, Ohio, for appellant.

J. W. Ford, of Youngstown, Ohio, for appellees.

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

WARRINGTON, Circuit Judge. John L. Greer, William G. Greer, and Robert C. Greer were partners and dealing in coal at Youngstown, Ohio, under the firm name of Greer Bros., when (on February 26, 1915) the involuntary petition in bankruptcy was filed which gave rise to the present controversy. The petition alleged that "Greer Bros." were "insolvent, and that within four months next preceding" they had committed certain acts of bankruptcy, among which was an unlawful preference made in favor of the Ft. Pitt Coal Company of Pittsburgh, and the prayer was that "Greer Bros. may be adjudged * * * to be bankrupt." In March following, John L. Greer, William G. Greer, and Robert C. Greer were "declared and adjudged bankrupts as a partnership." Whether the form of the petition and that of the adjudication were regarded by the trial judge, the present Mr. Justice Clarke, as involving both the partnership and the individuals composing it, in the sense that all were alike adjudged bankrupt, is not certain; but it is clear that the court exercised jurisdiction over the property both of the partnership and the individual partners, and that this was done without objection on the part of either the partnership or any of its members. However, one of the firm creditors, the Ft. Pitt Company, to whom both the referee and the trial judge found that unlawful preferences had been given, reserved exceptions to such findings, and particularly to the portions which concerned transactions had between that company and two members of the partnership. The important question for decision here grows out of the transactions last mentioned.

The bankrupt partnership was indebted to the Ft. Pitt Company in the sum of $4,373.30. In December, 1914, the company placed its claim in the hands of an attorney for collection, and on the 31st of the month the matter was adjusted by giving to the Ft. Pitt Company two cognovit notes and certain security. One of the notes was for $4,000, signed by Greer Bros. and two members of the firm, viz., John L. Greer and Robert C. Greer, and secured by a mortgage of that date on the real estate of Robert C. Greer; and this note was further secured by a chattel mortgage of the same date on the personal property of the firm and the personal property of John L. Greer, but this instrument was not filed according as the Ohio statute required; the filing was delayed until February 6, 1915. The other cognovit note was signed by Greer Bros., John L. Greer, and Robert C. Greer, and

was for $373.30. Judgment was taken on this note, February 28, 1915, against "J. L. Greer and Robert Greer, partners trading as Greer Bros., and individually."

The trustee in bankruptcy, Oscar Diser, was appointed April 10, 1915, and petitions were filed later by him, asking sales of the personal property of both the partnership and John L. Greer and the real property of Robert C. Greer, and praying, among other things, that the Ft. Pitt Company be required to appear and set up by answer such interest as it claimed to have in this personal and real property. The Ft. Pitt Company, through separate answers and cross-petitions, alleged its claims in respect of both classes of property, and prayed for orders finding the validity, extent, and priority of its liens under the judgment, the chattel mortgage, and the real estate mortgage, and directing sale of the personal property clear of incumbrances and transfer of its lien to the sales proceeds, but objected to any order of sale of the real estate, and, on the contrary, asked that the application for such sale be dismissed. The trustee filed an answer to the cross-petition of the Ft. Pitt Company as to the real estate of Robert C. Greer, denying that the company obtained a lien thereon through the note and mortgage before mentioned, and alleging that such note and mortgage amounted to a preference.

Evidence was received under the issues so presented, and findings and orders were made in substance as follows: (a) That the note for $4,000, and the chattel mortgage covering the personalty of the partnership and of John L. Greer, each constituted a preference against partnership creditors in favor of the Ft. Pitt Company; all the personal property was sold, according to order, and the proceeds derived from the sale of the firm's portion were ordered to be distributed, but the proceeds arising from the sale of John L. Greer's portion were retained subject to further order. (b) That the judgment on the note for $373.30 and the mortgage on Robert C. Greer's realty each also constituted a preference against the partnership creditors in favor of the Ft. Pitt Company; orders were entered directing the realty to be sold and the proceeds, after satisfaction of liens found in favor of persons other than the Ft. Pitt Company, to be distributed among the general creditors. The Ft. Pitt Company appeals. The company has also sought to have the proceedings revised in matter of law, but the appeal was its true remedy, and hence the petition to revise will be dismissed.

[1] We see no reason to disturb the findings as made by the referee and the trial judge. The only questions requiring consideration are whether the findings and orders made in respect of the acts of John L. Greer and Robert C. Greer in promising to pay a partnership debt and in securing it were within the jurisdiction of the court, and, if so, whether the transactions effected preferences against the partnership creditors. As to the question of jurisdiction, if it could safely be said that the members composing the partnership, as well as the partnership itself, were each adjudged bankrupt, the court's jurisdiction could not be questioned. We prefer, however, to assume that the bankruptcy proceeding and the adjudication were aimed at the partnership alone; for upon this hypothesis, as well as upon the other, we think the jurisdiction of the court reached the property of the individual mem-

bers. This is because of the necessity in this instance to resort to the property of the individual members of the partnership in order to wind up its affairs; indeed, one of the essential facts alleged in the petition and necessarily found by the adjudication was the insolvency of the partnership, and the conclusive inference is that the partners themselves were insolvent, since insolvency of a partnership is impossible while its members are able to pay its debts. It is to be added that the copartners here made no objection; indeed, they in effect assented to the orders of the court, entered upon the petition of the trustee, directing sales of the individual property.

It is settled that where a partnership is declared bankrupt on a ground involving its insolvency, although one or more, but not all, of the individual members are declared bankrupt, the effect of the adjudication is to draw to the jurisdiction and administration of the bankruptcy court the separate estates of all the partners as well as the partnership estate. This was so decided in Francis v. McNeal, 186 Fed. 481, 485, 108 C. C. A. 459 (C. C. A. 3), affirmed in 228 U. S. 695, 701, 33 Sup. Ct. 701, 702, 57 L. Ed. 1029, L. R. A. 1915E, 706, Mr. Justice Holmes saying:

"On the other hand, it would be an anomaly to allow proceedings in bankruptcy against joint debtors, from some of whom, at any time before, pending, or after the proceeding, the debt could be collected in full. If such proceedings were allowed, it would be a further anomaly not to distribute all the partnership assets. Yet the individual estate, after paying private debts, is part of those assets so far as needed. Section 5f. Finally, it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several. We say the same persons, for, however much the difference between firm and member under the statute be dwelt upon, the firm remains at common law a group of men, and will be dealt with as such in the ordinary courts for use in which the discharge is granted. If, as in the present case, the partnership and individual estates together are not enough to pay the partnership debts, the rational thing to do, and one certainly not forbidden by the act, is to administer both in bankruptcy. If such a case is within section 5h, it is enough that Francis never has objected to the firm property being administered by the trustee."

The same rule was laid down in Dickas v. Barnes (1905) 140 Fed. 849, 851, 72 C. C. A. 261, 263, 5 L. R. A. (N. S.) 654 (C. C. A. 6), where Judge Severens said:

"One who combines with others in a partnership enterprise becomes bound for the payment of the partnership debts. As partner he shares the fortunes of the partnership. In certain circumstances it may become subject to the exercise of the powers of a court of bankruptcy, where its resources will be gathered in to satisfy the claims of creditors. One of those resources is the liability of the partner, for which his individual property stands charged. It is true that by virtue of the rule in equity, as well as in bankruptcy, for the marshaling and distribution of assets, his individual property is first applicable to the payment of his private debts, if there be any. The surplus then becomes assets for the payment of the partnership creditors." [1]

[1] Of course, such decisions as these concern the effect of the present Bankruptcy Act, which treats a partnership as a distinct entity, and so gives rise to the question how the court adjudicating a firm bankrupt, but not its individual members, may reach the property of the nonbankrupt partners. The decision in Dickas v. Barnes was criticized by Prof. Brannan in June, 1907 (20 Harvard Law Review, 589). It was, however, held, in harmony with the

Again, in Armstrong v. Fisher, 224 Fed. 97, 99, 139 C. C. A. 653, 655 (C. C. A. 8), Judge Sanborn said:

"The second objection raises this question: May a court of bankruptcy which has adjudged a partnership, composed of two members, and one of its members, bankrupt, draw to itself and administer the property of the other member, and require him to file a list of his individual creditors and a schedule of his assets? There was a time when this question was debatable. * * * But it is so no longer. The Supreme Court of the United States has decided that the provision of section 5h of the Bankruptcy Law, * * * that 'in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt,' which counsel for the petitioner invoke, is inapplicable to a case of this character, is limited in its effect to those cases in which one or more, but not all, of the partners have been, and the partnership has not been, adjudged bankrupt, and that, even if such a case as that in hand were governed by section 5h, the failure of the petitioner to object to the administration of the partnership property in bankruptcy and himself to settle the partnership business, would estop him from successfully claiming that his individual estate could not be drawn into and administered by the bankruptcy court. Francis v. McNeal, 228 U. S. 695, 700, 701 [33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706]."

The rule was also applied in Menke v. Sunderman, 186 Fed. 486, 108 C. C. A. 464 (C. C. A. 3); In re Stokes, 106 Fed. 312 (D. C.), by present Circuit Judge McPherson; In re Lattimer, 174 Fed. 824, 826 (D. C.); In re Hansley & Adams, 228 Fed. 564, 566 (D. C.). To the same effect is In re Meyer, 98 Fed. 976, 979, 39 C. C. A. 368 (C. C. A. 2), approved in Vaccaro v. Security Bank, 103 Fed. 436, 442, 43 C. C. A. 279 (C. C. A. 6), which in turn is approved in Francis v. McNeal, supra, 228 U. S. at 702, 33 Sup. Ct. 701, 57 L. Ed. 1029, L. R. A. 1915E, 706.

The logic of the foregoing decisions is that the adjudication in bankruptcy of a partnership on a ground involving its insolvency, includes a determination that the applicable portions of the separate estates of the partners, as well as the partnership estate, are in that proceeding to be subjected to the payment of the partnership debts, regardless of whether all or any of the partners themselves are adjudged bankrupt. It was therefore well within the jurisdiction of the court below to pass upon the acts of John L. Greer and Robert C. Greer in promising to pay and in securing a partnership debt.

[2] We come next to the question whether the acts of these two partners effected preferences against the partnership creditors. It is objected that their acts could not amount to preferences; for (a) the partners have not been adjudged bankrupt, and (b) their acts at most had the effect of making the Ft. Pitt Company the individual creditor of each of these partners, in addition to its existing rights as a creditor of the partnership. The argument made in support of the first of these grounds is that under section 60 preferences can be predicated only of the acts of persons who have subsequently been declared bankrupt, and therefore that the acts of these partners cannot be regarded

principle of that decision, in Re Telfer, 184 Fed. 224, 106 C. C. A. 366 (C. C. A. 6), that the bankruptcy provisions recognizing the partnership entity were designed to be remedial, rather than to change the substantive rights of either bankrupt partnerships or their creditors.

as preferences; and for a like reason it is said that the judgment obtained by the Ft. Pitt Company against these partners individually cannot be treated as falling within section 67f, since that section relates only to judgments obtained against a person who is "adjudged a bankrupt." It is urged in support of the second of these grounds that, in view of the partnership entity, as recognized by the Bankruptcy Act, the portions of the separate estates of these two partners not needed to pay their private debts were not chargeable with the partnership debts until the partnership estate should be exhausted, and hence that it was open to the partners each to make the Ft. Pitt Company his private creditor and so charge his whole separate estate with the payment of the company's claim and in priority to the partnership creditors. While both of these grounds may seem at first blush to be technically correct, yet in a case like this they are devoid of merit. In the first place, they yield no recognition to the principle that at the time the acts in question were committed, the partners were liable in solido for the debts of the partnership. It was found below by the referee and the trial judge, and the findings are undoubtedly correct, that on the date of these acts (and they occurred within four months before the filing of the petition) the partners were both insolvent; indeed, the most that is claimed in this respect is that the partners would have been solvent but for their liability upon the firm debts. Hence, if the judgment and the two mortgages were permitted to stand, they would operate to transfer not only the portions of the separate property of these members which must first be devoted to the payment of their private debts, but also the portions which are subject to the debts of the partnership. After referring to the entity of a firm as distinct from its members, Mr. Justice Holmes said, in Francis v. McNeal, supra, 228 U. S. at page 699, 33 Sup. Ct. at page 702, 57 L. Ed. 1029, L. R. A. 1915E, 706:

"But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets. The nature of the liability is determined by the common law, not by the possible intervention of the Bankruptcy Act."

In the next place, upon facts almost identical with those attending the acts of John L. Greer and Robert C. Greer, it was held in Mills v. J. H. Fisher & Co., 159 Fed. 897, 901, 87 C. C. A. 77, 81, 16 L. R. A. (N. S.) 656 (C. C. A. 6), that such acts constitute acts of bankruptcy, because they operate to transfer partnership assets to one partnership creditor against the interests of the other creditors of the same class, and so effect preferences against the partnership creditors. True, such preferential acts are performed in the names of the partners, yet their operation and effect are in substantial measure to transfer assets equitably belonging to the partnership creditors to the favored creditor of that class. The late Mr. Justice Lurton said in the Mills Case:

"Upon the facts stated in this petition it is obvious that when one member of a firm, which is insolvent and without assets, applies his whole separate estate in satisfaction of one joint liability, that creditor will receive a greater

percentage of his debt than other creditors of the same class. This, at last, is the supreme test of a preference."

The inevitable effect of this ruling is completely to answer the insistence that the partners might through the same acts favor a single creditor of the firm by making him also an individual creditor of themselves, since such acts cannot simply under another name or purpose escape the vice of creating preferences; for the transactions, however characterized, necessarily involve the wrongful use of assets equitably belonging to all the joint creditors. Surely insolvent partners of an insolvent partnership cannot rightfully devote the whole of their separate estates to the benefit of a single firm creditor under the guise of treating him as their private creditor, and so ignore their joint and several liability to all the firm creditors.

[3] Further, if we were in error in treating the acts of these two partners as preferences and as a wrongful appropriation of assets equitably belonging to the partnership creditors to the use of a single creditor of that class, it cannot escape attention that the practical effect of the acts of these partners is the same as it would have been had the partners, as well as the partnership, been adjudged bankrupt, in which case their acts would unquestionably have been open to a charge of technical preference; and in view of the facts already shown that the adjudication actually made resulted in drawing these individual assets into the jurisdiction and administration of the bankruptcy court, and since in every equitable sense these acts were the equivalents of technical preferences, the court itself might well set them aside in virtue of its power under section 5g to "marshal the assets of the partnership estate and the individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates." Judge Lowell said of section 5g in Re Denning (D. C.) 114 Fed. 219, 221:

"Moreover, section 5g of the Bankruptcy Act was intended, I believe, to clear up the whole matter, and to permit the court to deal with conversions of this kind so as not only to prevent preference in the technical meaning of that word, but also so as to 'secure the equitable distribution of the property of the several estates.'"

This view of Judge Lowell is in accord with that of the late Circuit Judge Adams, who, as District Judge, decided the case of In re Jones, 100 Fed. 781. There an insolvent member of an insolvent firm caused his overdue individual note to be indorsed in the name of the firm without any new consideration moving to the firm. Judge Adams, in view of the creditor's knowledge of these conditions, held this to be a fraudulent attempt to prefer the holder of the note over other creditors by converting the individual debt of the maker into a partnership obligation, and, under the power vested in the court by section 5g to marshal the assets of the bankrupts "so as to prevent preferences and secure the equitable distribution of the property," denied the right to prove the note as a claim against the joint estate.

We may add that in our view the instant case cannot on principle be effectively distinguished from what it would have been had the partners themselves been adjudged bankrupts. It is clear that if this had

happened there would have been no room for the contentions made here. What is sought to be done is opposed to the principle of equitable distribution embodied in the Bankruptcy Act; it would give exclusively to one joint creditor the entire joint assets of the insolvent partners; it would not, of course, defeat the claims of their individual creditors, but it would prevent the other joint creditors from sharing equally with the Ft. Pitt Company in the surplus of these two individual estates; and we cannot think that in the presence of an adjudication against the firm the absence of a formal proceeding against the partners is sufficient to entitle them or their favored creditor successfully to resist the rule which plainly would be applicable under an adjudication against both the firm and the partners (In re Frazer, 221 Fed. 83, 85 [D. C.]; In re Hull, 224 Fed. 796, 799 [D. C.]), although the facts of the latter case were not regarded as sufficient to constitute a preference.

Upon all these considerations, we hold that the acts of John L. Greer and Robert C. Greer in undertaking to pay the debt of the partnership, and to secure such debt, operated to create forbidden preferences as against the general creditors of the partnership estate, and so justified the court in setting them aside; hence the decree will be affirmed.

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## LUCAS v. SCOTT et al.

(Circuit Court of Appeals, Ninth Circuit. January 8, 1917.)

No. 2840.

1. WILLS ⟸440—CONSTRUCTION—INTENTION OF TESTATOR.

The cardinal rule for the construction of wills is to ascertain the intention of the testator, which is to be found from the language of the will and the entire context thereof, and not from isolated provisions or expressions; and, having ascertained the general purpose of the testator, the court is to be guided by that, rather than by arbitrary or technical rules.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. ⟸ 440.]

2. WILLS ⟸602(1)—CONSTRUCTION—DEVISE OF LAND.

A testator, who owned a tract of land then under lease for 25 years, provided by article 1 of his will that one-third of the rental should be paid to his widow and the remaining two-thirds to his "children or surviving children" in equal shares, with a further provision that in case of the death of the widow her share should be equally divided among the children or surviving children. Article 3 provided: "At the expiration of the 25 years lease * * * it is my sincere wish and will that my lands shall befall in equal shares and interest upon my three sons, * * * or then surviving sons or son, provided, however, that at such a time these my sons or son, shall pay to each one of my daughters or surviving daughters the sum of $5,000;" also that in case one or more of the sons should not make such payment the others or other son should "have the right to buy" the whole of the land by making the payments to the daughters and paying the same amount each to the shortcoming sons or son. By article 4 it was provided that, should such payments not be made, the land should be sold or leased, and the money derived from the sale or lease "equally divided amongst my children or their

lawful heirs and assigns." *Held*, that the words "daughters or surviving daughters" in article 3 were used in the same sense as the words "my children or surviving children" in article 1, as meaning the daughters who survived the testator and not those who survived the lease; that the paramount purpose of the testator, as gathered from all of the provisions of the will, was to leave the land to his children who survived him, and to vest an equal estate therein in each, subject to a contingent defeasance, on termination of the lease, of the interest of the daughters and of any shortcoming son by the payment to him of cash by one or more of the then surviving sons, in case any of them should exercise the option.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351, 1352, 1359; Dec. Dig. ⟸602(1).]

3. POWERS ⟸28—ASSIGNABILITY.

Under article 3 of said will, construed in the light of its other provisions and of the testator's general purpose and "sincere wish" as therein expressed, the privilege given the sons, or either of them, of acquiring the interests of the daughters in the land, was personal, and not assignable, and a grantee of the sons could not enforce such right of purchase.

[Ed. Note.—For other cases, see Powers, Cent. Dig. § 79; Dec. Dig. ⟸28.]

In Error to the Supreme Court of the Territory of Hawaii.

Action by Mary N. Lucas against Walter W. Scott, Janet M. Scott, and Rubena F. Scott, minors, and the Bishop Trust Company, Limited, guardian of their estate. Judgment for defendants, and plaintiff brings error. Affirmed.

This is a writ of error to review the judgment of the Supreme Court of Hawaii upon a case submitted to that court under sections 2381, 2382, and 2383 of the Revised Laws of Hawaii of 1915, upon an agreed statement of the facts. The facts as agreed to are substantially the following: Christian Henry Bertelmann, of Hawaii, died on or about February 15, 1895, being at that time seised in fee of the lands which are the subject of the controversy. He owned other property not involved in the suit. He left surviving him three sons, Frank, Henry, and Christian, and six daughters, Catherine, Angeline, Wilhelmina, Justine, Josephine, and Beatrice, who all still survive, excepting Catherine, who died on or about September 10, 1905, leaving surviving her three children, Walter W. Scott, Janet M. Scott, and Rubena F. Scott, the defendants in error in the present case. Catherine's husband died in January, 1908. The testator's widow died in September, 1915. The Bishop Trust Company, Limited, is the guardian of the estate of the three minors, the defendants in error herein. Bertelmann left a will, which was executed December 12, 1891. The will was admitted to probate April 18, 1895. Mary N. Lucas, the plaintiff in error, has by various conveyances acquired all the right, title, and interest of the three sons and the five living daughters of the testator under the will. On November 1, 1890, the testator leased to the Kilauea Sugar Company all of the lands which are the subject of the present controversy for the term of 25 years from that date, and that lease continued in operation until November 1, 1915. The will contained certain specific devises of property to the widow and to each of the sons and daughters. Then followed the third and fourth articles which contain the provisions out of which the present controversy arises:

"Third. At the expiration of the 25 years lease with the Kilauea Sugar Company it is my sincere wish and will that my lands shall befall in equal shares and interest upon my three sons Frank Charles, Henry Godfrey and Christian Sylvester Bertelmann, or then surviving sons or son. Provided however that at such a time these my sons or son shall pay to each one of my daughters or surviving daughters the sum of five thousand dollars, $5,000. In case one or two of my sons should be at that time, or within a year from that time unable to furnish, produce or raise the necessary amount to pay to

each one of my daughters or surviving daughters his share of the $5,000 per capita, the two or the one of my sons will have a right to buy the whole of my lands now leased to the K. S. Co. by paying:

"1. To each of my daughters or surviving daughters the amount aforesaid of $5,000.

"2. To my shortcoming son or sons the same amount of $5,000 each, being the same share as will be paid to my daughters. By doing so, they my sons or he my son will enter in full possession of all my lands; and their or his right and title will be undisputable, provided they or he (my sons or son) comply and fulfill the above mentioned conditions.

"3. To my wife Susan Bertelmann a life rent of $2,000 per annum. I make the payment of all these amounts above given a charge upon all my estate.

"Fourth. Should none of my sons be able to pay these amounts, then my lands will be sold at public auction, or leased over again according to circumstances and best advantage of my family. The money deriving from said sale or lease will be equally divided amongst my children or their lawful heirs and assigns after the distributive share of dower will have been given to my wife Susan Bertelmann according to law."

Antonio Perry, of Honolulu, T. H., for plaintiff in error.

E. A. Mott-Smith, of Honolulu, T. H., for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). It is the contention of the defendants in error that the words "surviving daughters" in article third relate to the time of the testator's death; that Catherine, who survived the testator, but died before the expiration of the lease, was a surviving daughter within the meaning of that article; that under the will a vested estate, a one-ninth interest, was devised to her which upon her death descended to her three children; that although, if Catherine had survived the expiration of the lease and her interest could have been defeated by the payment of $5,000 to her by her brothers, that interest now vested in the children cannot be defeated, because the condition therein expressed has, by her death before the expiration of the lease, become impossible of performance, and that therefore the three children now own an undivided one-ninth interest indefeasible in the lands mentioned in article third.

The plaintiff in error contends that the expiration of the lease and not the death of the testator is the period of survivorship referred to in the phrase "surviving daughters" used in article third, and that Catherine was not a surviving daughter within the meaning of that article; that the devise to Catherine did not vest an estate in her on the testator's death, but an interest contingent upon her surviving the term of the lease, and upon the nonpayment to her within one year after the expiration of the lease of the sum of $5,000 by the three sons or one or more of them; that, whether the devise to Catherine was vested or contingent, the condition expressed in article third be it a condition of defeasance or a condition of vesting, permitted the sons or one or more of them to pay $5,000 to her or her heirs within the time stated, and that, Catherine not having survived the expiration of the lease, the law does not require the sons or any of them to pay $5,000 to defeat the interest which would otherwise have gone to Catherine; that the children of Catherine have now no right or interest in the property mentioned in article third; that the plaintiff in error, the

assignee of the three sons, is now the sole owner of the lands without making any payment to Catherine's children, and that, even though the correct construction of the will is that the death of the testator was the period of survivorship referred to in article third, and even though the devise to Catherine was of an interest which vested at the time of the testator's death and descended to her three children, that interest was nevertheless defeasible upon payment to them by the sons or one or more of them of $5,000; and that the plaintiff in error is now entitled to defeat that interest by paying the defendants in error before November 1, 1916, the sum of $5,000.

The decision of the Supreme Court of Hawaii, consisting of three judges, one judge dissenting, was that the death of the testator was the period of survivorship referred to, and that Catherine was a surviving daughter; that the devise to her was of a vested interest, defeasible upon the condition stated, which was a condition subsequent; that upon her death her one-ninth interest descended to her three children; that the condition subsequent named in article third required the payment of $5,000 to Catherine personally in her lifetime; that the payments of $5,000 to each of the daughters were not to be made until at and after the expiration of the lease; that by reason of Catherine's death prior to that time the defeasance became impossible of performance, and that the case stands, therefore, as though there were no condition of defeasance, and Catherine's children now own an undivided one-ninth interest in the lands; and that the plaintiff in error has no right to defeat that interest upon the payment of $5,000. The court also held that the privilege granted to the sons to pay the $5,000 to each daughter "seems personal" and nonassignable by the sons.

The defendants in error, in support of their contention, cite the decision of the Supreme Court of the Territory of Hawaii of July 29, 1902, in Bertelmann v. Kahilina, 14 Hawaii, 378, a decision rendered by judges other than those who compose the present court. Frank C. Bertelmann and Henry G. Bertelmann, two of the sons of Christian Henry Bertelmann, were the plaintiffs in that suit, and the defendants were four of the daughters and the widow of the testator. The plaintiffs in that suit claimed to own an undivided one-third in fee simple of the lands described in article third. The defendants denied that the plaintiffs owned such an interest, and alleged that they owned no more than an undivided two-ninths of the estate, and that the defendants, the daughters, each owned an undivided one-ninth, and that the widow was entitled to her dower in said lands. The majority of the court in that case held, one judge dissenting, that the widow took a life estate in one-third of the land, subject to be defeated upon the performance of the conditions prescribed in the third article, in which case she would thereafter have a fixed sum of $2,000 a year, which would be a charge on the land; that the children took equally vested estates in fee, subject to the widow's interest, defeasible as to the interest of the daughters and the shortcoming sons, upon the performance of the prescribed conditions by the other son or sons, the sons having meanwhile contingent devises as to such interests.

[1] The cardinal rule for construing and interpreting wills is to ascertain the intention of the testator. The intention is to be found

from the language of the will and the entire context thereof, and not from isolated provisions or expressions, for it is by all the provisions of the will taken together that the intention of the testator is evidenced. Having become convinced of the general purpose of the testator, we are to be guided by that rather than by arbitrary or technical rules. In Smith v. Bell, 6 Pet. 68, 75 (8 L. Ed. 322), Chief Justice Marshall said:

"The intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law."

See, also, Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138, Hardenbergh v. Ray, 151 U. S. 112, 126, 14 Sup. Ct. 305, 38 L. Ed. 93, and Home for Incurables v. Noble, 172 U. S. 391, 19 Sup. Ct. 226, 43 L. Ed. 486.

[2] Approaching the will under consideration with this rule in view, we find that the testator first makes reference to his land, which consisted of more than 3,500 acres, and which he had leased to the Kilauea Sugar Company for the term of 25 years, commencing November 1, 1890, at the rental of $6,000 per annum. In the first article of the will he devises to his widow one-third of that rental, and to each of his children, or surviving children, the remaining two-thirds thereof, in equal shares, with the further provision that, in case of the death of the widow before the expiration of the lease, her share should be equally divided among the children or surviving children. By this provision the testator clearly expressed his intention to provide for the children who survived his death, out of the rental of the land, in equal shares. The second article refers to land not included in the lease, and provides that it shall be divided into ten lots, one of which was devised to the widow, and one to each of the nine children. The third and fourth articles contain the provisions the construction of which is involved in the present suit. In those provisions is evidenced a general purpose to make equal, or substantially equal provision for all his children out of the land which was subject to the lease. There is also clearly expressed the wish of the testator that the leased land should, after the expiration of the lease, be owned by his sons or one or more of them, for the testator declared:

"It is my sincere wish and will that my lands shall befall in equal shares and interest upon my three sons, or then surviving sons or son."

He goes on to prescribe the method by which they may acquire title, which he declares shall be by paying to each one of his daughters or surviving daughters the sum of $5,000 within a year from the expiration of the lease, and he provides further that, in case one or two of his sons shall fail to make such payment, "the two or the one of my sons will have the right to buy the whole of my lands now leased to the K. S. Co." by making the $5,000 payment to each of the daughters or surviving daughters and to the shortcoming son or sons, and that by doing so "they, my sons, or my son, will enter into full possession of all my lands; and their or his right and title will be indisputable provided they or he (my sons or son) comply and fulfill the above-mentioned conditions." In the fourth article the will provides that, in

case of the failure of the sons to make the payments, the lands "will be sold at public auction, or leased over again, according to circumstances and the best advantage of my family," and that in case of sale there shall be equal distribution of the money derived therefrom "amongst my children or their lawful heirs and assigns."

It will be seen that there are two periods of survivorship mentioned in the will. One relates to the expiration of the lease. The sons "then surviving" are given the privilege to purchase the interest of the daughters. The other relates to the death of the testator. The "daughters or surviving daughters" referred to in article third are not the daughters who shall survive the lease, but those who shall survive the testator. The words "daughters or surviving daughters" there found are used in the same sense as "my children or surviving children" in the second subdivision of the first article. If the testator's purpose had been otherwise, he would have indicated by the word "then" in article third that the surviving daughters whose rights the sons might purchase were those who survived the lease. This purpose of the testator is further evidenced by the provision in the fourth article that, in case of sale of the land at the expiration of the lease, the money derived therefrom shall be equally distributed "amongst my children or their lawful heirs and assigns." There has been much discussion in the briefs of the paramount intention of the testator. The plaintiff in error finds in article third evidence that the principal purpose of the testator was to vest his land in equal shares in his three sons, subject to a defeasance in case of their failure to pay the surviving daughters each the sum of $5,000. That his sons or some of them should own the land in an undivided tract is indeed clearly expressed as the sincere wish of the testator. But we are of the opinion that it was not his paramount wish or purpose. If that had been his paramount wish, the natural and simple method to express it would have been to devise to his "then surviving" sons the whole of the land, subject to a charge in favor of each of his daughters for the sum of $5,000.

The will taken by its four corners means, we think, that the testator intended thereby to leave his land to his children who survived him, and to vest an equal estate therein in each of them, subject to a contingent defeasance of the interests of the daughters and of the shortcoming sons, by the payment to them of cash by one or more of his then surviving sons, in case they or any of them should exercise their option "to buy the whole of my lands now leased." In other words, the intention of the testator was to leave the land in equal shares to all his children who survived him, subject to the privilege of the sons to buy the interests of the daughters, and not to leave it all to the sons subject to a defeasance as to six-ninths thereof in case they failed to exercise their option. There was no further controlling provision as to the disposition of the estate after the expiration of that period, in case the sons should fail to exercise the option. It was then to be optional with the devisees whether the land should be sold, and the proceeds equally divided, or whether it should again be leased. The wish that the sons, or one or more of them, might acquire the whole tract, however dear it may have been to the heart of the testator, was

expressed in such a way as to give the sons no more than the privilege to acquire the interests of the daughters in the land by complying with a condition precedent. Compliance with that condition was absolutely necessary before the estate of the daughters could vest in the sons, for it is apparent from the will that the testator did not intend that the daughters' estates should vest in the sons unless the conditions were fully and literally performed. The defeasance of the daughters' estate, on the other hand, depended on a condition subsequent, the payment to each of them of a prescribed sum within a fixed period of time. These views are in harmony with what was decided by the court below, and with the decision in the Kahilina Case, and it becomes unnecessary to consider the question whether or not the rule of the latter case became a rule of property as to the rights of any of the parties to the present controversy.

[3] A question more difficult of solution is whether or not the plaintiff in error has acquired the right of the testator's sons to buy the interests of the daughters, and whether Catherine's children may be compelled to convey their interest to the plaintiff in error upon the payment to them of the sum of $5,000. The deeds of Henry and Sylvester Bertelmann to the plaintiff in error conveyed not only the grantors' interests in the land, but the rights, powers, and privileges granted under paragraph third of the will. The title of Frank Bertelmann was obtained under foreclosure of mortgages and by a sheriff's deed. Upon a consideration of the terms of the will, the situation of the testator, his family, and his property, and with the endeavor to ascertain what he intended should be done with his estate, we reach the conclusion that article third was the expression of his desire, not that his sons should be favored in the distribution of his property, but that the title to the land, so held at that time under the lease, should be kept in the male members of his family, and that that was what he meant when he declared his sincere wish and will to be that his lands "shall befall in equal shares and interest" upon his sons, and that the privilege which he conferred upon his "then surviving" sons to buy the interests of his daughters at a fixed price was intended to be personal to the sons, and not transferable to another. It was strictly a family scheme, one purpose of which may have been, and probably was, to offer an inducement to the sons to practice habits of industry and economy, so as to accumulate the money requisite for the purchase of the other interests when the time should come for the exercise of their option. There is in the will no expression of the testator's wish that such a right should go to his then surviving sons and their assigns, although it is to be said that the absence of the word "assigns" is not of controlling effect. But the provision that, in case one or two of his sons should not at that time be able to furnish the amount to pay for the daughters' shares, the other son or sons should have the right to buy the whole thereof, is suggestive of the testator's purpose to exclude strangers from participating in that right of purchase, and to confine it to his sons. He goes on to provide, in substance, that, should none of his sons be able to pay the specified amounts within the time limited, their rights so to purchase shall end, and the property shall be owned by

his children, share and share alike. That purpose is in harmony with the previous provision of the will wherein, after having devised to his children each a small parcel of land, the testator directed that not one of the lots so devised should ever be conveyed, sold, or in any other way disposed of outside of his own family, so long as there should be one or more legal offsprings of his family. "Conditions may be merely personal to those designated, and not apply to their grantees." 40 Cyc. 1697; Wood v. Ogden, 121 Mo. App. 668, 97 S. W. 610; Alexander v. Alexander, 156 Mo. 413, 57 S. W. 110.

Again, Catherine's interest went to her, as we have seen, as an estate in fee, subject to be defeated upon the performance of a condition subsequent, the payment to her by one or more of her brothers of a stipulated sum. We need not pause to consider whether or not the court below correctly held that the sons' right to acquire Catherine's interest ceased with Catherine's death, as being thereby rendered impossible of performance. We are of the opinion that the condition subsequent could not be complied with, even if Catherine were now surviving, by the tender to her of the sum specified in article third within the time therein limited, by any one other than those who were expressly given that right by the will, for a conveyance by the heirs of Catherine to the plaintiff in error would not be the conveyance which was contemplated by the testator. In 13 Cyc. 689, it is said:

"Conditions subsequent, working a forfeiture of the estate conveyed, should be strictly construed, as such conditions are not favored in law, and are to be taken most strongly against the grantor to prevent such forfeiture."

In 30 Am. & Eng. Enc. of Law, 802, concerning conditional devises and bequests, it is said:

"Conditions subsequent are considered liberally, in order to save, if possible, the vested estate or interest."

"A contingency divesting a prior vested interest must happen literally." 1 Roper on Legacies, 619.

These principles are abundantly sustained by the authorities. Nevius v. Gourley, 95 Ill. 206, 213; McFarland v. McFarland, 177 Ill. 208, 217, 52 N. E. 281; Merrifield v. Cobleigh, 4 Cush. 184; Hooper v. Cummings, 45 Me. 359; Ritchie v. K., N. & D. Ry. Co., 55 Kan. 36, 56, 39 Pac. 718; Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682; Southwick v. N. Y. Christian M. Society, 151 App. Div. 116, 135 N. Y. Supp. 392; Davis v. Gray, 16 Wall. 203, 230, 21 L. Ed. 447; Southard v. Central Railroad Co., 26 N. J. Law, 13; Burgson v. Jacobson, 124 Wis. 295, 102 N. W. 563; Potomac Power Co. v. Burchell, 109 Va. 676, 64 S. E. 982; Harrison v. Harrison, 105 Ga. 517, 31 S. E. 455, 70 Am. St. Rep. 60.

The judgment is affirmed.

## THE LOUISE RUGGE et al.

(Circuit Court of Appeals, Third Circuit. January 30, 1917.)

No. 2191.

1. MASTER AND SERVANT ⟸301(4)—LIABILITY FOR NEGLIGENCE OF SERVANT—SERVANT HIRED TO ANOTHER.

A contractor with two counties for the replacement of a drawbridge over a stream between them was required by his contract to maintain a temporary bridge while the work was being done at its own expense and responsibility. Subsequently by a verbal arrangement the bridge tenders employed by the counties to operate the old bridge were retained to operate the temporary bridge, and while still paid by the counties such payments were allowed by the contractor from the contract price. *Held*, that such arrangement did not relieve the contractor from liability for their negligence in operating the bridge, but that in such operation they were its servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1213, 1214.]

2. NAVIGABLE WATERS ⟸20(8)—BRIDGES—INJURY TO VESSEL FROM NEGLIGENT OPERATION OF DRAW.

Injury to libelant's lighter by striking its mast against the draw of a bascule bridge while passing through in the night *held*, on the evidence, due to the negligence of the bridge tenders in failing to raise the draw to its full height, until after it had been struck by the mast.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 96.]

3. EVIDENCE ⟸77(5)—PRESUMPTION FROM FAILURE TO PRODUCE WITNESSES.

In a suit for injury to a vessel through the alleged negligence of bridge tenders employed by respondent, the failure of respondent to produce their testimony raises a damaging presumption.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 97.]

4. ADMIRALTY ⟸122—COSTS—BETWEEN CORESPONDENTS.

Where, in a suit for injury to a vessel through negligence, for which it was alleged one or the other of a number of respondents was liable, such respondents contest the question of liability with each other on the evidence, those exonerated are entitled to costs from the one held liable.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 797-827.]

Appeal from the District Court of the United States for the District of New Jersey; Charles P. Orr, Judge.

Suit in admiralty by the Clyde Steamship Company against the tug Louise Rugge, the Board of Chosen Freeholders of the County of Essex, the Board of Chosen Freeholders of the County of Hudson, and the Snare & Triest Company. Decree for libelant against the Snare & Triest Company, from which it appeals. Affirmed.

For opinion below, see 234 Fed. 768.

Hector M. Hitchings, of New York City, for appellant.

Park & Mattison, of New York City (Henry E. Mattison, of New York City, of counsel), for The Louise Rugge.

James J. Murphy, of Jersey City, N. J., and Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and E. Curtis Rouse, both of New York City, of counsel), for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

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

WOOLLEY, Circuit Judge. This suit in admiralty was brought by Clyde Steamship Company against the Steam Tug Louise Rugge, The Board of Chosen Freeholders for the County of Essex, The Board of Chosen Freeholders for the County of Hudson, and The Snare & Triest Company, to recover damages for injuries sustained by the libellant's lighter, The Boston. From a decree finding The Snare and Triest Company in fault and dismissing the libel as to all other respondents, this appeal was taken.

The facts of the case appear at length in the opinion of the District Court. 234 Fed. 768. Only the substance of the testimony, as it bears upon the discussion of the matters for review, will be given in this opinion.

The Boston, a hand winch, mast and derrick lighter, square ended, without steering gear or motive power, was being towed, stern first on short lines, by the Tug Rugge, up the Passaic River. On passing through the draw of a temporary bascule bridge, which The Snare & Triest Company had constructed for use while erecting a new bridge under contract with The Boards of Chosen Freeholders of Hudson and Essex Counties, the upper extremity of the lighter mast was struck by the overhanging draw span of the bridge, causing it to break and fall, thereby occasioning the injuries complained of.

The libellant, conceiving that it had sustained damages by the negligence of someone, filed a libel against everyone having a possible relation to the accident. These included the tug which was towing the lighter, The Boards of Chosen Freeholders of the two counties for which the new bridge was being erected, and The Snare & Triest Company, contractor, engaged in the new work in connection with which the temporary bridge was built and operated. The libellant charged negligence in a wandering way, first against the tug for carelessly handling her tow in passing through the draw; and then against The Boards of Chosen Freeholders of the two counties and The Snare & Triest Company (according as the testimony might fasten negligence upon one or the other) in the operation of the span. Each respondent, defending separately, attempted to exonerate itself with indifference as to the effect of its defense upon its co-respondents. The tug denied negligence in its manœuvres; the Boards of Freeholders, while not denying negligence in the operation of the bridge, denied their liability for it, upon the ground that the temporary bridge was operated at the time of the accident by the Snare & Triest Company under a contract with them to operate the same for the free passage of vessels, and to be responsible for all accidents resulting therein; and the Snare & Triest Company, while producing no testimony to disprove negligence, denied liability for the negligence proved, because, as it contended, it had been relieved of its original liability under the contract with the Boards of Freeholders for the safe operation of the bridge by a change in its terms, whereby, at the time of the accident, the bridge was operated by servants of the Boards of Freeholders of the two counties for whose negligence the counties were liable. In this state of the pleadings the trial opened, the libellant endeavoring to place the responsibility with indifference upon some re-

spondent, and each respondent striving to escape liability with indifference as to the fate of the others. The outcome was a decree against the Snare & Triest Company.

The complaint of the Snare & Triest Company (hereinafter called the appellant) is two-fold; first, that the court erred in finding from all the evidence that it was in fault; and second, that in reaching that finding, the court erred in using against it evidence produced by other respondents in their own defense, when between them and the appellant no pleadings had been filed and no issues joined.

In this case there was an issue between the libellant and the several respondents, each being charged with the negligence which inflicted the injury. It was therefore necessary for the trial court to consider either separately or collectively the whole testimony in order to determine where the negligence lay, the liability therefor, and the measure and perhaps the division of damages. It is easy to find from the court's opinion the testimony upon which it dismissed the libel as to three of the respondents, but it is not entirely clear upon whose testimony the court found against the appellant. It may be that the finding was based in part upon the testimony of witnesses other than those produced by the libellant. We are therefore inclined, without approving the appellant's theory, to review the case, first, upon all the testimony, and second, upon the testimony of the libellant's one witness as to negligence, and of the appellant's one witness in reply.

We concur in the decree of the trial court based upon the whole testimony. Briefly stated, it shows that the tug, having in tow the libellant's lighter, blew for the bridge when about 2,000 feet away; that she lowered her speed to one bell, and then stopped her engines entirely and drifted towards the bridge waiting for it to rise; that, though the night was dark, the bridge lights were plainly discernible, and that she started only after the light on the end of the bridge showed that the bridge had been raised and had stopped, and then with due care proceeded on a course that would have enabled her tow to clear the bridge had the bridge been fully raised; that in passing through the draw, the mast of the lighter struck the overhanging span, whereupon the span was instantly raised to its proper and full height. It further appears that the bridge was a temporary structure, of a lift or bascule type, used in connection with permanent work being conducted by the appellant under contract with the counties of Essex and Hudson; that under this contract the appellant undertook to operate the bridge, and assumed sole responsibility for accidents of any kind that might occur during the progress of the work; that after the contract had been entered upon, an arrangement was made between the appellant and the Boards of Freeholders of the two counties, whereby the bridge-tenders previously employed upon the old bridge should be retained, and to secure payment for their services the appellant surrendered to each county a certain portion of its contract money.

By this testimony we think the District Court was justified in its findings of fact, that by no possibility was the libellant's lighter in fault; that the tug was not in fault; and that the negligence which caused the injury was the negligence of the men who operated the draw.

This negligence was not denied by testimony produced either by the appellant or by the two Boards of Freeholders, which were the only parties that had a relation to the operation of the draw, but liability therefor was denied by all, according as each viewed the arrangement with respect to bridge-tenders. We are of opinion that the evidence was sufficient for the court to find the further fact that while the bridge-tenders were the servants of the counties they were hired or loaned to the appellant, were paid for their services by the appellant (though indirectly) and were engaged in its work at the time of the accident.

[1] In applying the law to these findings of fact, in order to determine the appellant's liability for the negligence of the servants of another, the trial court very properly invoked the principle, that:

"If the servants of a man are sent to work upon the property or the premises of another, they will become the servants of the latter if they work under his direction and control: otherwise not, and where the servants of one person are hired or loaned to another they become the servants of the latter for the time being." Cooley on Torts, 624.

The court followed the tendency of modern decisions in disregarding as essential or controlling the mere incidentals of the situation, such as the mode and manner of payment of wages and which of two parties had the power of discharge, Atlantic Transport Co. v. Coneys, 82 Fed. 177, 28 C. C. A. 388, and was right in applying the test pointed out by the Supreme Court in Standard Oil Co. v. Anderson, 212 U. S. 215, 221, 222, 29 Sup. Ct. 252, 53 L. Ed. 480, by inquiring whose was the work being performed and by ascertaining who had the power to control and direct the servants in the performance of that work.

[2] Viewing the decree as based upon the testimony produced by all the parties, respondents as well as libellant, we find no error in the inferences drawn or in the law applied. We will now inquire whether the decree against the appellant can be sustained upon the testimony of the libellant's witness alone, without conceding, as contended by the appellant, that after using the witnesses of its co-respondents by cross-examination and argument to shift liability from itself to them, it may still avoid the force of their testimony against itself.

The appellant seeks to escape the burden of the testimony of its co-respondents upon the theory that as they did not file cross-bills against it and as it did not file cross-bills against them, their testimony, by analogy to the confession of a co-defendant and to the rule that the answer of one defendant is not evidence against another (Conklin's Admiralty [2d Ed.] vol. 2, page 270), is not binding upon it. Of course the answer of one defendant is not evidence against a co-defendant any more than is the confession of one binding upon the other, and nothing of the kind was attempted at the trial. The situation of the respondents did not call for or permit interpleading between them by cross-bill. A cross-bill is in the nature of a cross-suit, to be heard in the original suit, and is filed to the original bill when a counter-claim is urged or affirmative relief is prayed with respect to a matter arising out of the same cause of action. No respondent made counter-claims by answer against other respondents affecting

their rights and entitling them under any rule to notice thereof by service of the answer; nor did any respondent, by pleading or evidence, seek affirmative relief or make claims against another in the nature of counter-claims for contribution, indemnity or otherwise. The relation of each respondent to the libellant was that of tortfeasor, but their relation to one another was merely that of finding themselves joined in one action and severally charged with the same wrongdoing, in which each claimed it was not guilty, and from which each endeavored to escape by exonerating itself at the expense of the others. As between defendants thus jointly sued, though severally charged, where each claims it is not guilty for the reason that the other is guilty, interpleading is no more necessary than between defendants jointly indicted.

[3] What is the effect of the libellant's testimony directed solely against the appellant and of the appellant's testimony in reply? The libellant's one witness as to negligence testified in substance that he was the captain of the lighter; that he saw the bridge and its lights; that the tug blew for the bridge and waited "until the bridge got up * * * and then started to go ahead again" at half speed, indicating the angle at which the bridge opened and how the mast of the lighter struck. While the appellant makes the argument from this testimony that the tug went under the bridge when it was still ascending, we think the testimony conclusively shows that the bridge had risen and had stopped before the tug proceeded, and that this amounted to an invitation to the tug to come on, and prima facie shows negligence of those operating the bridge. This is the substance of the testimony of the one witness produced by the libellant. To controvert this testimony, meagre as it was, the appellant produced no witnesses, not even the men who raised the span and who were engaged upon the work at the time of the accident. Such an omission in admiralty raises a damaging presumption. The one witness it produced was its secretary and treasurer, who restricted his testimony to the denial of the libellant's liability for the negligence shown, under his version of the transaction between the libellant and the Boards of Freeholders of the two counties as to whose servants operated the bridge, how they were paid, and by whom they were controlled.

The appellant's contention that it is not bound by the testimony of its co-respondents introduced in exoneration of themselves, does not, even if sound, aid it in the state of the testimony just recited. The libellant proved a prima facie case of negligence against the party responsible for the operation of the bridge without showing who that party was. The appellant supplied this omission in proofs by showing that at one time it was the party responsible for the operation of the bridge under its contract with the Boards of Freeholders, but for defense maintained (without controverting the proven negligence) that it was not responsible at the time of the accident because it had been relieved of the operation of the bridge by an alteration in the contract. Therefore, the appellant's defense was in the nature of confession and avoidance, confessing the fact of negligence by not controverting it, and avoiding it by endeavoring to show that it had been relieved of

its one time liability for the operation of the bridge, and therefore the negligence proved was the negligence of another. Negligence thus being prima facie shown and not controverted and original responsibility for the operation of the bridge being admitted, the one question remaining for the court was whether the appellant had shown that at the time of the accident it had been relieved of its original responsibility by a valid change in the contract. We are of opinion that by the appellant's own showing, the arrangement as to bridge-tenders was not an official act of the two Boards appearing in their minutes, and that it was not otherwise "the subject of a written agreement," and therefore the court was justified in finding that the contract between the appellant and the counties had not been changed, that the work of operating the bridge remained that of the appellant, and that even if the bridge-tenders were nominally the servants of the counties, they were nevertheless actually engaged upon the appellant's work and for their negligence the appellant was liable. We have examined the decree, based upon the testimony restricted as claimed by the appellant, and find that the decree against the appellant can be sustained without the aid of the testimony produced for the other respondents by which, in exonerating themselves, they cast upon the appellant the accumulated evidence of its negligence and liability.

[4] Error is assigned in the decree of the court awarding costs to each of the respondents against the appellant, upon the theory that there were no matters litigated between them, and that the appellant had nothing to do with making them parties. The appellant took issue at the trial with certain of its co-respondents (not with the libellant) upon the question of negligence, and with certain other co-respondents upon the question of liability, and endeavored to do to its co-respondents the very thing of which it complains of them, namely, use the testimony of one against the other to exonerate itself in one way or another. The issues were really fought out between the respondents, negligence of one of them being manifest. The appellant accepted the issue of negligence tendered by the tug, and tried out that issue with the tug, and itself tendered the issue of liability to the two Boards of Freeholders and tried out that issue with them. Having thus tried the issues with its co-respondents and lost, we apprehend that it cannot now complain of an award of costs against it in their favor.

The decree below is affirmed.

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## LOUISVILLE WOOLEN MILLS v. TAPP et al.

(Circuit Court of Appeals, Sixth Circuit. February 6, 1917.)

No. 2958.

1. MECHANICS' LIENS ⟸198—PRIORITY OF MATERIALMAN'S LIEN OVER LANDLORD'S LIEN.

Ky. St. § 2314, declares that if, after the commencement of any tenancy, a lien be created, the lienor may remove the property only by satisfying the landlord's lien; while section 2315 declares that an execution against the tenant, levied on property found on the demised premises, shall be

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

subject to the landlord's lien. Section 2316 declares that any valid liens on the personal property of the lessee created before it was carried on the leased premises shall prevail against the landlord, while, if such lien be created, whilst the property is on the demised premises the landlord shall have preference; and section 2317 declares that a landlord shall have a superior lien on the personal property of the tenant owned by him after possession is taken under the lease. Section 2487 gave one who furnished property to a bankrupt clothing company a lien on property so furnished; while sections 2488, 2489, and 2490 provide that such lien shall be superior to the lien of any mortgage or other incumbrance thereafter created, etc. *Held* that, as the materialman's lien is in the nature of a reservation, being created before the property was placed on the demised premises, and as such lien is placed on a par with wage claims, and is declared to be superior to the lien of any mortgage or other incumbrance thereafter created, the lien for wages accruing within six months being superior to that of mortgages theretofore created, the materialman's lien on property furnished and placed on the demised premises took priority over the lien of the landlord.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 348–355; Dec. Dig. ⟸198.]

2. MECHANICS' LIENS ⟸198—PRIORITY OF MATERIALMAN'S LIEN OVER LANDLORD'S LIEN.

Where a lease expired by its terms in November, and by virtue of a holding over for three months a new tenancy from year to year was created, in accordance with Ky. St. § 2295, such tenancy must be deemed one created at the date of the expiration of the old lease, and hence a lien for rent accruing under the second tenancy is inferior to the lien of a materialman for property on the demised premises at the time the second tenancy was created.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 348–355; Dec. Dig. ⟸198.]

3. BANKRUPTCY ⟸249—TRUSTEES IN BANKRUPTCY—EXPENSES OF ADMINISTRATION.

Where the landlord asserts a lien on the property of a bankrupt tenant found on the demised premises, the trustee has the option to pay the claim of the landlord, or to refuse and surrender the premises, allowing the landlord to perfect such claim as he may against the estate, and so the trustee, having retained possession of the demised premises for the purpose of winding up the estate, is entitled to charge the rent paid during that time as an expense of administration, although not rent which accrued before bankruptcy, or that paid after the trustee ceased to use the premises; it not appearing that the payment of such rent was necessary to enable the trustee to retain possession desired.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 347; Dec. Dig. ⟸249.]

4. BANKRUPTCY ⟸273—LIABILITY TO ESTATE—CLAIMS.

Where a landlord, who asserted a lien on the property of the bankrupt tenant found on the demised premises, was overpaid by the trustee, his liability to repay amounts to the estate was primary, although the trustee was also liable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 347; Dec. Dig. ⟸273.]

5. BANKRUPTCY ⟸273—PAYMENTS BY TRUSTEE—PROTECTION.

Payments by a trustee in bankruptcy pursuant to orders of the referee, not made at creditor's meetings and without notice, while the supersedeas

of a former appeal was in effect, must be deemed voluntary payments by the trustee; the orders not being any protection.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 347; Dec. Dig. ⊂=273.]

Petition to Revise and Appeal from the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

In the matter of the bankruptcy of the Tapp Clothing Company. The landlord's lien of P. H. Tapp and another was adjudged to have priority, and the Louisville Woolen Mills, a corporation, petitions to revise and appeals. Reversed and remanded on appeal, and petition to revise dismissed.

W. S. Mendel, of Louisville, Ky., for petitioner and appellant.

J. B. Baskin and D. A. Sachs, Jr., both of Louisville, Ky., for respondents and appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. In the case of Louisville Woolen Mills v. Johnson, 228 Fed. 606, 143 C. C. A. 128, we had for review certain proceedings in the matter of the Tapp Clothing Company, bankrupt, and we held that the Woolen Mills had a materialman's lien, under the Kentucky statute, against the bankrupt estate. In further proceedings below, in the same estate, it appeared that Tapp, as owner of the factory premises, had a landlord's lien against the same body of property. There was not enough to satisfy both; and the referee and the District Judge have both held that the landlord's lien takes precedence. Whether this view was right is the question for present decision.

Each lien is created by an independent section of the Kentucky Statutes. The sections have no direct relation to each other. Apparently, when each lien was created, the existence of the other was not distinctly in the legislative mind. Which one is superior must be determined by comparison of the statutes and by interpretation of the general language. Unfortunately the subject has not been considered in any direct way by the Kentucky Court of Appeals.

[1] A landlord's lien arises under Kentucky Statutes, § 2317, and is regulated by sections 2314, 2315 and 2316. Section 2317 says:

"A landlord shall have a superior lien on the * * * personal property of the tenant * * * owned by him after possession is taken under the lease."

Section 2314 provides that "if, after the commencement of any tenancy, a lien be created on the property upon the leased premises," the lienor may remove the property from the premises only upon satisfying the landlord's lien; by section 2315, an execution against the tenant, levied on the property found on the leased premises, must be satisfied subject to the landlord's lien; and section 2316 says: "All valid liens upon the personal property of a lessee, * * * created before the property was carried upon the leased premises, shall prevail against * * * the landlord," while, "if such lien be created whilst the prop-

erty is on the leased premises," then the landlord must have preference.

The materialman's lien arose under section 2487, and is regulated by sections 2488, 2489, and 2490. Section 2488 provides that it "shall be superior to the lien of any mortgage or other incumbrance thereafter created." This court has considered the nature of the landlord's lien, as applicable in bankruptcy proceedings, in Courtney v. Fidelity Co., 219 Fed. 57, 134 C. C. A. 595, and has discussed the character of the materialman's lien in the Johnson Case, supra, and the cases therein cited.

The District Judge applied the rule of some earlier decisions in the District Court. These depended, essentially, upon the theory that the lien of the materialman did not vest or exist or attach in any tangible way until the time of bankruptcy, but was an inchoate right to a preference upon distribution if the specified distribution should occur, rather than a definite lien. If this view should be adopted, it would solve the present controversy; but we think it is inconsistent with the Johnson Case and our previous opinions there cited and discussed. The unescapable inference from these opinions is that the materialman's lien is created along with the shipment and delivery of the goods, and that the statutory provisions which specify "when" the materialman shall "have" the lien refer to the maturity of the lien and to the time when and the event on account of which it may be foreclosed or enforced. We see no construction, other than this, which will make the law reasonably efficient and workable. It is a mistake to suppose that this lien may never come to full maturity, unless under exceptional conditions which the lienor cannot control. It may be avoided by payment; but, short of that, the lienor can always bring it to maturity by taking judgment and levying execution.[1]

Keeping in view these characteristics of the materialman's lien, and without expressing any opinion as to whether it may be subject to a landlord's lien under a lease in existence when the property was taken upon the leased premises, we are compelled to think that it does take priority over the lien of the landlord under a lease made after the shipment and delivery of the raw materials to the manufacturing tenant. With otherwise equally balanced considerations on both sides of the argument, there are three things which lead us to the conclusion stated:

The first is that section 2316, which undertakes to declare the respective rank of the landlord's lien and all other valid liens on defendant's property, makes it turn upon the situation when the property, sought to be subjected, was carried upon the premises; and the lien of the materialman, for the unpaid purchase price, is in the nature of

[1] We do not overlook Hall v. Guthrie, 103 S. W. 721, 31 Ky. Law Rep. 801, in which it was said that there was no lien before the happening of the event (in that case, an assignment). The question was whether, when the materials were furnished, the lien came into existence in such a way as to make necessary the filing of the claim of lien specifically required for builders' liens and which some general language seemed to apply to all liens. Whether a lien exists so far as to carry such a burden and whether it exists far enough to give it reasonable efficiency are obviously different questions.

a reservation. In a very substantial, though not in a technical, way, the materials are subject to this claim from the time they leave the vendor's hands until they are paid for, and this reserved claim is, for convenience, transferred to the body of property with which the materials are mingled. The landlord's lien has no opportunity to attach to such materials, original or substituted, save subject to the already existing claim and contingent lien of the vendor. The landlord can hardly be prejudiced by the assertion of the other and—in a sense—earlier lien, and this because it is not required to be recorded, and the landlord must usually know of the existence of this class of liens and may govern himself accordingly.

The second is that the materialman's lien is given by the same statute and is enforced in the same way as the employé's lien for wages. Section 2488 says that the lien for material or wages "shall be superior to the lien of any mortgage or other incumbrance thereafter created," and that the lien for wages accruing within 6 months shall be superior even to the lien of any mortgage or other incumbrance theretofore created. It follows that the landlord's lien, created after materials were furnished, cannot be given priority over the lien for material without, at the same time, making it superior to any lien for wages which are more than 6 months old. Since the landlord's lien may reach back 11 months, this would be to say that the lien for rent of a factory building, accruing during the first 5 of the 11 months just ended, was superior to the lien for wages accruing during the same period, and in view of the universal favor given labor liens, this would be an unusual presumption.

The third thing is that the section just cited expressly declares priority over "any mortgage or other incumbrance thereafter created." The effect of this language to give priority to the lien for material cannot be evaded, except by saying that the landlord's lien is not an "other incumbrance." This restrictive meaning is said to be made out by reliance upon the rule of ejusdem generis. We think that rule cannot be here applied. We observe no instance of any incumbrance, other than a mortgage, of precisely the same class, and hence, unless "other incumbrance" is intended to reach beyond the specific class, the words can have no meaning. Further, a mortgage is not an incumbrance of lesser dignity than a lien for rent. Such lien may be created by mortgage provisions in the lease, or may be implied by law from the contract which the parties make. No reason appears why the labor or material lien should have been given priority over an express mortgage for rent, and yet be subject to an implied lien for the same rent. The holding in Hatton v. Rogers, 134 Ky. 840; 121 S. W. 698, to the effect that an attachment was not an "incumbrance," is not applicable to a statutory environment materially different from that there considered.

Upon the whole, we think it reasonably clear that of these two liens in this case the landlord's is of inferior rank.

[2] In the application of this last-quoted section, we find that the landlord's lien in question is one "thereafter created." In the present case, the appellant's material was carried onto the premises in June;

it does not appear that any of the property claimed to be subject to the landlord's lien was added after October. The lease, existing in June, expired, by its terms, November 1st; by the force of section 2295, Kentucky Statutes, and by virtue of a holding over by both parties for 3 months, there arose a further relation of landlord and tenant for one year from November 1st; the bankruptcy occurred February 26th; and all rent for which a lien is claimed accrued after November. The Kentucky Court of Appeals, in Lyons v. Deppen, 90 Ky. 305, 14 S. W. 279, held that a lien for rent under a renewal lease was inferior to a mortgage given during the term of the original lease. In English v. Duncan, 14 Bush (Ky.) 377, the court was careful to point out that the term of the lease did not appear. Neither upon the reasoning of Lyons v. Deppen, supra, nor upon the principles involved do we see any way to distinguish between a new lease duly signed upon a separate paper and a written extension indorsed upon the foot of the old lease and an extension implied by law from the joint voluntary act of the parties. In each instance the extended term is a new contract. It follows that the landlord's lien in this instance must be considered as having been created as of November 1st.

[3] One further circumstance affects the landlord's right. Under the rule declared by this court in Courtney v. Fidelity Co., 219 Fed. 57, 66, 134 C. C. A. 595, the trustee in bankruptcy in these cases has the option (to be exercised on his judgment, or by vote of the creditors, or by order of the court, as the case may be) to pay the claim of the landlord for the full amount of the rent for the future period to which the lien extends, or to refuse to do so, surrender the premises to the landlord and thereby subject the estate to such lien as the landlord may succeed in establishing to cover his loss. Obviously, in the former alternative, the trustee is entitled to the possession of the premises during the period which he pays for, and if the premises are needed and used by the trustee for carrying on the business or other administration purposes, their rent, or, at least, their rental value, forms an expense of administration. Kinkead v. Bacon, 230 Fed. 362, 144 C. C. A. 504. In this case the trustee used the premises for carrying on and closing out the business for a period not shown by the record. As to the rent which had accrued before bankruptcy, the present record contains no sufficient justification for treating it as an administration expense. Since the alternative to paying past-due rent is to get out, and since it may sometimes be essential to the administration that the trustee keep possession of the premises for a time, it may happen that the relation between the past-due rent and the desirability of keeping the premises will justify an order that this rent be paid by the trustee as part of the cost of conducting the liquidation; the trustee does not seem to have made any such claim in this case. The rent which accrued after the trustee ceased to use the premises for the business of the estate, and during the period when he was merely minimizing his loss by subletting as much as possible, we cannot consider as cost of administration. However, all subrentals which he actually received were subject to an equitable charge in favor of

the landlord, and it was not wrong to pay them over. In no case could the lien for materials reach such subrentals.

The question was raised below whether the lien for materials extended to the whole fund in court. We do not see that it was decided, and the record does not enable us to do so.

[4, 5] Whatever amount has been overpaid to the landlord should be repaid by him to the trustee. His is the primary liability, but the trustee is also liable to the estate. The payments by him must be considered voluntary. Each was made pursuant to an order of the referee, but these orders were made without notice to any one and not at a creditors' meeting, and most of them even while the supersedeas of the former appeal was in effect. Such orders do not protect the trustee. Cabenas v. Coe (D. C., N. Y.) 178 Fed. 158; United Co. v. Hess (C. C. A. 6) 159 Fed. 889, 87 C. C. A. 69; Loveland (4th Ed.) § 576; Remington, § 1889; Collier (10th Ed.) § 58.

Upon the appeal, the case must be remanded for modification in conformity with this opinion. The appellant will recover costs.

The petition to revise is dismissed.

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## BOLLMAN v. TOBIN.

(Circuit Court of Appeals, Eighth Circuit. January 16, 1917. Rehearing Denied February 21, 1917.)

No. 171.

1. BANKRUPTCY ⟸125—TRUSTEE—EFFORTS TO CONTROL ELECTION.

The choice of a trustee, subject to approval of the court, which should be given, except for good cause, being by Bankr. Act July 1, 1898, c. 541, § 44, 30 Stat. 557 (Comp. St. 1913, § 9628), intrusted to the creditors, efforts of creditors to control election of a trustee, so long as directed to the welfare of the entire body of unsecured creditors, are not objectionable, as is interference therewith by the bankrupt, or one on his behalf.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 170, 180, 181, 183, 184; Dec. Dig. ⟸125.]

2. BANKRUPTCY ⟸132—TRUSTEE—REMOVAL.

The trustee in bankruptcy failing to carry out the wishes of, and placing himself in direct antagonism to, the creditors by whom he was chosen, thus making it impossible to secure their co-operation, especially when indispensable to efficient administration of the trust, should be removed, reason for his action based on the welfare of the entire body of creditors not being shown; it being unnecessary that he shall have been guilty of any personal dishonesty.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 190; Dec. Dig. ⟸132.]

Petition to Revise Order of District Court of the United States for the Eastern District of Missouri; John C. Pollock, Judge.

Petition by Otto Bollman to revise order denying petition for removal of John C. Tobin, trustee in bankruptcy. Order vacated, with directions.

Randolph Laughlin, of St. Louis, Mo., for petitioner.

Charles A. Houts, of St. Louis, Mo., for respondent.

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

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

AMIDON, District Judge. In December, 1915, the brokerage firm of Payne & Becker, doing business at St. Louis, Mo., was adjudged bankrupt on the petition of Otto Bollman and others. Bollman was the principal creditor having a claim amounting to $39,000. Randolph Laughlin had been his attorney, and was also a creditor of the estate. Bontie Becker, a member of the firm, absconded a short time before the adjudication in bankruptcy, and has not yet been found. He was in charge of the business at St. Louis. Payne, the other partner, resided at Kansas City. One of the principal contentions of the creditors was that E. C. Becker, the father of Bontie Becker, was a silent member of the firm. He was financially responsible, and the establishment of his liability as a partner was the main hope of the creditors. Mr. Bollman and Mr. Laughlin led a campaign to elect a trustee favorable to aggressive action to establish the responsibility of Mr. E. C. Becker. Mr. Becker undertook a counter campaign to secure a trustee favorable to himself. The Bollman-Laughlin faction secured a majority in amount and number of creditors. Powers of attorney to represent them were given to Mr. Laughlin. He first elected Mr. Bollman, but the referee, having in mind the fact that Bollman was a large creditor, and that his claim was questioned, refused to approve his selection as trustee. Thereupon Laughlin cast his votes for the respondent, John C. Tobin, who had been receiver of the bankrupt estate. The Becker faction objected to Tobin, on the ground that he intended to appoint Laughlin as his attorney. Tobin was present, but made no answer to the charge, and the referee overruled the objection. Tobin had been active with the creditors who elected him, and accepted the appointment, knowing well the campaign that had been conducted, and the purpose of the creditors who had prevailed. Notwithstanding this, he so conducted the trust as to forfeit the confidence of the creditors and of Mr. Laughlin. He had conferences with E. C. Becker. He took no action to establish Becker's liability. He appointed a couple of young lawyers as his attorneys, who knew nothing about the affairs of the bankrupts, and who have accomplished nothing, either in the collection of the estate or the enforcement of Becker's liability. An expert bookkeeper had been employed by the Bollman faction to make an investigation of the business transactions of Payne & Becker, and he had made a preliminary report. His report was turned over by the trustee to the bankrupts, and has been dismembered and parts of it lost. The result of these acts by the trustee is that he has forfeited the confidence of the creditors by whom he was elected. They refuse to communicate with him, or to co-operate with him or his attorneys in the administration of the estate. The result has been antagonism, recrimination, a barren administration, and fruitless litigation. Finally the creditors who secured Mr. Tobin's election presented a petition to the court asking that he be removed. In it are charges which affect, not only his competency and fidelity, but also his honesty. This petition was answered, and a full hearing had before the trial court. The

learned trial judge ruled that the question whether Mr. Tobin had forfeited the confidence of the creditors, or failed to carry out the policy which they desired, was wholly immaterial. He insisted that, inasmuch as charges had been made affecting his integrity, those charges must be proved, or the petition be denied. He condemned both the creditors and Mr. Becker for the campaign that was conducted for the election of a trustee. He expressed the opinion that Mr. Tobin ought not to continue as trustee, but refused to remove him because the charges affecting his integrity had not been proved, and to remove him might reflect upon his character. The petition was therefore dismissed, and the creditors have filed the present petition to revise.

We think that the learned judge, in his zeal to protect Mr. Tobin's character, lost sight of the interests of the estate. It was not necessary that either be sacrificed.

[1] We first observe that the court fell into error in visiting the same condemnation upon the creditors and upon Mr. E. C. Becker for their efforts to control the election of a trustee. One of the distinctive features of the present bankruptcy law is the power which it gives to creditors in the administration of the estate. It treats the estate as theirs, and requires that they be consulted in meetings at all important steps. They may also compel special meetings at any time for the expression of their views. Section 55, subdivision "C" (Comp. St. 1913, § 9639), provides:

> "The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this act."

At these meetings a majority of the general creditors in number and amount controls. See sections 55 and 58 of the Bankruptcy Act (Comp. St. 1913, §§ 9639, 9642), and General Order No. 13 (89 Fed. vii, 32 C. C. A. vii); In re Lewensohn (D. C.) 98 Fed. 576; In re McGill, 106 Fed. 57, 45 C. C. A. 218.

The courts have uniformly enforced these distinctive features of the law. It is true that the administration of the estate is by the court, and not by creditors; but on questions of general business policy the wishes of a majority of the creditors ought not to be disregarded, except for good cause arising out of some special feature affecting the particular estate. If the majority seeks a factional advantage to the injury of the minority, it is the duty of the court to interfere and protect the rights of all. But so long as the majority seeks no advantage, except such as will accrue to the benefit of all creditors, their judgment should prevail, unless the circumstances are quite exceptional. One of the highest acts of the creditors is the choice of a trustee. That power is clearly committed to them by section 44 of the Bankruptcy Act. Their choice is subject to the approval of the court, but should be approved unless good cause exists for disapproving. One of the chief causes for disapproval is interference in the election by parties having an interest hostile to the general creditors, such, for example, as the bankrupts or their friends or kindred. Such interference has been frequently condemned by the courts. In the case of In re Lewen-

sohn (D. C.) 98 Fed. 576, Judge Brown, after a careful examination of the decisions and the statute, uses this language:

"The beneficiaries are not the bankrupt, but the creditors. For that reason the law gives to them alone the choice of trustee. The bankrupt has no part in it, because presumably he has no interest in it."

The Circuit Court of Appeals of the Sixth Circuit, in the case of In re McGill, 106 Fed. 57, 45 C. C. A. 218, speaking by Mr. Justice Day, says:

"It may be taken, then, as an established proposition, upon reason and authority, that interference by the bankrupt, certainly when such as to control the election, will avoid the choice thereby attained, as it is the policy of the law to secure a trustee who is the selection of the creditors, and not the bankrupt."

See, also, In re MacKellar (D. C.) 116 Fed. 547; In re Hare (D. C.) 119 Fed. 246; In re Van De Mark (D. C.) 175 Fed. 287; Collier on Bankruptcy, 637, 641.

It is manifest, therefore, that the activity of Mr. E. C. Becker to control the election of a trustee must be treated quite differently from the campaign of the creditors to accomplish that result. Mr. Becker's campaign was conducted in antagonism to the creditors, to protect himself against liability. Even if he is not a member of the firm, his interference with the election of a trustee, owing to his close relationship to Bontie Becker, should be viewed as made on behalf of the bankrupt. To place his activities and those of the creditors in the same class, as the trial court did, is to visit the just and the unjust with the same condemnation. There is no way in which a majority of the creditors can be brought into uniform and intelligent action, except by leadership and co-operation. So long as efforts are directed to the welfare of the entire body of unsecured creditors, there can be no objection to such activities.

[2] Mr. Tobin has not only failed to carry out the wishes of the creditors by whom he was chosen, but has placed himself in direct antagonism to those creditors. In doing so he has violated the trust upon which he was placed in office. He could not thus depart from the policy desired by the creditors without being able to assign good reasons for so doing based on the welfare of the entire body of creditors. No such reason for his conduct is disclosed by the record. To justify his removal it is not necessary to find that he has been guilty of any personal dishonesty. It is enough that he has so conducted himself as to forfeit the confidence of those who are the beneficiaries of his trusteeship, and thus made it impossible for him to secure their co-operation. That is especially true in a case like the present, where the co-operation of the beneficiaries is indispensable to the efficient administration of the trust. The rule was stated by the Supreme Court in May v. May, 167 U. S. 310, 320, 17 Sup. Ct. 824, 828 (42 L. Ed. 179), as follows:

"The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed, and may properly be exercised whenever such a state of mutual ill feeling, growing out of his behavior, exists between * * * the

trustee in question and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent * * * the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out, or are greatly exaggerated."

The facts as we have outlined them in this opinion rest upon uncontroverted evidence. We may therefore deal with the case upon this petition to revise.

We join with the trial court in completely exonerating Mr. Tobin from all charges which affect his integrity. That, however, is as far as we can go, and we further find that the welfare of the estate demands his removal, and the election of a new trustee by the creditors.

The order of the trial court is therefore vacated and set aside, with directions to enter an order removing the defendant as trustee, and directing the referee to call a meeting of creditors to elect a new trustee. The procedendo will go down at the expiration of 20 days from the date of the filing of this opinion, unless otherwise ordered.

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## AMBROSIUS v. AMBROSIUS.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 52.

1. TRUSTS ⟸371(8)—PLEADING—PRAYER—GENERAL RELIEF.

Where a bill to recover personal property was framed on the theory that a trust had been declared therein by complainant's father, but contained a prayer for general relief, complainant can recover, if she establishes that she was the original owner of the property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 598; Dec. Dig. ⟸371(8).]

2. GIFTS ⟸22—GIFTS INTER VIVOS—DELIVERY—NECESSITY.

A gift by a father to his daughter of certain securities, which was only evidenced by a statement prepared by him and kept with a list of securities, a copy being delivered to his mother in a sealed envelope, to be opened only after his death, is ineffectual for want of delivery, and equity will not interfere to perfect it.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 37; Dec. Dig. ⟸22.]

3. TRUSTS ⟸37½—EXPRESS TRUST—DECLARATION—INCONSISTENT ACTS.

Where one not a lawyer signed a statement, on a list of securities which he purchased with his own funds, that he held the securities as trustee for his daughter during his lifetime, but thereafter he dealt with the securities as his own, selling some and pledging others, his acts indicate that he did not intend by his declaration to make himself trustee in the legal sense, but only to transfer to his daughter such securities as he might own at his death, and such intention cannot be enforced.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 53; Dec. Dig. ⟸37½.]

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

Suit by Marie Marjorie Ambrosius, an infant, by Kate Ambrosius, her next friend, against Iva H. Ambrosius, as administratrix of the

goods, chattels, and credits of Herman Z. Ambrosius, deceased. From a decree dismissing the bill, complainant appeals. Affirmed.

Krauthoff, Harmon & Mathewson, of New York City (E. J. Patterson and Carroll G. Walter, both of New York City, of counsel), for appellant.

Davis, Symmes & Schreiber, of New York City (David T. Davis and Robert C. Ryder, both of New York City, of counsel), for appellee.

Before COXE, WARD, and HOUGH, Circuit Judges.

WARD, Circuit Judge. September 26, 1905, Herman Z. Ambrosius, an employé of Speyer & Co., bankers of this city, having then an only child by his first wife, a daughter eight years of age, living with his mother in Chicago, drew up on a sheet of paper a list of securities, which he headed with the words, "List of securities held by L. J. Salomon in Speyer & Co.'s vault in envelope marked 'Property of H. Z. Ambrosius,'" and concluded with the words:

"All these foregoing securities belong to my daughter Marie Marjorie Ambrosius, and are held by me in trust for her during my lifetime.
"New York, September 26, 1905. H. Z. Ambrosius."

About a month later he visited his mother in Chicago and delivered to her a press copy of this sheet in a sealed envelope, telling her to keep it carefully, as it contained a paper of value to Marie, but not to tell her about it, as he did not want her to get the idea she had money. His mother put the sealed envelope in her box at a safe deposit company, to remain unopened in accordance with his directions until after his death. Other than this there was no communication to any one of what he had done. The securities stood in his own name, or in the name of third parties, indorsed by them in blank, and he sold some of them, noting the fact and date of sale on the list and running a line through the entry.

September 10, 1907, he made another list, headed, "List of securities handed to L. J. Salomon for safe-keeping in Speyer & Co.'s vault, in envelope marked 'Property of H. Z. Ambrosius,' which securities belong to my daughter, Marie Marjorie Ambrosius, and are held by me in trust for her, during my lifetime," into which he carried most of the securities which were left on the first list and signed it September 10, 1907: "H. Z. Ambrosius. Witness: A. Lincoln Baer." Some of the securities on this list also he sold and struck off in the same way, and on some of them he borrowed money from the banks. On the back of each of these sheets were lists of other securities, some of which had been sold and crossed off in the same way as was done with those on the front of the sheets, and as to them the complainant makes no claim.

Ambrosius paid his mother at first $30 a week, and afterwards $50 a week, for the board and lodging of his daughter, and paid in addition for her schooling, medical expenses, etc. October 15, 1913, he died, leaving a second wife, whom he had married in 1904, and two children by her, him surviving. His mother then opened the envelope

given her containing the press copy of the paper of September 26, 1905, as drawn.

After his death there were found in his desk at Speyer & Co.'s an open envelope, marked "Property of H. Z. Ambrosius, August 29, 1912," containing the two lists before mentioned and a large number of the listed securities, together with other securities not mentioned in either list. There is no evidence that the securities were ever delivered to Salomon, or were ever in Speyer & Co.'s vault.

Judge Veeder dismissed the bill, on the ground that it was the decedent's intent to make a testamentary disposition, and that if he ever intended to make a trust he revoked it in his lifetime.

[1] While the bill proceeds directly and expressly upon the ground of a trust declared by Ambrosius in his lifetime, it asks for general relief, and, as the decedent did state that the securities belonged to the complainant, she was entitled to recover under the bill on the ground of her antecedent ownership, if she could prove it. But she did not prove it. The decedent's father died in Chicago in 1894, leaving nothing but $1,000 coming from his lodge. His mother supported herself by dressmaking. There was positive proof that most of the securities mentioned in the papers of 1905 and 1907 were brought by Ambrosius with his own money, and there is not a vestige of evidence that the complainant had any money or property whatever. Therefore the claim that the securities belonged to her before the papers of 1905 and 1907 were signed is wholly without support.

In this respect the case differs from Govin v. De Miranda, 140 N. Y. 474, 35 N. E. 626, on which the complainant so much relies. In it there was no evidence of any relationship between the deceased and the plaintiffs, so that the court held that, in view of his express statement that the securities belonged to them it was bound to assume that they came to them by purchase or gift from some one. If there had been any evidence that the bonds had been purchased by the decedent with his own money, the decision would unquestionably have been different. This was evidently the opinion of the General Term upon the appeal from a judgment directed by the court in favor of the plaintiffs in a second suit to recover the interest paid on the bonds in question during the decedent's lifetime. Govin v. De Miranda, 79 Hun, 329, 29 N. Y. Supp. 347. In that case the court directed a verdict in favor of the plaintiffs on the ground that the ownership of the bonds had become res judicata in the first action, and evidence that the decedent bought the bonds with his own money was not admissible in the second action to contradict that adjudication.

[2] Of course, if Ambrosius intended a present gift to his daughter, it was quite ineffectual for want of delivery, and equity will not intervene to perfect it.

[3] Therefore the question is: Can the complainant recover upon the strength of a declaration of trust made by the decedent in her favor? What we have to determine is the intention of the decedent. If the language in the paper of September 26, 1905, constituted him a trustee for the complainant as to the securities therein mentioned, we think that the delivery of a copy of it in a sealed envelope to his

mother to keep for the complainant was sufficient evidence to support the trust. This envelope was opened after the death of Ambrosius, and of course throws no light upon the meaning of what he wrote. We have to determine his intention, both from what he wrote in 1905, and what he did during the eight years thereafter, down to the time of his death.

Ambrosius was a layman, and may have been unaware of the legal meaning and effect of the expression he used as to holding the securities in trust for his daughter. Between what he wrote and what he did his intention is not clear. At least, we must consider what he did in the premises, as well as what he wrote. He is to be presumed to have been an honest man, and very evidently was a loving father. There being no evidence that he ever kept any account with the complainant of the income of the securities, kept them in his own name, used them for his own purposes just as he did all other securities he had, it is impossible to believe that he intended by what he wrote to divest himself of ownership. His conduct during this long period is absolutely inconsistent with the character of a trustee. We cannot believe that he would have acted with such bad faith if he had supposed himself to be a trustee for his daughter in the legal acceptation of that term. We think he intended that only such of the securities as should be in his possession at the time of his death should then go to the complainant.

Another case arising out of De Miranda's estate is nearer the present case. Govin v. De Miranda, 76 Hun, 414, 27 N. Y. Supp. 1049. The decedent signed and acknowledged before a notary public a paper as follows:

"State and City of New York, May 25th, 1881.

"For the sum of $1 to me in hand paid, the receipt of which is hereby acknowledged, and for certain other valuable considerations, I do hereby transfer, set over, and deliver to the young man known as Felix Govin Dias, a native of Matanzas, Island of Cuba, now living at No. 147 East 39th street in the city of New York, two certificates of $10,000 each ($20,000) of the U. S. 4½ per cent. loan under the act of Congress entitled 'An act to authorize the refunding of the national debt approved July 14, 1870, issued one Jan. 18, 1878, Letter A 13,235, and the other one issued May 17, 1877, Letter A 10,642. Said certificates will be retained in my custody for the present as trustee for the said Felix Govin Diaz. Felix Govin y Rute. [L. S.],

"Trustee of two certificates each one of ten thousand dollars."

Notwithstanding the expression that he held the securities in trust for the plaintiffs, the court decided that, as the decedent kept the paper in his possession and sold the bonds, it was clear he did not intend to divest himself of title.

Some distinctions in the cases cited may be briefly pointed out. In Locke v. Farmers' Loan & Trust Co., 140 N. Y. 135, 35 N. E. 578, the decedent declared a trust of which he notified the beneficiaries and which he actually performed for their benefit for several years before his death. In Van Cott v. Prentice, 104 N. Y. 45, 10 N. E. 257, a complete and effective trust was drawn up in writing and delivered in a sealed envelope to the trustee. In Matter of King, 115 App. Div. 751, 100 N. Y. Supp. 1089, affirmed 188 N. Y. 626, 81 N. E. 1167, the deed of trust and the securities themselves had been de-

livered by the decedent to the trustee. In Linton v. Brown (C. C.) 20 Fed. 455, a deed of trust had been delivered by the decedent to the beneficiary and by her delivered to a third party. In Fowler v. Gowing (C. C.) 152 Fed. 801, and 165 Fed. 891, 91 C. C. A. 569, the stock in question was purchased by the father as trustee with his children's money and their ownership was not disputed.

The decree is affirmed.

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## MARYLAND CASUALTY CO. v. EDDY.

(Circuit Court of Appeals, Sixth Circuit. February 7, 1917.)

No. 2896.

1. INSURANCE ⟸136(5)—APPLICATION—ANSWERS OF INSURED.
Though the signature of insured to the application is questioned, the authenticity of the answers therein, which were made part of the policy as issued, must be treated as admitted, since no rational theory of contract can be made that does not hold the assured to know the contents of the instrument to which he seeks to hold the other party.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 222–224, 229, 230; Dec. Dig. ⟸136(5).]

2. INSURANCE ⟸300—FORFEITURE—MISREPRESENTATION.
A misrepresentation by an applicant for accident insurance that no similar insurance had been canceled, or renewal thereof refused, when in fact such a policy had been canceled for the stated reason that insured was too reckless in driving automobiles, and the application was made to secure insurance in place of that canceled, is, as a matter of law, material and intentional, and prevents recovery on the policy.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 679; Dec. Dig. ⟸300.]

3. COURTS ⟸363—RULES OF DECISION—STATE STATUTE—INSURANCE AGENTS.
The United States courts will follow and apply a state statute determining the status of an insurance agent.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939–949; Dec. Dig. ⟸363.]

4. INSURANCE ⟸73—AGENTS—STATUTES—ACCIDENT INSURANCE.
Comp. Laws Mich. 1897, § 7246, which is part of a chapter relating wholly to fire and marine insurance, and which declares to be agents all those who have anything to do with placing the risk, does not apply to accident insurance which is controlled by sections 5110–5115.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 99, 100; Dec. Dig. ⟸73.]

5. INSURANCE ⟸73—AGENTS—RESTRICTIONS ON AUTHORITY.
In the absence of statutory regulation, a stipulation in a policy that no person, unless duly authorized in writing, shall be deemed the agent of the company, is binding on those who take the policy.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 99, 100; Dec. Dig. ⟸73.]

6. INSURANCE ⟸376(2)—AGENTS—RESTRICTIONS ON AUTHORITY—IMPLIED PROVISIONS IN POLICY.
A provision in an accident insurance policy that an agent has no authority to change the policy or waive any of its provisions, and that notice to any agent or knowledge by him shall not be held to affect a waiver of any part of the policy, applies to the provision, read into the

policy by law, that a material intentional misrepresentation avoids the policy, as well as to the provisions expressed therein, and the fact that the agent had knowledge of such misrepresentation, does not prevent forfeiture of the policy therefor.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 955; Dec. Dig. ⊂=376(2).]

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 Leeta M. Eddy against the Maryland Casualty Company. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

George Hoadly, of Cincinnati, Ohio, for plaintiff in error.

A. J. Mills, of Kalamazoo, Mich., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. This suit was brought in the court below by Mrs. Eddy to recover the amount of a policy insuring her husband against death by external, violent, and accidental means. He was found dead in a hotel room, and, for the purposes of this opinion, it may be assumed that his death was caused by an overdose of chloral, taken by him to induce sleep, and without suicidal intent. The defenses were that the issue of the policy had been procured by false representations, and that the death was not of the class covered by the policy. Upon the trial, the court denied the defendant's motion to take the case from the jury, and the jury found in plaintiff's favor upon the issues submitted. The insurance company brings this writ of error.

The policy, dated September 2, 1913, began with these words:

"In consideration of the statements in the application for this policy, a copy of which is indorsed hereon and made a part hereof, and of $25 premium, the * * * company * * * hereby insures," etc.

The copy indorsed, as well as what purported to be the original application offered in evidence, commenced:

"Application is hereby made for a * * * policy to be issued upon the following statements, viz."

These statements were numbered upon the copy, and upon the application itself, from 1 to 15. The numbered paragraphs were, by the caption, denominated "statements," and, by a footnote upon the application, "warranties."

[1] Upon the trial, some question was suggested whether Mr. Eddy's signature to the application was sufficiently proved; but the statements now involved were part of the policy as issued, and the case has been argued in this court as though the authenticity of his answers must be admitted. We treat the case upon the same theory. "No rational theory of contract can be made that does not hold the assured to know the contents of the instrument to which he seeks to hold the other party." Lumber Underwriters v. Rife, 237 U. S. 605, 609, 35 Sup. Ct. 717, 718 (59 L. Ed. 1140).

The policy contained no express provision as to the effect upon the company's liability in case any statement in the application was false, nor did the policy itself declare that these statements were warranties. In this situation it was held by the district court that the mere falsity of a statement—even a material statement—would not vitiate the policy, unless it further appeared that the statement was deliberate and purposeful, and that Mr. Eddy intended to deceive the company about a material matter in order to get it to issue the policy. This rule of law is challenged by the company, but we pass the question.[1]

[2] The claimed misstatements were three:

(1) No. 14 was, "My habits of life are correct and temperate." The evidence tended to show that the applicant had gone on periodical drinking sprees; that he had taken the so-called "gold cure" with only temporary good results; that at a time not fixed by the record, but seemingly not long before the application, he had taken another kind of medical treatment for the cure of the liquor habit; and that he died in a relapse of the habit.

(2) A part of statement No. 9 was:

"No application ever made by me for accident * * * insurance has been declined or notice of action withheld."

In fact, two years before this application, his application for a $25,000 accident policy in the Travelers' Insurance Company had been declined.

(3) Another part of statement No. 9 was:

"Nor has any such [accident] policy of insurance been canceled or renewal been refused."

In fact, a $5,000 accident policy in the Travelers' had been canceled within the previous four months, upon the stated ground that Mr. Eddy was an undesirable accident risk, because too reckless in driving automobiles.

As to the statement regarding his temperate habits of life, the excuse is that he believed he was completely cured, and that he therefore did not intend to deceive. As to the statement that no application had been declined, the explanation is that this declined policy was of a special class, issued only to preferred risks, and hence Mr. Eddy was justified in supposing that the refusal to issue such a policy was not a material matter. Upon both of these subjects we may assume that there was an issue for the jury; but as to the third statement, above recited, we find in the record no suggestion of explanation or excuse. Mr. Eddy had been notified of this cancellation; he talked it over with the local agent of the Travelers'; this same local agent was a soliciting broker for the Maryland Company; and the application for the policy in suit was made with the purpose by both of getting insurance to replace that which had been canceled. Under this situa-

[1] The Michigan statute, upon the books when this policy issued (section 6, Act 264, of 1913), states a rule which seems to be consistent with Phœnix Co. v. Raddin, 120 U. S. 183, 189, 7 Sup. Ct. 500, 30 L. Ed. 644, and by which a materially false statement, even without intent to deceive, would avoid the policy; but this statute was postponed in its taking effect to January 1, 1914.

tion, there is no room to deny that the misrepresentation was not only most deliberate and intentional, but that they both knew it to be material. Such a situation presents no question of fact for the jury; the materiality of such a statement is apparent as matter of law. Phœnix Co. v. Raddin, 120 U. S. 183, 189, 7 Sup. Ct. 500, 30 L. Ed. 644. It is clear to us that no reasonable man could think that the deceit practiced upon the company was unintentional or in any way excusable; and we are satisfied that, on these facts, plaintiff cannot recover. Ætna Co. v. Moore, 231 U. S. 543, 34 Sup. Ct. 186, 58 L. Ed. 356; Mutual Co. v. Hilton, 241 U. S. 613, 622, 36 Sup. Ct. 676, 60 L. Ed. 1202; Mutual Co. v. Powell (C. C. A. 5) 217 Fed. 565, 568, 133 C. C. A. 417.

However, before accepting this conclusion as controlling upon the present record, we must observe what effect, if any, is to be given to the relation between the parties and Rankin, the so-called agent, who took the application. Rankin himself, a witness for plaintiff, says that, while he was agent for the Travelers', he was "just a broker" for the Maryland; and there is nothing expressly to the contrary.

[3, 4] It should be noted that no Michigan statute is found affecting Rankin's status. The Supreme Court of the United States will follow and apply such a statute (Continental Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. 87, 33 L. Ed. 341; McMaster v. New York Co., 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64); although such statute does not raise special agents with limited authority into general ones possessing unlimited power (Mutual Co. v. Hilton, supra, 241 U. S. at page 623, 36 Sup. Ct. 676, 60 L. Ed. 1202); but the rule familiar in Michigan, and declared by the Supreme Court of that state in Pollock v. German Co., 127 Mich. 460, 461, 86 N. W. 1017, is merely an adoption of the express words of section 7246 of the Michigan Compiled Laws of 1897. This section is part of chapter 194, which relates wholly to fire and marine insurance, and has no application to accident insurance. The latter subject is controlled by Act No. 237 of 1881, being sections 5110–5115 of the Compiled Laws of 1897, and these sections contain nothing corresponding to that provision of section 7246 which declares to be agents of the insurance company all those who have anything to do with placing the risk.

[5] Further, the policy in suit, by agreement No. 13, provides:

"In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company."

In the absence of statutory regulation, such an agreement is binding upon those who take a policy containing it. Ætna Co. v. Moore, supra. There is, in this record, no effective evidence of any authority in writing from the Maryland Company to Rankin; but, as there are some vague allusions to such authority, it may exist, and we prefer not to dispose of the case on this ground. We therefore assume that in some substantial sense Rankin may have been the agent of the company.

It is to be noted, also, that we have not here a case where the applicant stated the truth to the agent, and the agent either changed the answer without applicant's knowledge, or gave applicant advice as to

how questions should be interpreted, in which instances it has been thought right that an agent with ordinary powers should be considered to be acting for the company. Union Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617; New Jersey Co. v. Baker, 94 U. S. 610, 24 L. Ed. 268. As to the above-recited statements, 1 and 2, there is room to suppose that Rankin gave such advice or prepared the answers in accordance with his interpretation; not so as to misstatement No. 3.

[6] We have already recited parts of the policy and application, from which it appears that the policy was issued in consideration of the statements of the application, and that the statements of the application were made as the basis of getting the policy. It thereupon became, as matter of law, a vital condition of the contract that the making of a statement which was material and false, and known by the applicant to have both of these characteristics, would be a defense to any action on the policy. Mutual Co. v. Hilton, supra. It was quite unnecessary to say this in so many words; "the modest intelligence of the prudent man" (Underwriters v. Rife, supra, 237 U. S. 619, 35 Sup. Ct. 717, 59 L. Ed. 1140) would be sufficient to inform the policy holder both that the condition existed and that it was vital. Agreement No. 13 of the policy says:

"An agent has no authority to change this policy, or to waive any of its provisions, nor shall notice to any agent or knowledge of his or any other person be held to effect a waiver or change in this contract or any part of it. No change whatever in this policy and no waiver of its provisions shall be valid unless an indorsement is entered hereon, signed by the president, vice president, or secretary of the company, expressing such change or waiver."

That this provision is valid and binding on the insured is clearly held in Ætna Co. v. Moore, supra; and the substance of plaintiff's position must be that the provision attached by law to the words of the contract, by which provision a knowingly false and material statement avoids the contract, was "changed" or "waived" because the agent had knowledge of the falsity. If this provision had been expressed in words, it would be entirely clear that there could be no change or waiver by the agent even by his most express consent, and we see no satisfactory distinction between that case and one where the condition or provision said to be waived is read into the contract by the law, with which both parties must be deemed familiar.

If it be said that Ætna v. Moore is to be distinguished because the agreement there involved was that notice to the agent should not be notice to the company, we find, perhaps, even closer analogy in the companion case of the Prudential Company v. Moore, 231 U. S. 560, 34 Sup. Ct. 191, 58 L. Ed. 367. In the latter case, it had been agreed that:

"No agent has power * * * to modify this * * * contract, * * * to * * * waive any forfeiture or to bind the company by making any promise, or making or receiving any presentation or information."

The court said (231 U. S. 567, 34 Sup. Ct. 194, 58 L. Ed. 367):

"It is contended here, as in the Ætna Case, that the company is estopped by the knowledge of the agent, and the same cases are cited as were cited

there. We answer here, as we answered there, that the terms of the policy constituted the contract of the parties and precluded a variation of them by the agent."

In this disposition of the matter, the conclusion seems necessarily involved, although not spelled out, that to say that the company is estopped to rely upon such a false answer because its agent had knowledge, is to say that the terms of the contract are to be changed. Upon the subject of knowledge by the agent under similar circumstances, see, also, Mutual Co. v. Hilton, supra, 241 U. S. at page 623, 36 Sup. Ct. 676, 60 L. Ed. 1202 and Mutual Co. v. Powell, supra, 217 Fed. at page 568, 133 C. C. A. 417.

We imply no opinion as to whether the evidence sufficiently tended to show death by "external, violent, and accidental means," as distinguished from an intentional taking of an amount of chloral which proved to be too much, but which otherwise involved no element of accident.

The judgment must be reversed, with costs, and the case remanded for new trial, if it is thought that other evidence may give the case a different aspect.

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## WRIGHT & COBB LIGHTERAGE CO. v. SNARE & TRIEST CO. et al.

(Circuit Court of Appeals, Third Circuit. January 31, 1917.)

No. 2192.

1. NAVIGABLE WATERS ⟸20(8)—BRIDGES—INJURY TO VESSEL FROM NEGLIGENT OPERATION OF DRAW.

A steam lighter passing up the Passaic river was injured by the premature closing of a drawbridge, which had opened after her signal. In fact the draw had been opened on the signal of a down-bound tug in the other channel, and the tenders did not see the lighter, nor hear her signal. *Held*, that the injury was due solely to their negligence.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 96.]

2. NAVIGABLE WATERS ⟸20(8)—DUTY OF PUBLIC CORPORATION TO KEEP FREE —DELEGATION TO CONTRACTOR.

Counties, under a public duty to keep open a navigable stream between them, may employ an independent contractor for the operation of a drawbridge, who assumes liability for its proper operation; and, conceding that they would not thereby relieve themselves from liability for injury to a vessel through negligent operation of the bridge, that question cannot be raised by the contractor, when sued for the injury for which it contracted to be liable.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 96.]

Appeal from the District Court of the United States for the District of New Jersey; Charles P. Orr, Judge.

Suit in admiralty by the Wright & Cobb Lighterage Company against the Snare & Triest Company, and the Boards of Chosen Freeholders of the Counties of Hudson and Essex. Decree for libelant against the Snare & Triest Company, which appeals. Affirmed.

For opinion below, see 234 Fed. 774.

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

Hector M. Hitchings, of New York City (J. Elmer Melick, of New York City, of counsel), for appellant.

Foley & Martin, James A. Martin, and Geo. V. A. McCloskey, all of New York City, for appellee Wright & Cobb Lighterage Co.

James J. Murphy, of Jersey City, N. J., and Herbert W. Taylor, of New York City, for appellees Boards of Chosen Freeholders of Hudson and Essex Counties.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The libellant was the owner of the steam lighter Pioneer, which came into collision with the draw span of a temporary bridge on the Passaic River, built by The Snare & Triest Company for use during its construction of a new bridge under contract with The Board of Chosen Freeholders of the County of Essex and The Board of Chosen Freeholders of the County of Hudson. The Snare & Triest Company was found in fault (234 Fed. 774), and from the decree entered it took this appeal.

[1] The facts of the case are of narrow compass. It appears that the bridge was of the draw or turntable type, made in one structure, spanning two channels of the river when in place, and resting upon a central pier, upon which it was electrically revolved in opening and closing. On the occasion of the accident the bridge-tenders heard a signal, and, thinking it the signal of a tug then approaching in view, opened the bridge and let her through one channel. Before the bridge was opened, the Pioneer had signalled the bridge, and when it opened, whether in response to her signal or to the signal of the tug, she proceeded through the other channel. Her approach to the bridge was for a time obscured by new construction work, and not being observed, the bridge-tenders began closing the bridge while she was still in the draw. Realizing her danger, she gave a danger signal and reversed her engines, a doubtful manœuvre. The bridge-tenders, then seeing her for the first time, tried to reverse the bridge but were too late, and the collision followed. In this state of the testimony there is doubt whether the signal, in response to which the bridge was opened, was the signal of the tug or the signal of the Pioneer. There is no doubt, however, that the Pioneer signalled the bridge, when at a proper distance and under proper control, there being affirmative testimony for the Pioneer that she blew, which was opposed only by negative testimony of the bridge-tenders that they did not hear her blow. We think that in approaching the bridge and entering the draw, the Pioneer gave the only signal which under maritime rules or in prudence was required of her; that she was not in fault in assuming that the bridge was opened in response to her signal, and that, as reply signals from the bridge were not customarily given, the opened bridge was an invitation to her to come through, in accepting which there rested upon those operating the bridge, whether opened for the passage of one craft or two, the duty to permit her to pass through in safety. We further find that being without fault in entering the draw, the Pioneer was not liable for unwise manœuvres in the extremity in

which she was placed by those who closed the bridge upon her, and that the accident was occasioned by the negligence of those operating the bridge.

It was not disputed that the bridge was operated by the servants of one or another of the respondents. The question was, which of the respondents was operating the bridge. The Boards of Freeholders of the two counties, while not denying the negligence charged, denied liability therefor, as in the case of The Louise Rugge (D. C.) 234 Fed. 768, recently reviewed by this court, upon the ground that the bridge was operated not by them but by the appellant under a contract with them, whereby it undertook to operate the same "and be solely responsible for accidents of any kind that may occur during the continuance of * * * work" on the new bridge. The appellant denied negligence, as well as liability, imputing negligence to the lighter, and maintaining that under an arrangement with the Boards of Freeholders of the two counties the bridge was not operated by it but by employés of the counties, for whose negligence the counties, and not the appellant, were liable. Upon this question the trial court found, as in the case of The Louise Rugge, that under the arrangement between the appellant and the two counties, the bridge-tenders, though servants of the counties, were engaged in the work and were within the control of the appellant. Cooley on Torts, 624; Atlantic Transport Co. v. Coneys, 82 Fed. 177, 28 C. C. A. 388; Standard Oil Co. v. Anderson, 212 U. S. 215, 221, 222, 29 Sup. Ct. 252, 53 L. Ed. 480. This finding was based upon even clearer evidence than in the other case, because here the appellant itself defined the employment of the bridge-tenders by saying:

"As we understand it, the agreement is as follows: The twelve men (bridge-tenders) now employed for operating the temporary bridge are under our control and are to be subjected to the orders of our superintendent and to work in a manner satisfactory to us.

"We are to pay a proportion of their wages. * * * This arrangement to continue until such time as we would be entitled under our present contract to discontinue the operation of the temporary bridge with our own employés. * * * This agreement to be entirely outside of our contract and is not in any way to affect the terms of our contract as regards the operation of the bridge or payments due under our contract."

This shows so certainly that the bridge was operated by the appellant with servants, though nominally of the counties yet actually under its command and control, that the appellant does not urge with the same vigor the defense made in the Tug Louise Rugge, but defends upon other grounds.

[2] The first is, that there was a duty upon the Boards of Freeholders to keep their navigable waters clear, of which, because a governmental duty, they could not divest themselves by delegating it to the appellant; hence the contract by which the appellant undertook to operate the bridge was ultra vires of the counties and for that reason relieved the appellant of liability for its negligence in the performance of its undertaking.

Assuming for the moment that the obligation of the counties to keep clear navigable streams within their borders is a public trust which they cannot abdicate, we are at a loss to see how that obligation re-

lieves the appellant of its obligation to be the instrument through which the counties undertook to perform that function. Manifestly the counties, being bodies politic and not persons, can perform their function of keeping open navigable streams only by employing agencies or instrumentalities of some kind or other. These may be servants directly employed and paid by the counties under such contracts of service as the parties may expressly or impliedly make; or the instrument may be an independent contractor, as in this instance, who undertakes to work for the counties under such a contract with respect to duties, obligations and indemnities, both to the public and to themselves, as the parties may agree upon. When the independent contractor undertakes to do such work and to assume liability for negligence in its performance, its undertaking raises a duty to the public, and is an obligation to the counties in the nature of a contract of indemnity, and is binding upon it both to the public and to the counties without regard to whether the counties have or have not abdicated their public function. Whether the counties can abdicate such a function and can avoid liability by delegating it to another, are questions that can be raised only by one to whom the counties owe a duty and who has suffered by a violation of that duty. They cannot be raised by the independent contractor, who has based his undertaking upon a consideration received and retained, and to whom the counties owe no duty and with respect to whom the counties have violated no obligation, contractual or governmental.

As no question of the power of the counties to employ the appellant in its work has been raised in this case by one qualified, we are not called upon to determine such a question. We may, however, assume without deciding, that the counties are still liable. Then we have outstanding concurrently two obligations, as occasionally happens, both being obligations to the public, one the obligation of the counties and the other the obligation of the contractor, to do the work without injury to the public through negligence. If the injured party chooses to sue the counties alone, we might then have the question which the appellant has raised, but if, as in this instance, the injured party elects to sue both the contractor and the counties, then the rule is that the one whose positive act inflicts the injury is primarily liable to the injured party without regard to the liability of the other, leaving the parties sued to adjust their liabilities, one to the other, according to their contractual undertakings. Wilson v. Watertown, 3 Hun (N. Y.) 508; Tierney v. Troy, 41 Hun (N. Y.) 120, 121.

As in this case the appellant undertook to operate the bridge and to assume "sole responsibility for accidents" therein, and as the court has found that the injury was inflicted by its acts, it is primarily liable, and we need not inquire merely because the negligence was inflicted upon a highway of navigation, whether the counties for which the appellant was acting are liable also. Casement v. Brown, 148 U. S. 615, 623, 13 Sup. Ct. 672, 37 L. Ed. 582.

The appellant further contends that the action should have been dismissed because the contract between it and the counties could not inure to the benefit of a vessel damaged. This action is not brought against

the appellant on its contract with the counties. Injury to a vessel from negligence in operating a draw is a maritime tort, and it is for such a tort and not upon the contract that this action is brought. The contract is evidence of the identity of the party operating the bridge and inflicting the injury, and the ground of this action in admiralty is its negligence in that operation.

The award of costs was within the discretion of the trial court and we cannot say that it abused its discretion.

The decree below is affirmed.

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## HINES et al. v. ROLLER et al. *

(Circuit Court of Appeals, Fourth Circuit. January 8, 1917.)

No. 1458.

1. SPECIFIC PERFORMANCE ⟸29(2)—CONTRACT—CERTAINTY.
A contract to purchase all the land owned by defendant on White Oak run in a certain county is sufficiently definite to be specifically enforced, though neither of the parties knew the exact description or acreage, since the description and acreage are capable of being made certain.
[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 71–73, 75–82; Dec. Dig. ⟸29(2).]

2. SPECIFIC PERFORMANCE ⟸97(3)—SUIT—CONDITION PRECEDENT—TENDER.
Where there is a bona fide difference of opinion between the parties as to the quantity of land conveyed, the purchaser does not lose his right to specific performance by not tendering payment for the amount claimed by the vendor, though that claim was correct, since the purchaser was entitled to have the decision of the court on that issue.
[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 296–298; Dec. Dig. ⟸97(3).]

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

Suit for specific performance by Cary C. Hines and others against John E. Roller and another. Decree dismissing the bill, and complainants appeal. Reversed.

W. E. Haymond, of Sutton, W. Va. (Haymond & Fox, of Sutton, W. Va., on the brief), for appellants.

E. L. Cutlip, of Webster Springs, W. Va., for appellees.

John E. Roller, of Harrisonburg, Va., in pro. per.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The question before us is whether the District Court erred in dismissing the bill for specific performance on the grounds: First, that the minds of the parties were never in agreement as to the property to be conveyed; and, second, that the conduct of the complainants did not show that diligence and promptness necessary to the relief asked.

In 1895, John E. Roller contracted to convey to O. C. Reed a tract of land containing about 4,000 acres in Webster county, W. Va. There

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

*Rehearing denied February 17, 1917.

was some difference between the parties as to the validity of the title to part of the land. This difference was settled by proceedings in the state court under which a conveyance was made for the greater portion of the tract. The plaintiffs afterwards acquired by successive conveyances the land conveyed to Reed. Roller having perfected his title to the portion of the tract which Reed did not take because of defective title, on October 15, 1913, Cary C. Hines, on behalf of himself and the other complainants, made by letter to E. L. Cutlip, Roller's agent, an offer to buy it in these words:

"If you want to sell all the land owned by John E. Roller on White Oak run, in Webster county, we will give you twenty-one dollars per acre for the same, pay you one-third cash when the survey is made by you and a deed is tendered us with covenants of general warranty, conveying a good marketable title to us, and pay the residue in one, two and three years thereafter, with interest from the date of said deed, execute notes for said deferred payment in equal sums, with interest and payable as aforesaid, and secured by vendor's lien on the property so conveyed."

The offer was accepted by Cutlip on October 24, 1913. Thereafter a survey was made under the supervision of Cutlip, and the complainants by courses and distances supposed by both parties to be correct. This survey showed an area of 276 acres. Cutlip prepared a deed of conveyance and sent it to Roller, and notified complainants of his action. The complainants, on November 11, 1913, wrote Cutlip that they would comply as soon as the deed was returned duly executed. Roller, alleging a mistake in the survey, refused to execute the deed, and afterwards had another survey made under his own direction by what he claimed to be the true courses and distances. This survey showed an area of 324.7 acres. He tendered a deed for this acreage at $21 an acre. Plaintiffs refused to accept this deed for excess of acreage, for error in the statement of interest, and for improper acknowledgment. The two last objections were admitted to be valid. Thereupon the complainants brought this action for specific performance, alleging the true acreage to be 276 acres, and averring their readiness and willingness to comply in all respects with their contract. The defendant alleged in his answer that a correct survey of the true boundaries showed an acreage of 324.7, that the minds of the parties never met as to the land to be conveyed, and that the tender of the conveyance and its refusal by the complainants operated as a discharge of his obligation, if any ever existed.

After this suit was commenced the defendant tendered another deed in proper form for 324.7 acres. The complainants, still contending that the true area was 276 acres, refused to accept the deed, but proposed that it be filed in the cause to abide the decision of the court as to the quantity of land. This offer the defendant declined. Pending the suit, the defendant, Roller, sold the land to A. F. Scott, who bought with notice, and was afterwards made a party defendant. By amended and supplemental bill the complainants set up that if they were mistaken as to the number of acres "owned by Roller on White Oak run," they were entitled, under the contract, to all the land falling under that description. The answer to the supplemental bill set up the same defenses as the original answer.

[1] A statement of the law applicable to these conditions, we think, will make clear the right of the complainants to specific performance. The contract was perfectly definite and certain. The test is not whether the contract is so definite and certain that the parties agree on its meaning, but whether it is so definite and certain that the court can ascertain with certainty what it means. If one chooses to take the risk, he may make a perfectly certain contract without any knowledge of the subject-matter described, for that is certain which can be made certain. Here the contract implied that the boundaries and acreage were unknown to the parties. The description, "all the land owned by John E. Roller on White Oak run in Webster county," identifies the land, because the court could ascertain with certainty the land, its boundaries and acreage, which Roller owned on White Oak run. In Barry v. Coombe, 1 Pet. 640, 7 L. Ed. 295, the description, "Your ½ E. B. wharf and premises," was held sufficiently definite. Williams v. Morris, 95 U. S. 444, 24 L. Ed. 360. The description, "my farm" or "my mill," was held sufficient upon proof that the vendor had no other farm or mill. White v. Core, 20 W. Va. 272; Ensminger v. Peterson, 53 W. Va. 324, 44 S. E. 218.

[2] Obviously it cannot be that a bona fide difference between the parties as to the boundaries, or the acreage of the land, or the money due, requires that the party seeking enforcement of the contract must comply with the demands of the other on pain of losing his bargain if it should turn out that he was mistaken as to his rights. When such a difference arises, the rule of reason is that either party may bring the matter into court for adjudication, alleging his construction of the agreement and his understanding of his rights under it, his readiness to perform his obligations as he understands them, and also his readiness to conform to the court's construction of the contract. That is this case. After the vendor and the purchaser had clearly ascertained that neither would accept the survey contended for by the other, tender of title by the vendor or of the purchase money by the purchaser would have been a useless formality. When the purchaser brought the vendor into court so that the difference as to the boundaries and area of the land might be determined, he did all that could be required.

"A party does not forfeit his rights to the interposition of a court of equity to enforce a specific performance of a contract, if he seasonably and in good faith offers to comply, and continues ready to comply, with its stipulations on his part, although he may err in estimating the extent of his obligation." Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501; Tavenner v. Barrett, 21 W. Va. 657; Vaught v. Cain, 31 W. Va. 426, 7 S. E. 9; Armstrong v. Maryland Coal Co., 67 W. Va. 589, 69 S. E. 195.

The principle is clearly stated and illustrated by Judge Brannon in Watson v. Coast, 35 W. Va. 463, 14 S. E. 249, and by Vice Chancellor, now Justice, Pitney, in Worch v. Woodruff, 61 N. J. Eq. 78, 47 Atl. 725.

The evidence shows good ground for the difference between the vendor and vendee as to the boundaries and area of the land, and therefore as to the amount of the purchase money. There is no ground to impute bad faith to either. The weight of evidence, how-

ever, sustains the conclusion of the District Court in favor of the vendor's contention that the tract contains 324.7 acres.

The decree of the District Court must be reversed, with instructions to enter a decree requiring the defendant Roller to convey the track of land shown by his survey as 324.7 acres upon payment by the complainants of $6,818.70, being $21 an acre, the agreed price.

Since the defendants' contention as to the acreage was correct, the costs in the District Court should be paid by the complainants.

Reversed.

## THE PILE DRIVER NO. 2.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 84.

NAVIGABLE WATERS ⟸19—DEPOSITING REFUSE IN—LIABILITY OF VESSEL.

Under Act March 3, 1899, c. 425, §§ 13, 16, 30 Stat. 1152, 1153 (Comp. St. 1913, §§ 9918, 9921), which provides that, with certain exceptions, "it shall not be lawful to throw, discharge or deposit * * * from or out of any ship, barge, or other floating craft of any kind, * * * any refuse matter of any kind, * * * into any navigable water of the United States," and which makes any vessel or other craft "used or employed in violating" such provision liable for the penalties imposed therefor, where a pile driver and a catamaran alongside, containing piles, were being used together in repairing a ferry rack in North River, the action of one of the pile driver crew in cutting off the ends of piles on the catamaran, which were too long for use, and throwing such ends into the river, was a violation of the act, for which the pile driver is liable.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 59–63, 67–72.]

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

Libel by the United States against the New York Central and Hudson River Railroad Pile Driver No. 2; the New York Central & Hudson River Railroad Company, claimant. Decree for libelant, and claimant appeals. Affirmed.

This action was brought in rem under the act of March 3, 1899 (30 Statutes at Large, 1151–1155), entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes."

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

The pile driver proceeded against was engaged in repairing the ferry rack at the foot of Forty-Second street, New York City. The repairs consisted (inter alia) in driving in new piles. The material for this purpose was in or on what is called a "catamaran," viz. a framework or container within which piles could lie until seized on by the pile driver and elevated into place for driving. The pile driver and the catamaran are entirely distinct, but for the purpose for which they were used at the time neither was of any value without the other. Nor, indeed, was the catamaran itself of any use without piles either in it or on it. Some of the piles were longer than was necessary, whereupon a member of the pile-driving crew cut off their ends with an ax

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

and let the unwanted ends float out into the river; one at least of the same being a piece of timber 12 or more feet in length. Such a thing constitutes a most dangerous menace to ships navigating with the aid of propellers.

Section 13 of the act declares "that it shall not be lawful to * * * deposit, or cause, suffer, or procure to be * * * deposited either from or out of any ship, barge, or other floating craft of any kind," any "refuse matter of any kind or description whatever other than that flowing from streets and sewers * * * into any navigable water of the United States." The unwanted ends of piles are clearly refuse matter, and the act of the member of the pile driver's crew in permitting them to float off is a violation of the statute.

I have no doubt that the violation was intentional. This statement is made after listening to the testimony of all the members of the pile driving crew, who probably never heard of this act. It seems that they intended to do what they did. This action, however, is brought in rem under section 16 of the act, which declares that "any * * * craft used or employed in violating any of the provisions of section 13 * * * of this act" shall be liable to be proceeded against "summarily by way of libel."

The whole question is, therefore, whether the pile driver, as distinct from the catamaran, *was used or employed* in the violation of section 13, which consisted in the act of a member of the pile driver's crew in casting adrift from the catamaran unwanted ends of piling. It seems to me quite clear that the pile driver, the catamaran, and the logs were all being used and employed in one single job, namely, repairing the Forty-Second Street ferry rack, and that if in the process of executing those repairs the human beings who were executing the work and managing all the property required therefor throw refuse matter in the river, then all the boats or other craft (i. e., pile driver and catamaran) employed on the job were used in the violation of the statute. It is true that the punishment inflicted by the act on such a trifling offense as this is grotesquely severe; but that ought not to affect one's views of a statute.

Of course, it often does affect the judicial view of statutes, as may be seen by a comparison of the cases of The Anjer Head (D. C.) 46 Fed. 664, and The Bombay (D. C.) 46 Fed. 665. Of these two cases, I think the decision of Judge Benedict in The Bombay is the proper method of construing the earlier act out of which this statute grew. I am also of opinion that the reasoning of Dodge, J., in The Scow No. 9 (D. C.) 152 Fed. 548, in relation to this particular act, compels decision against claimant.

Libelant may take a decree for $500, without costs.

Alex S. Lyman and Jacob Aronson, both of New York City, for appellant.

H. Snowden Marshall, U. S. Atty., and John Hunter, Asst. U. S. Atty., both of New York City, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The act in question provides, in section 13, as follows:

"It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, * * * any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States."

The facts are fairly stated in the opinion of the District Judge and need not be repeated here. The testimony and admissions of the claimant clearly established the following propositions: First. On the day in question the pile driver was engaged in repairing the ferry rack

on the south side, at the foot of West Forty-Second street, New York. Second. Lying alongside the pile driver was a raft containing piles which were too long for use and a man was engaged there in cutting them off and shoving the discarded ends into the river. Third. This was done in three instances. He was then hailed by an inspection boat and the third piece was hauled back on the raft. Fourth. The two pieces first thrown overboard were picked up by the patrol boat, one piece being about 50 feet and the other about 150 feet distant from the raft. These discarded pieces were, respectively, about 20 feet and 13 feet long and 7 inches in diameter. Clearly these timbers were or might become a serious menace to navigation. Floating about in the crowded waters of the harbor of New York, in the night as well as during the day, they might easily be caught by the propeller wheels of vessels, thus endangering life as well as property. Unquestionably they were deposited in the water of the harbor by the agents and servants of the appellant. The catamaran on which the piles lay and the pile driver were both engaged in the same business of repairing the ferry rack. They were so near that a person could step from one to the other. It also appears that the man who threw overboard the obstructions complained of was a member of the pile driver's crew and was acting under orders from the foreman in charge of the work. The construction urged by the appellant that the raft or catamaran and not the pile driver is liable, would emasculate the statute and make the enforcement thereof difficult if not impossible. It would only be necessary to carry the discarded pieces to a floating platform moored to the pile driver, and cast them overboard from there, in order to escape liability. The case is clearly distinguishable from U. S. v. Emperor (D. C.) 49 Fed. 751, where Judge Brown says:

"The dumping before reaching the proper place was by no act, omission, or privity of the tug; but by the willful and criminal act of the men on the scows, wholly independent of the tug, and against the express orders of the captain. It seems to me very clear that neither the captain nor any person on board of the tug, was the 'person offending.'"

In the present case the entire enterprise was under the direction of those in charge of the pile driver. The raft was merely an auxiliary platform, so to speak, because there was no place for the piles on the driver. The man who threw them overboard was a member of the crew of the pile driver, the catamaran had no crew and could not act independently of the pile driver. We think the doctrine of The Bombay (D. C.) 46 Fed. 665, is applicable to the present situation.

The decree is affirmed with costs.

## TOKU SAKAI v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1917.)

No. 2794.

1. ALIENS ⟸54—DEPORTATION PROCEEDINGS—WAIVER OF ERRORS.
Where, in deportation proceedings, counsel for the alien first stated that he did not desire to offer further evidence, but desired time to file a brief, and later stated that he did not desire to file a brief or do anything further in the case, any defect in form in the cabled authority or warrants on which the alien was arrested was waived.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112.]

2. ALIENS ⟸54—DEPORTATION PROCEEDINGS.
Where an alien woman, whose deportation was sought under Immigration Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899, as amended by Act March 26, 1910, c. 128, § 2, 36 Stat. 264 (Comp. St. 1913, § 4247), on the ground that she was practicing prostitution, admitted the charge, and her counsel stated that he desired to offer no further evidence, and subsequently waived the right to file a brief, such alien, having been informed that she was entitled to counsel and not having been taken advantage of, cannot complain of the order of deportation.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112.]

Appeal from the District Court of the United States for the Territory of Hawaii; Charles F. Clemons, Judge.

Deportation proceedings by the United States of America against Toku Sakai. Defendant applied for writ of habeas corpus, and from decree discharging the writ, she appeals. Affirmed.

George A. Davis, William T. Rawlins, and Charles S. Davis, all of Honolulu, Hawaii, for appellant.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Appeal from decree discharging the writ of habeas corpus of appellant, Toku Sakai. Deportation proceedings were prosecuted under that portion of section 3 of the Immigration Law, which reads as follows:

"Any alien who shall be found * * * practicing prostitution after such alien shall have entered the United States * * * shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections 20 and 21 of this act."

The District Court ordered appellant to be deported.

Appellant makes two points: First, that she had no hearing before the immigration authorities at the port of Honolulu, as required by law; second, that she was given "only the semblance of a hearing" before the immigration authorities at the port of Honolulu.

The record shows these facts: That on September 29, 1913, a cablegram in code form was sent by the Acting Secretary of Labor at Washington, D. C., to the "Immigration Service" at Honolulu, ordering the arrest of Toku Taki (sic) and that she should be taken before

the immigration authorities for hearing, and that the record of proceedings be forwarded to the Department at Washington; that she was found practicing prostitution after entry into the United States. Authority for her release from custody under a bond was also granted in the cablegram.

It appears that on October 2, 1913, at Honolulu, appellant, who said her name was Toku Sakai, appeared before Harry B. Brown, examining inspector of the Immigration Service; that an interpreter and a stenographer were present; that a copy of the cablegram warrant of arrest was attached to the proceedings had, marked as Exhibit A. The appellant was sworn, and testified to the effect that she was a married woman, separated from her husband and practicing prostitution, and had been practicing it for about a year, and before that time, and that she started in such occupation about five years before the time of the examination. She was then asked by the immigration official if she wanted a lawyer, and replied that she did. The alien also appears to have signed her name, and the further hearing seems to have been partly carried on upon October 7th. On October 17, 1913, another cablegram was sent from Washington by Louis F. Post, Acting Secretary of Commerce and Labor, addressed to "Immigration Honolulu." This was also in code, and as interpreted directed the arrest of the appellant and others, and the bringing of appellant and others before the immigration authority for hearing, and the forwarding of the record of proceedings to the Department upon a charge that the alien was found practicing prostitution after entry. On the same day a written warrant, addressed to Richard L. Halsey, inspector in charge, for the arrest of the alien, Toku Sakai, in regular and due form, was forwarded by mail by the Acting Secretary of Commerce and Labor to the inspector in charge at Honolulu. The warrant recited that whereas, from evidence submitted to the Acting Secretary of Commerce and Labor at Washington, the alien had been found in the United States in violation of the act of Congress approved February 20, 1907, amended by the act approved March 26, 1910, and that she was a prostitute and had been found practicing prostitution subsequent to her entry into the United States, the Acting Secretary of Commerce and Labor by virtue of authority vested in him did command the inspector in charge to take the alien into custody and grant her a hearing, to enable her to show cause why she should not be deported in conformity with law, and that pending further proceedings the alien might be released from custody upon furnishing satisfactory bond in the sum of $1,000.

The record also shows that a notice from the Department of Commerce and Labor, through the office of inspector in charge at Honolulu, dated December 18, 1913, was addressed to Wm. J. Sheldon, at Merchant street, Honolulu, as attorney in the case of Toku Sakai, that—

"further hearing in this case will be had on Monday, December 22d, at 9:30 a. m., at which time any evidence pertinent to the case which you submit will be considered."

On December 22, 1913, Attorney Wm. J. Sheldon appeared before the immigration official and stated that he did not desire to offer any

further evidence or testimony in the case, but desired time to file a brief. Thereafter, on March 12, 1914, the immigrant inspector made this memorandum:

"On December 22, 1913, Attorney W. J. Sheldon stated that he desired time to file a brief in this case. He was this date communicated with, and states that he does not desire to file a brief or do anything further in this case."

Thereafter, on March 16th, the inspector in charge transmitted to the Secretary of Labor at Washington the testimony in the case of Toku Sakai, "who was arrested and given a hearing as directed in warrant or arrest No. 53678/465," which was the warrant of October 17, 1913, heretofore referred to. Thereafter, on March 28, 1914, a warrant of deportation was made in usual form.

[1] Whatever defects of form there may have been in the cabled authority or warrants, they were waived when counsel for the alien appeared before the immigration authorities and without suggestion of irregularity in the warrant or arrest stated that he did not desire to file any brief or to offer any "further evidence or testimony in the case." Bishop's New Criminal Procedure, § 126; Commonwealth v. Betton, 5 Cush. (Mass.) 427; Healy v. Backus, 221 Fed. 358, 137 C. C. A. 166; Peterson v. State, 45 Wis. 535.

[2] There is no evidence of any unfair conduct toward the alien on the part of the immigration authorities. She was not threatened in any way, she was asked if she desired counsel, and no compulsion appears to have been used to elicit any statement which she made. Under such circumstances, when counsel appearing in her behalf stated that he did not desire to offer any "further" evidence or to file a brief, he waived the right to offer testimony again, and acted upon the assumption that the sworn statement which had previously been made by his client before the immigration officer was the evidence to be considered in the case, and that upon it the authorities could make such order as might be appropriate in the premises. The questions of identity and the spelling of the name were evidently of no moment.

The case, therefore, became one where the finding by the administrative officers is supported by undisputed evidence which had been received and heard before the immigration authorities, and as there is no suggestion that the alien did not understand the nature of the charge against her, there is nothing to show that her rights were disregarded or any injustice done her. Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165; Ex parte Wong Yee Toon (D. C.) 227 Fed. 247; Wong Back Sue v. Connell, 233 Fed. 659, 147 C. C. A. 467.

The judgment is affirmed.

SOUTHERN POWER CO. v. McCLURE et al.

(Circuit Court of Appeals, Fourth Circuit. January 8, 1917.)

No. 1476

1. MASTER AND SERVANT ⊜119—INJURIES TO SERVANT—DEGREE OF CARE—ELECTRICITY.
An electric power company owes its employés the duty to exercise care commensurate with the dangerous and subtle power of electricity.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 210; Dec. Dig. ⊜119.]

2. APPEAL AND ERROR ⊜1005(1)—VERDICT—APPROVAL BY COURT.
There is a presumption in favor of the conclusion of the district judge that there was material evidence of defendant's negligence and of the employé's freedom from negligence, and an appellate court should be clearly convinced before setting up its own judgment against that of the trial judge and the jury on an issue of negligence.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948; Dec. Dig. ⊜1005(1).]

3. MASTER AND SERVANT ⊜281(12)—INJURIES TO SERVANT—EVIDENCE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.
In an action for the death of an electric power lineman, evidence *held* to show that the proximate cause of the accident was the lineman's negligence in striking a wire which he knew to be highly charged with electricity, instead of the wire he was directed to strike, and which was not then charged.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 995; Dec. Dig. ⊜281(12).]

In Error to the District Court of the United States for the Western District of North Carolina, at Salisbury; James E. Boyd, Judge.

Action by W. A. McClure and another, administrators of Grover McClure, deceased, against the Southern Power Company. Judgment for plaintiffs, and defendant brings error. Reversed.

W. S. O'B. Robinson, Jr., and F. I. Osborne, both of Charlotte, N. C. (Osborne, Cocke & Robinson, of Charlotte, N. C., on the brief), for plaintiff in error.

Thomas J. Jerome, of Greensboro, N. C. (H. S. Williams, of Concord, N. C., Rufus E. Austin, of Albemarle, N. C., and Edward C. Jerome, of Greensboro, N. C., on the brief), for defendants in error.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. The administrators of the estate of Grover McClure recovered a judgment for $3,500 for his death from contact with a heavily charged wire of the Southern Power Company. The writ of error is based on the position that the District Judge should have ordered a nonsuit or directed a verdict for the defendant because of entire failure of evidence tending to show negligence on the part of the defendant, and because of conclusive evidence of the negligence of McClure as the sole efficient cause of his death.

[1] In the decision of the question full weight must be given to the obligation of defendant to exercise care commensurate with the dangerous and subtle power of electricity, and also to the presumption in favor of the conclusion of the District Judge that there was material evidence of defendant's negligence, and that McClure's negligence as the sole or contributing cause of the accident was not proved beyond reasonable controversy.

[2] An appellate court should be clearly convinced before setting up its own judgment against that of the trial judge and the jury on an issue of negligence. Nevertheless, in this case we cannot resist the conclusion that a fair statement of the evidence tends inevitably to the conclusion that the defendant was not responsible for the death of McClure.

[3] The Southern Power Company was changing its single circuit pole line for the transmission of electric power between High Point and Winston-Salem, N. C., to a double circuit steel tower line. McClure was an experienced lineman, and participated in the work under the direction of Fisher, the foreman. Work on the south wire of the towers could be done only when the current had been switched entirely to the north wire by using insulators, cutting the wire, and carrying it across and attaching it to the north wire. To prevent the interruption of the current during working days this switching of the current from one side to the other was done on Sunday. During the week before Sunday, July 5, 1914, the current had been running on the south wire while the force was working on the north wire. On that day McClure himself, with other linemen, cut the wires and switched the current to the north wire. During all the following week he and the other linemen were employed in the work of knocking out kinks in the loops of the south wire. He not only knew that the north wire was charged with a deadly current of electricity, but he had worked for almost an entire week on the south wire. He knew, or had every reason to know, that according to the method of the company and the necessity of the case the current would not be changed until the following Sunday. The uncontradicted testimony of the foreman and of every lineman who could be produced was to the effect that the foreman directed the linemen, including McClure, that each should go to a separate tower and straighten out with a stick the kinks in the loop of the south wire. The other linemen performed the work assigned to them on the south wire without injury. McClure ascended one of the towers, and struck at a kink in the loop of the north wire charged with 88,000 volts of electricity, and was almost instantly killed.

The attempt is made to support an inference that McClure was ordered to strike out the kinks on the north side by the testimony of witnesses, who were present at the moment, or soon after, that they saw a kink or kinks in the north wire, but did not see kinks in the south wire. These witnesses were mere casual observers of the accident, and it would be beyond all reason to infer, first, that there were no kinks on the south side because they did not observe any, and from that to infer that the foreman directed McClure to strike out kinks on a wire

which he knew to be deadly because these casual observers saw no kinks in the south wire.

The other testimony relied on and admitted by the District Judge solely as a contradiction of Fisher, the foreman, was that of W. A. Smith, W. A. McClure, and Mrs. Hattie McClure, the father-in-law, father, and wife of Grover McClure, to the effect that Fisher told them that the fault was not that of Grover or himself, but of the substation in not carrying out his request to deaden the north wire. The testimony of these witnesses is vague and variant. But if Fisher made such a statement, the physical conditions demonstrate its falsity. Everybody concerned knew that the current would not be stopped altogether, and that it would be running on one of the wires. It had been running all the week, it was necessary that it should run, and there was not a particle of evidence of any reason for stopping it, or for supposing it had been stopped. It could be changed to the south wire only by the working force to which Fisher belonged. This could be done only by having the current taken from both wires and actually cutting the wire and reattaching it to the south wire. Fisher knew this, and therefore the statement attributed to him could not be true. Unless we reject the unquestioned evidence as to physical conditions and presume negligence on the part of the defendant, it is impossible to resist the conclusion that McClure was responsible for the accident. It is difficult to account for his action. Familiarity with danger tends to produce disregard of it. We know that from this and other causes the human mind sometimes slips, and fails to correlate and take into account perfectly apprehended facts. We can find in the record no other explanation of the sad tragedy.

Reversed.

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FIRST NAT. BANK OF GRAHAM, VA., v. WEITZEL et al.

(Circuit Court of Appeals, Sixth Circuit. February 6, 1917.)

No. 2895.

1. APPEAL AND ERROR ⊜850(3)—REVIEW—RECORD.

An opinion will not take the place of findings, as regards the record, preserving right to review depending on findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3351–3362, 3375, 3376; Dec. Dig. ⊜850(3).]

2. BILLS AND NOTES ⊜525—HOLDER IN DUE COURSE—EVIDENCE.

Evidence that negotiations of attorneys for sale to plaintiff of a note would naturally have informed it that they were acting for H., and the fact that the form of indorsement thereon by defendant bank, after that of H., was: "Pay to the order of any bank or banker. All previous indorsements guaranteed"—authorizes a finding that plaintiff was not a holder in due course, on the theory that it was put on inquiry, which would have disclosed that defendant bank was only a forwarding agent.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832–1839; Dec. Dig. ⊜525.]

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3. BILLS AND NOTES ⟸504—ACCOMMODATION INDORSEMENT—EVIDENCE.
That defendant was an accommodation indorser of the note sued on may be shown by transactions occurring out of plaintiff's presence; it being shown to be chargeable with notice.
[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1719-1727; Dec. Dig. ⟸504.]

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Action by the First National Bank of Graham, Va., against Fred W. Weitzel and others. From an adverse judgment, plaintiff appeals. Affirmed.

J. S. Hays, of Winchester, Ky., for appellant.

H. C. Hazlewood, of London, Ky., for appellees.

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

DENISON, Circuit Judge. The Bank of Graham, Va., sought to recover against the Bank of London, Ky. (Weitzel, receiver), upon an indorsement placed by the cashier of the London Bank upon the promissory note of one Calhoun, before maturity and before the note was sold to the Graham Bank, which indorsement read:

"Pay to the order of any bank or banker. All previous indorsements guaranteed. First National Bank of London, Kentucky."

A jury was waived, and the case was tried before the District Judge. Findings of fact and law were requested, but were not made, except as a careful opinion embodied the views of the judge upon the facts and the law. Judgment was entered for the defendant.

[1] An opinion cannot take the place of findings (Mason v. Smith [C. C. A. 6] 191 Fed. 502, 112 C. C. A. 146); but we are inclined to overlook any such question, and treat the record as if it clearly preserved the right to urge in this court the proposition that the undisputed evidence imperatively required a judgment for plaintiff. Further than that we cannot go.

The undisputed facts are that the note in question belonged to the payee, Holliday, living at London; that he desired to sell it, and indirectly engaged, as his agents for this purpose, a firm of attorneys at Keystone, Va., where Calhoun, the maker, was engaged in large business enterprises; that these attorneys interested the cashier of the Graham Bank in the purchase enough so that he desired that the note be sent on for inspection and possible purchase; that the Keystone attorneys wrote to Holliday, asking him to send the note to them for inspection, and for sale if they could find a purchaser at a stated price; that thereupon Holliday took the note and the letter from these attorneys to the London Bank, and requested it to forward the note pursuant to the attorneys' request. The note then had been indorsed in blank by Holliday. It was thought best to send the note through another bank, and so the London Bank sent it to the Keystone Bank, accompanied by the attorneys' letter, with instructions to deliver the note upon receipt of the agreed price. In this connection the cashier

of the London Bank stamped upon the note the indorsement above recited. The Keystone Bank delivered the note to the attorneys; they carried it to the Graham Bank, which purchased the note and paid the specified price; and this purchase price was duly remitted through the London Bank to Holliday. It is not disputed that upon these facts the indorsement of the London Bank, if it was an indorsement importing full liability, was for accommodation only, and was beyond the power of the bank to make, and that the plaintiff can recover only upon the ground that it became a holder "in due course," and so entitled to the right of full recovery given by the Uniform Negotiable Instruments Act, which has been adopted in both Kentucky and Virginia.

[2] The trial court found that the plaintiff was not a holder in due course, and, upon a review of the record, we cannot say that there is nothing to support this finding. The conversations between the cashier of the plaintiff and the Keystone attorneys would naturally have informed the cashier that the attorneys were acting for Holliday, and he does not deny that he so understood; the application to discount or rediscount the note did not come in the ordinary course of business from the London Bank or any one representing it; there was nothing in the situation to make the indorsement by the London Bank with full liability a thing natural or to be expected; and the indorsement was by that peculiar form of words which it appears without dispute is customarily used among banks for the purpose of forwarding for collection and not for the purpose of rediscount or sale. Putting all these things together, no court can say that the Graham Bank may not have been under a duty to make that further inquiry, the first step of which would surely have disclosed that the London Bank was only a forwarding agent.

With this conclusion of fact, it becomes immaterial to consider the very interesting question whether this form of indorsement is blank or special, full or restrictive.

[3] The Graham Bank also alleges error that the court admitted in evidence facts pertaining to the history of the note and its handling at London, which facts, including conversations at the London Bank, were not in the presence of or brought to the notice of the officers of the Graham Bank. This is only another form of the same substantial question as to the sufficiency of the evidence. To show that the Graham Bank was not a holder in due course required two steps. The defendant must prove, first, the accommodation character of the indorsement; and, second, plaintiff's knowledge. In such a situation, the actual character of the paper must of necessity be shown by evidence of transactions in which the plaintiff did not participate. If the trial were in the presence of a jury, such evidence would be received, accompanied by the caution that it would be incompetent unless it was later found that plaintiff was chargeable with notice; and so here, when the circuit is completed by showing that plaintiff must be held to know that the paper was not what it seemed, plaintiff is not harmed by the admission of the ultimate facts as to its real character.

The judgment must be affirmed.

## THE GEORGE I. FORSYTH.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 44.

TOWAGE ⊂=15(2)—SINKING OF TOW—LIABILITY OF TUG.

The allegations of a libel that the sinking of a dredge was due to the fault of a towing tug in going out in a high wind, when she had insufficient power to handle her tow, *held* not sustained by the evidence.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 34–36; Dec. Dig. ⊂=15(2).]

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

Suit in admiralty by William Beard, owner of the dredge Beard, and others, against the Moran Towing & Transportation Company, with the steam tug George I. Forsyth impleaded. Decree for respondents, and libelants appeal. Affirmed.

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

It is not easy to classify the libel in this case. There are no formal charges of fault, and the one thing that is clear in its language is that respondent furnished the Forsyth to perform a towage for which she was not strong enough in the weather conditions prevailing at the time, so that, as the result of such weakness, libelant's dredge William Beard was taken to "the flats off Liberty Island, where she sank, receiving serious damage." It is not alleged that she was in a sinking condition on arriving at the flats, nor is it anywhere stated that her sinking was due to any act or omission on the part of the Forsyth; indeed, the cause of sinking is left unexplained. In short, the libel is open to peremptory exception.

No such objection having been taken, and there being no proof of the tug's weakness, some ground of complaint will be looked for in the libel. It is found in the statement that, when the Forsyth started on her voyage from Brooklyn to Haverstraw with a tandem tow of a coal scow, a dredge, and a water boat (in the order named), the weather was "unfavorable and unfit for [the tug] to undertake the performance to tow said crafts aforesaid without endangering the same." As matter of fact, the tug and tow started from Gowanus entrance early on the morning of a bright March day, with the wind blowing between 50 and 60 miles an hour from the southwest, according to the anemometer used by the Weather Bureau and several hundred feet above sea level. The wind was less on the bay, but how much less no one has stated or estimated.

When the Forsyth arrived off the southerly end of Governor's Island, the tug Henry S. Beard, belonging to libelant and a far abler vessel than the Forsyth, came alongside the dredge and inquired whether anything was the matter. The master of the tug Beard had observed that "the dredge Beard was rolling considerably; [so] thinking she might want some help, and might be in some trouble," he inquired. The reply from the dredge master was that he "was all right," but that he did not care to go up the river with the wind as it was; he preferred to be put into a dock on the Jersey shore.

The tug Beard went ahead to convey this request to the Forsyth, and the course was changed accordingly. Then the dredge blew her whistle; the tug Beard went back and asked what was wanted. The dredge master asked for a syphon and steam hose, which were furnished. Some minutes (estimated at five) later the Henry S. Beard's master concluded that the Forsyth was not hauling the tow fast enough, whereupon he cast off the line between dredge and coal scow and hastened with dredge and water boat toward New Jersey.

At this time the tow was well off the upper end of Governor's Island. When near the edge of the west bank and in about 18 feet of water, the dredge master, suddenly and without order or request, dropped both his forward spuds, whereupon, further progress being impossible, the dredge sank.

It was about an hour from the time the Forsyth left Gowanus entrance until the Henry S. Beard took charge of the dredge; how long afterward she sank does not appear. The cause of sinking was entrance of water through hatches for which no sufficient covering was provided. There seem to have been covers, but no means of fastening them. In my opinion, also, water steadily came into a hawse pipe carelessly stuffed with a gunny sack or sacks.

Undoubtedly a wind of 40 miles or over is a gale, but it does not stop harbor navigation. Whether it is negligent to go out in such weather depends on the kind of boat to be taken out. It is not doubted that the coal scow ahead of the dredge, with only two feet of freeboard and no hatches over the coal, made perfectly good weather. Doubtless the dredge, with her heavy top hamper, would roll more than the scow; but this was to be expected, and no excuse appears for leaving hatches either open or so loosely closed that the covers washed off in a seaway that did not disturb the scow, nor wet the coal which the Forsyth had piled in her waist—where her freeboard is said to have been even less than that of the coal scow. The dredge had 2½ feet freeboard.

I measure the weather danger by the event in the case of the boat naturally most exposed to swamping. That was the coal scow. As she was not injured, no reason appears for the dredge's injury, except her own bad management, or some unknown (and after sinking), undiscoverable leak. The claim of present counsel for libelant is that a dredge is an especially tender article, and weather that was well enough for a coal scow was dangerous for a dredge. This is not proven, nor does experience commend the proposition.

This action was originally brought against the Moran Company, on the theory that a contract had been made with said company for the tug's services, although she did not belong to respondent. The Forsyth was impleaded, as an independent contractor, though, of course, she was properly brought in, even if libelant's construction of the agreement were accepted.

As I am persuaded that there was no fault on the part of the Forsyth, libelant cannot recover from any one; therefore no opinion is expressed as to the legal relation between the Moran Company and the owners of the Forsyth.

The libel is dismissed, with costs. The owners of the Forsyth recover costs from the Moran Company.

R. J. M. Bullowa, of New York City, for appellants.

Burlingham, Montgomery & Beecher, of New York City, for respondent appellee.

Haight, Sandford & Smith, of New York City, for claimant appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Decree affirmed.

## THE EMELINE.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 93.

COLLISION ⊜=71(2)—MOVING AND ANCHORED VESSEL—FAULT.

A steam canal boat, proceeding up the Hudson river at night, pushing four other boats ahead of her, *held* to have properly anchored as far to one side of the channel as she could safely go when a dense fog came on, and a collision between a moving steamer and one of the boats in the tow, although the canal boat was regularly sounding her bell, *held* due solely to the fault of the moving vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101.]

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

Suit in admiralty for collision by the F. W. Jarvis Company against the steamer Emeline; David C. Woolsey, claimant. Decree for libelant, and claimant appeals. Affirmed.

The decree holding the steamer Emeline at fault for the collision which occurred between her and the canal boat Oneida on the morning of October 3, 1914, a dense fog prevailing at the time. The collision occurred in Haverstraw Bay, Hudson river, just north of Bowlines Point.

Peter Alexander, of New York City, for appellant.

Pierre M. Brown, of New York City, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. On October 3, 1914, the steam canal boat Tuscarora, with four other canal boats in tow, was proceeding up the Hudson river, the steamer pushing the other boats before her. The extreme length of the flotilla was about 250 feet. At 1:30 a. m., the weather became so foggy that the Tuscarora brought the boats to anchor on the westerly side of the Hudson not far from Bowlines Point. The Emeline, which collided with the canalboat, is a small side wheel steamer about 172 feet in length and was engaged in local trade between Haverstraw and Newburgh.

The Oneida was struck by the Emeline while she, the Oneida, with the rest of the flotilla, was at anchor, the Emeline alone being under way. There is, therefore, a heavy burden upon the Emeline to show that she was not at fault for the collision. The case presents only a question of fact and the District Judge's finding should not be disturbed by us unless we are clearly convinced that he was in error. The flotilla being towed by the Tuscarora encountered a mist or light fog while passing through Haverstraw Bay and it was concluded that safety required that she should anchor until the weather cleared. This was done and the boats came to anchor on the westerly side of the river, a short distance above Peck's Dock. The collision occurred between 7 and 8 o'clock on the morning of October 3, 1914, the Oneida being at anchor and the Emeline under way. The fog continued and

grew thicker. We think the Tuscarora was justified in coming to anchor. She had a large, unwieldy tow and there was danger in proceeding. We are of the opinion, therefore, that she took the wise and prudent course in anchoring until the fog lifted. Having done so she omitted no precaution and took all necessary steps to inform other vessels of her position.

There is no reason why the libelant's witnesses should not be credited and they testify that after they came to anchor the bell on the Tuscarora, which was above the engine room, was regularly sounded and was heard by passing vessels. It is true that those on the Emeline testify that they did not hear these signals but this simply presented a question of fact which was found by the judge in favor of the libelant. Negligence cannot be predicated of the action of the tug and tow in coming to anchor where and when they did. Prudence demanded that they should stop and not attempt to navigate such an unwieldy tow while the fog continued. Prudence having indicated the necessity for stopping, the place chosen for doing so was as far as it was safe to go from the center of the navigable channel. We are unable to conclude that the District Court was in error in finding that the Tuscarora was not guilty of negligence. By a process of exclusion we thus reach a consideration of the navigation of the Emeline. She was a small side wheel steamer about 170 feet in length and easily handled. It was her duty to proceed with great caution in such a dense fog. Her master was required to recognize the necessity of navigating with great care and to act accordingly. There was ample room for the Emeline to pass the anchored flotilla had she been handled with the skill which the situation demanded. She should have been so well in hand that the moment she discovered the Tuscarora and her tow at anchor she could have stopped before actually coming into contact with the Oneida or any of the tow. Ordinary prudence and skill would have avoided collision with any of the anchored boats. The Grand Manan (D. C.) 208 Fed. 583; The Strathleven, 213 Fed. 975, 130 C. C. A. 381. In short, the Emeline collided with a boat at anchor in a fog and has offered no reasonable excuse for so doing.

The decree is affirmed with costs.

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## BAXTER v. ORD.

(Circuit Court of Appeals, Sixth Circuit. February 6, 1917.)

No. 2875.

1. BANKRUPTCY ⟸303(1)—PREFERENCES—BURDEN OF PROOF.
Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 562, § 60, prior to amendment by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (Comp. St. 1913, § 9644), the burden of proof is on a trustee in bankruptcy, seeking to avoid an alleged preferential payment, to show that the creditor receiving such payment had reasonable cause to believe that the debtor intended to give him a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458, 459.]

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

2. BANKRUPTCY ⟸303(3)—PREFERENCES—ACTIONS.

In a suit by trustee in bankruptcy to set aside an alleged preferential payment, evidence *held* insufficient to show that the creditor had reasonable cause to believe that he was receiving a preference, or was charged with knowledge of facts sufficient to put him upon inquiry which might have resulted in the discovery of that fact.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462.]

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

Bill by Ida N. Baxter, trustee in bankruptcy of the Auto Body & Top Company, against John Ord, doing business as the Brooklyn Sawmill Company. From a decree dismissing the bill, complainant appeals. Affirmed.

The following is the opinion of Clarke, District Judge:

By the bill filed in this case, Ida N. Baxter, as trustee in bankruptcy of the Auto Body & Top Company, seeks to set aside what she claims was a preference in payment made by the defendant on the 24th day of January, 1912, and on the 30th day of January, 1912—the two payments amounting to $575.17. The defendant admits the two payments, but claims that the Auto Body & Top Company was justly indebted to him for an amount greater than that paid, and denies that the payment was made in such manner and under such conditions as to constitute a preference under the Bankruptcy Act.

[1] In Kimmerle v. Farr, 189 Fed. 295, 111 C. C. A. 27, the Circuit Court of Appeals of this circuit has decided that under the Bankruptcy Act prior to the amendment of 1910 (and for the purposes of this opinion the law is not affected by that amendment) the burden of proof is on a trustee in bankruptcy seeking to avoid what he claims is a preferential payment, and that before such payment can be set aside as preferential the creditor receiving the transfer must have had reasonable cause to believe that the debtor intended by the payment to give him a preference.

[2] The evidence in this case shows that Ord had done business with Patterson, the president and manager of the defendant company, for many years in the way of furnishing him lumber in a small way for his business, and that from March 1st until December 19th of the year preceding the failure of the bankrupt company he sold to it lumber to the value of $1,328.72. The defendant testifies that, before he began furnishing this lumber, Patterson, speaking for the bankrupt, said that he had a contract to make 10 or 12 automobile bodies and would need an unusual amount of lumber. Ord was a man of limited resources, and said that he could not furnish the amount required unless Patterson, for the bankrupt, would agree to pay for the lumber as soon as he received payment from the purchasers of the automobile bodies, which would be manufactured from it, and this he agreed to do.

Under this arrangement, which is not contradicted, Ord continued to furnish lumber until December 19th; but the bankrupt was not paying as promptly as Patterson had promised, and Ord says that he personally became "hard up" and frequently demanded payment, and that finally, late in January, the payments were made which are sought in this proceeding to be set aside as preferential. This court has no doubt at all that Ord did not have actual knowledge that the Automobile Company was embarrassed at the time this payment was made, and the only question is whether he had such knowledge of its financial condition as should have put him, as a reasonable man, upon inquiry which might have resulted in discovering it to be insolvent.

A voluntary petition in bankruptcy was filed against the company on the 26th day of February, 1912, or nearly a month after this payment was made. There is no testimony in this record which could charge Ord with knowledge or notice that the company was in a failing condition, except that it was slow

in paying him and that Patterson was not keeping his promise to pay for the lumber as the automobile bodies were sold. He said, however, that Patterson had been slow pay in the past, but that he always finally paid him. That Ord did not suspect that the company was insolvent up to December 19th is clear enough, for on that date he made his last delivery of lumber, and there is no evidence that anything was brought to his attention between that time and the little over a month later, when the payment was made, which should have put him upon inquiry into the affairs of the company, unless failure to pay as promised for that time is sufficient for that purpose.

Since the burden of proof is upon the trustee to make out her case, I cannot bring myself to find that the circumstances I have detailed are sufficient to give to Ord that reasonable cause to believe that the bankrupt was insolvent at the time the payments in controversy were made, and that a preference was intended to be given him by the making of them, and therefore, under authority of the decision cited, the bill will be dismissed, and the defendant will recover his costs.

Lawrence C. Spieth, of Cleveland, Ohio, for appellant.

F. W. Langin, of Cleveland, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. The trustee in bankruptcy filed a bill in equity for the recovery of certain alleged preferential payments made by the bankrupt to the defendant on the eve of bankruptcy. The case was heard on pleadings and proofs taken in open court, and the bill dismissed. Judge (now Mr. Justice) Clarke, who heard the case, was of opinion that defendant had no knowledge, at the time the payments were made, that the debtor was embarrassed, and that the trustee had not sustained the burden of showing that defendant had, at the time, reasonable cause to believe that the debtor was insolvent. Whether defendant had reasonable cause to believe that the transfer would effect a preference is the only question presented by the appeal. We have examined the evidence and find no reason to question the correctness of the decree, which is accordingly affirmed, with costs.

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## AMERICAN OIL & SUPPLY CO. v. WESTERN GAS CONST. CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 131.

1. REMOVAL OF CAUSES ⟸26—DIVERSITY OF CITIZENSHIP—NONRESIDENT PLAINTIFF.

Under Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094 (Comp. St. 1913, § 1010), authorizing removal of a suit of which the District Court of the United States is given jurisdiction, a nonresident defendant cannot remove to the United States court a suit begun against him in the state court by a nonresident plaintiff, though the parties were citizens of different states.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 60–63.]

2. REMOVAL OF CAUSES ⟸94—ORIGINAL JURISDICTION—WAIVER OF OBJECTIONS.

The objection that a suit between citizens of different states, neither of whom was a resident of the state where the suit was brought, cannot be

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

removed to the United States court, can be waived, and is waived by defendant's petition to remove, and by plaintiff's appearance to contest a motion to set aside service of process.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 203.]

3 CORPORATIONS ⟸668(5)—FOREIGN CORPORATIONS—PROCESS—SERVICE ON "MANAGING AGENT."

The sales agent of a foreign corporation who has no discretionary powers, but acts under the direction and control of the home office, is not a "managing agent," on whom process against the corporation can be served, under Code Civ. Proc. N. Y. § 432, subd. 3, though he made one contract for the corporation, which, however, was not shown to have been made without specific directions, and though the directory described him as an agent of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2611.

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

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

Action by the American Oil & Supply Company against the Western Gas Construction Company. From an order of the District Court, after the cause was removed to that court from the state court, setting aside the service of summons, plaintiff brings error. Affirmed.

J. Harry Hull, of New York City, for plaintiff in error.

Francis J. Byrne, of New York City, for defendant in error.

Before COXE, WARD, and HOUGH, Circuit Judges.

WARD, Circuit Judge. The plaintiff, a corporation of New Jersey, served its summons and complaint in the Supreme Court of the state of New York upon one Steinmuller as managing agent of the defendant, a corporation of the state of Indiana. The defendant removed the case to the District Court, appearing specially for the purpose of moving to set aside the service of process.

[1] It is to be noted at the outset that this action was not removable at all, because it could not have been brought originally in the District Court. Section 28 of the Judicial Code reads:

"* * * Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any state court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state."

The case is therefore different from Goldey v. Morning News Co., 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517, in which the plaintiff was a citizen of New York and the defendant was a corporation of Connecticut.

[2] But this objection may be waived, and it has been waived by the defendant by virtue of its petition to remove, and by the plaintiff by virtue of its appearance to contest the motion to set aside service of process. If it had not intended to waive the objection as to juris-

diction, it should have moved to remand. In re Moore, 209 U. S. 490, 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164.

[3] The contract is alleged to have been made in New York, but to be performed in Indiana; i. e., the defendant agreed to deliver to the plaintiff f. o. b. at Ft. Wayne, Ind., certain merchandise to be paid for in cash, which it subsequently refused to deliver, although the plaintiff was ready then and there to pay for the goods.

The person designated in 1907 under section 16 of the General Corporation Law (Consol. Laws, c. 23) upon whom process may be served within the state having disappeared, and the plaintiff finding no officer or director of the company within the state, served Steinmuller as a managing agent of the defendant in accordance with section 432, subd. 3, Code of Civil Procedure.

Judge Augustus N. Hand found that the company had done business within the state, but that Steinmuller was only a sales agent, without discretionary powers, and acting throughout under the direction and control of the home office in Indiana. The facts that in 1915 he had made one contract, in the absence of proof that he was not then acting without specific directions, and that the New York City Directory since 1912 had described him as agent, were not sufficient to overcome the positive affidavits submitted by the defendant that it had no office, property, nor any agent within the state, except Steinmuller, a sales agent. We concur in this conclusion.

The order is affirmed.

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## WADSWORTH v. PRESSED PRISM PLATE GLASS CO.

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

No. 1425.

1. PATENTS ⟸202(1), 218(1)—ASSIGNMENT—CONSTRUCTION OF CONTRACT.

A contract by which complainant assigned to defendant, a manufacturer, a number of patents relating to the manufacture of glass, construed with respect to royalties reserved, and under the facts found, and a provision allowing it free use of the patented inventions up to a stated quantity of product, defendant *held* not liable for royalties. *Held*, further, that under the terms of the contract complainant was not entitled to a reassignment of certain of the patents because of their nonuse by defendant, and that defendant was not therefore liable in damages for their depreciation in value.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 281–288, 330, 333, 336–338; Dec. Dig. ⟸202(1), 218(1).]

2. PATENTS ⟸202(1)—ASSIGNMENT—CONSTRUCTION OF CONTRACT.

Under a further provision of the contract that defendant should pay all expenses incidental to obtaining patents on pending or future applications by complainant, provided that such "expenses shall be authorized by the company," defendant was not required to take appeals from the action of the Patent Office denying any such applications, or to pay taxes necessary to keep foreign patents granted in force, if in its business judgment such action was not justified.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 281–288; Dec. Dig. ⟸202(1).]

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

3. CORPORATIONS ⊂⊃573(3)—REORGANIZATION—CONTRACT BETWEEN ASSENTING STOCKHOLDERS.

Where complainant, a stockholder and director of defendant corporation, was also chairman of a reorganization committee, and as such wrote and signed a proposed plan of reorganization, which was submitted to and accepted by all stockholders, he was bound by the contract so made, and entitled to no greater proportionate share of the new stock in exchange for his old stock than the other stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2296; Dec. Dig. ⊂⊃573(3).]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Suit in equity by Frank L. O. Wadsworth against the Pressed Prism Plate Glass Company. Decree for defendant, and complainant appeals. Affirmed.

Frederick W. Winter, of Pittsburgh, Pa., for appellant.

Charles Neave, of New York City, and Mason G. Ambler, of Parkersburg, W. Va. (Alan N. Mann, of New York City, on the brief), for appellee.

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

JOHNSON, District Judge. Frank L. O. Wadsworth, plaintiff, filed his suit in equity against the Pressed Prism Plate Glass Company, defendant, in the District Court for the Northern District of West Virginia. He will hereafter be referred to as the plaintiff, and the plate glass company as the defendant, that being the position they occupied in the District Court. The object of the plaintiff's bill was to secure relief which he alleged he was entitled to against the defendant in the following particulars:

First, for the reassignment to the plaintiff of the 1905 contract patents because of defendant's failure to either use the same in whole or in part or to accept reasonable license offers for some or all of said patents.

Second, damages for depreciation in the value of said patents due to the defendant's failure to either use or allow others to use the same, or to reassign them to the plaintiff.

Third, the reissue to the plaintiff of a number of shares of the capital stock of the defendant company which plaintiff alleged that he was induced by the defendant to surrender in a reorganization of the company for the purpose of raising capital to put in use the contract inventions, and which he alleges was never used for that purpose.

Fourth, damages for losses suffered by the plaintiff by defendant's action in allowing certain of the contract patents and applications for patents to abandon and become forfeited, in consequence of which plaintiff's reversionary rights therein were destroyed.

Fifth, an accounting for and payment of royalties under the said contract for use in part of certain contract inventions.

Upon the coming in of the answer of the defendant, the cause was referred to a master to take testimony and report his findings of fact and conclusions of law to the court. After the taking of the testimony and the argument of counsel, the master filed a report which was very full, elaborate, and clear. Plaintiff filled numerous exceptions to the master's report, and the defendant filed one exception. The District Court, after argument of counsel and consideration of the cause, overruled all exceptions and confirmed the master's report. Whereupon a short order was entered dismissing the plaintiff's bill. The material part of the master's report is as follows:

The plaintiff, Frank L. O. Wadsworth, is an engineer, and has for a number of years been an expert in the glass art, particularly in the specific art of optical and illuminator glass, and has made many inventions in and pertaining to the glass art, and particularly to what is known as prism glass and ornamental glass, and has applied for and taken out a large number of patents of the United States and foreign countries relative and pertaining to said art. The defendant, Pressed Plate Glass Company, is a corporation chartered and organized in the year 1902 under the laws of West Virginia, and having its chief (and only) works at Morgantown, Morgan district, Monongalia county, W. Va.

On September 1, 1902, the plaintiff and the defendant entered into a written contract containing the following provisions which seem pertinent here:

"The party of the first part [plaintiff] agrees:

"1. To assign and transfer to the party of the second part [defendant] all patents, inventions, devices, and processes relating in any way to the manufacture or production of any kind of glass or articles made of glass, or to any machinery, tools, or processes or devices for making, producing, treating, or assembling glass or glass articles of any kind, which, at any time during the period between February 1, 1898, and September 1, 1907, he has made or may make, devise or acquire" [with certain exceptions not material in this case].

"2. To sign and execute, upon request of the party of the second part, all papers necessary or convenient to properly effectuate such assignment and transfer, including applications for letters patent for any of said inventions, devices or processes."

"3. [Not material here.]

"4. That the party of the first part shall not be required, during said period of five years, to devote or give any of his time or services to the party of the second part. [Here follows immaterial matter.]"

The recited consideration for this contract was $1. The real consideration paid to the plaintiff consisted of capital stock of the defendant company to the par value of $104,000. Soon after its organization the defendant company entered upon the manufacture of glass, operating very largely under patents transferred to it under the contract above referred to.

It soon developed that the defendant company was unable to successfully carry on its operations without the active services of the plaintiff, and accordingly he was called upon for aid. This was a sore disappointment to him, as it was his desire to be left free to practice his profession in Pittsburgh. However, he was induced to give much of his time to the service of the defendant, and finally was persuaded to give up his professional work in Pittsburgh and to assume entire charge of the manufacturing operations at Morgantown. The plaintiff continued at the head of these operations until August, 1905, when he resigned. He retained, however, his place upon the directorate, which he had occupied from the formation of the company in 1902, and which he continued to occupy until the year 1913, when he resigned and sold all his stock interest.

It appears that during the whole history of the relations between the parties to this suit, those relations have been strained. At the very outset the plaintiff complained bitterly that it became necessary for him to give up his

work at Pittsburgh in order that the mechanical operations at Morgantown might succeed. He claims that this necessity arose because of negligence on the part of those in charge of the company's affairs, and that "the only alternative was to see all my interests lost by utterly incompetent management." Another source of trouble between the plaintiff and defendant was a certain sales contract entered into with the Luxfer Prism Company, under which that company, a competitor of the defendant, was given control of the sale of the defendant's product. This contract with the Luxfer Company was made against the plaintiff's protest, and he has always claimed that it was exceedingly unwise and that it resulted in great loss. It was the controversies arising between the plaintiff and the officers of the defendant company over this Luxfer contract that finally led to the plaintiff's resignation from the management of the company's plant in August, 1905. During that period of his employment at Morgantown, the plaintiff made a number of additional inventions relating to devices, processes, articles, etc., in connection with the glass industry, and filed a large number of applications for patents thereon, some of which applications had eventuated in patents at the time of the plaintiff's resignation above referred to in August, 1905. These inventions, applications, and patents were not turned over to the defendant company.

When the plaintiff resigned from the management of the defendant's plant in August, 1905, he notified the defendant company that he considered that it had violated the contract of September 2, 1902, and that it had therefore forfeited any rights which it had in any invention of his made subsequent to the date of that contract. There was considerable discussion growing out of this claim on the part of the plaintiff, some of it even before the plaintiff's resignation and formal notice. The defendant company claimed that under the contract of 1902 it was entitled to the inventions and patents in question, and the plaintiff claimed that it was not, but that it had forfeited its rights in that connection. The resignation of the plaintiff brought this dispute to a head, and his notification to the defendant was followed by a suit between the company and himself. This suit was settled in the fall of 1905 by the abrogation of the contract of September, 1902, and the execution of a new contract in lieu thereof bearing date October 27, 1905. This settlement was had and the contract of October 27, 1905, was executed for the purpose of compromising and settling the points at issue. Article 1 of the contract of 1905 provides as follows:

"The agreement in writing heretofore executed by and between the parties hereto and dated September 1, 1902, is hereby annulled and canceled and the provisions thereof are entirely substituted by the provisions and agreements of this present contract."

Under this compromise contract of October 27, 1905, the plaintiff did assign to the defendant the inventions, applications, and patents which were in dispute; and the defendant, on its part, entered into certain agreements with the plaintiff with regard to the said inventions, applications, and patents, and also employed the plaintiff as consulting engineer and expert at an annual retainer of $1,000 per year up to and including the year 1907, and agreed to pay him for any work which it might call upon him to perform at a rate to be agreed upon between the parties in each particular case. This contract of October 27, 1905, is Exhibit A of the bill of complaint.

This suit has two main branches or divisions, which may readily be considered separately, the one from the other. The first of these branches has to do with the last-mentioned contract. In the other branch the plaintiff seems to secure the residue to himself of certain shares of stock surrendered by him under a certain reorganization agreement hereinafter more specifically referred to. That branch of the case having to do with the contract of October 27, 1905, will be considered first. Under this head the plaintiff seeks:

(1) An accounting and payment to him of royalties claimed to be due for product manufactured by the defendant in which use was made of certain inventions covered by patents which were assigned by the plaintiff to the defendant in said contract.

(2) The reassignment to him of certain patents and applications for patents which were assigned by the complainant to the defendant in the said contract

and which cover inventions which have not been substantially used by the defendant.

(3) To recover as damages the depreciation in value of the said patents of which no substantial use has been made.

(4) To recover damages on account of the abandonment by the defendant of certain applications and foreign patents which were assigned by the said contract.

These claims will be considered in their order.

[1] *First.* Is the complainant entitled to an accounting of royalties on product manufactured by the defendant in which use was made of inventions covered by patents which were assigned by the complainant to the defendant under the contract of October 27, 1905?

The plaintiff's claim for royalties is based on section 4 of the contract, which reads as follows:

"4. The company agrees to pay to Wadsworth one-fourth of the gross amount received by it from each and every license granted under any of the letters patent or patent applications covered by this agreement; payments to be made within 30 days from the end of each quarter. The company also agrees that, if it uses any of the inventions covered by the letters patent herein referred to, it will pay to Wadsworth a royalty rate that shall be one-fourth of the minimum royalty rate that shall be paid to it by other using under corresponding licensed conditions such and such invention or inventions, and that if no such license has been granted by the company, then the company shall pay to Wadsworth, as a minimum license fee or royalty, *1 per cent. of the amount received by this company or any subsidiary company for sales of the product in question.* In case the company sells any one of their herein mentioned patents, it shall pay to Wadsworth one-fourth of the gross consideration in kind received. It being specifically provided, however, that Wadsworth is to receive no royalty for the use of the grinding and polishing machines referred to in applications serial Nos. 233,582, filed November 21, 1904; 255,863, filed April 17, 1905; 266,695, filed June 24, 1905; and 266,696, filed June 24, 1905—or any improvements thereon when said grinding machines are used in grinding or polishing any form of glass covered by the letters patent issued to Wadsworth and turned over to the company at the time of its formation September 1, 1902, or any improvements thereon, and it is further specifically provided that the company shall have free right to use at its present factory in the district of Morgan aforesaid, W. Va., with a capacity not to exceed 2,000,000 square feet per year, but not elsewhere, any of the inventions herein referred to up to the product of 500,000 square feet per year in the aggregate, above which amount the above-provided royalty shall be paid."

There is a wide difference between the construction which the plaintiff seeks to have placed on this section, and the construction which is sought to be placed on it by the defendant. But before taking up the subject of the construction of section 4, as applied to the facts as found by the master, it is necessary that those facts be set forth. They are as follows:

## Finding of the Facts.

(1) The defendant has not granted any license to others for using any of the inventions covered by the contract in suit, neither has it sold any of the patents covered by that contract. This is conceded by both parties.

(2) The only place at which the defendant has used any of the inventions covered by the contract is at its factory at Morgantown. This is also conceded.

(3) The large majority of the inventions covered by the contract have not been used by the defendant. This is conceded by both parties.

(4) It is conceded by both parties that prior to the year 1914, the capacity of the defendant's plant did not exceed 2,000,000 square feet of glass per year. It was shown, however, that in 1914 the defendant company installed a new casting machine and erected a new melting tank. It is clear that the capacity of this melting tank exceeds 2,000,000 square feet of glass per year. It also appears that the capacity of the casting machines including the new one

erected early in 1914 probably exceed 2,000,000 square feet. I think, however, it is clear that the capacity of the lehr, through which all glass must pass, is considerably below the 2,000,000 mark, as is also the capacity of the grinding and polishing machines. I am of opinion, therefore, that the capacity of the plant taken as a whole does not reach 2,000,000 square feet per year.

This holding is sustained by the positive testimony of the only witness who testified on the subject of the sustained capacity of the plant (Mr. Ross).

(5) The parties agree that the defendant has used the invention of what is known as the "casting hall patent," which is numbered 952,390 and is a patent for a process and apparatus for manufacture of plate glass. They also agree that the defendant has used the inventions described in the four patents numbered 845,987, 852,403, 891,197, and 891,198, this patent being for a grinding and polishing apparatus.

(6) The plaintiff also claims, and the defendant denies, that in the production of what is known as its "ornamental prism glass" and its "special design glass with an obscure background," the defendant has used the article invention described in patent numbered 818,208 for reinforced ornamental prism glass; the claim of the defendant being that, notwithstanding the design of this glass may be comprehended within the claims of the patent in question, yet it is also comprehended within the scope of prior patents issued to other parties, and should therefore be held to be outside the scope of the patent in question. It is my opinion, and I therefore hold, that this contention on the part of the defendant is not well taken, and that in the production of the glass in question the invention of patent numbered 818,208 is used.

(7) As to the extent of the use by the defendant of the invention of the "casting hall patent" there is considerable conflict. It is admitted by the defendant that this invention is used in the casting of its "ornamental glass" and "polished plate prism glass." The plaintiff contends that it is also used in the casting of "special design glass" and "rough skylight prism glass." With this contention of the plaintiff I cannot agree, it being my opinion that it appears from the evidence (1) that in the casting of these products by the use of several small dies on the same backing plate, even though that back plate be concave, concavity is not used or useful for the maintenance of parallelism, and (2) that the application of a low degree of heat to the dies, as heat is applied by the defendant, is not intended, nor is it sufficient, for the purpose of preventing any "substantial transfer of heat from the glass to the pressing element," but merely for the purpose of preventing the chilling of the surface of the glass.

(8) It clearly appears from the evidence that there is no record kept of the number of square feet of glass actually pressed by the casting hall device. Immediately following the pressing of this glass the sheets are put through the lehr, or annealing furnace, and are then squared up for what are called the rough racks, these racks holding the sheets pending their submission to the grinding and polishing machines. A record is kept of the square footage of the several kinds of glass squared up at the end of the lehr and placed in the rough racks. From this record it appears that during the year 1912–1913 there were placed in the rough racks the following number of square feet of glass cast by the use of the casting hall invention:

| | |
|---|---|
| Ornamental prism | 443,292 sq. ft. |
| Plate prism | 96,668 sq. ft. |
| | 539,460 sq. ft. |

(It is important to note that the only evidence in the case as to the square footage of glass produced by the use of inventions of the plaintiff related to the year commencing on the 1st day of April, 1912, and ending on the 31st day of March, 1913.)

(9) From the evidence it appears that during the year in question the Wadsworth patent grinding and polishing machines were used in operating upon 127,463 square feet of glass, but of this total footage 24,980 square feet was plate prism glass, which was produced under an article patent assigned

to the defendant under the contract of September 1, 1902. Under the allowance clause contained in section 4 of the contract of October, 1905, glass so produced is not to be considered in estimating the footage operated upon by the grinding and polishing machines. It therefore appears that during the twelve months from April 1, 1912, to March 31, 1913, the Wadsworth grinding and polishing machines were used upon 102,483 square feet of glass of forms other than those specified in the allowance clause.

(10) It appears from the evidence that little, if any, of the glass produced by the defendant company, is finished and salable until operated upon by the company's grinding and polishing machines, except glass letters and skylight prism glass; but in designing and casting glass letters and skylight prism glass none of the patents assigned under the contract of October, 1905, are used. It therefore seems clear that the total amount of finished product upon which inventions covered by the 1905 contract were used in the year 1912–1913 cannot have been in excess of the total amount operated upon by all of the defendant's polishing and grinding machines. (There are five of these machines, one of which was not built under any patent covered by the 1905 contract.)

Now the total amount of glass operated upon by these five machines in the year 1912–1913 was 527,406 square feet. But it appears from the evidence that, as to one kind of glass which was ground and polished, the Wadsworth machines were not used. I refer to the "clear fluted special design." None of this glass was either designed, cast, or polished by the use of any of the patents covered by the 1905 contract. The amount of this glass that was produced was 51,785 square feet. It seems, therefore, that the total amount of finished product produced by the use of any of the contract inventions during the year in question cannot have been in excess of 527,406 square feet minus 51,785 square feet—that is, a net total of 475,621 square feet.

(11) The total amount of glass sold by the defendant during the year 1912–1913 was 340,000 feet.

Construction of Section 4 of the Contract.

It is important to bear in mind that the defendant has neither granted any licenses to use any of the inventions covered by the contract nor sold any of the contract patents. Therefore, as bearing on the questions here involved, section 4 of the contract reads as follows:

General provision: "The company agrees that, if it uses any of the inventions covered by the letters patent herein referred to, * * * it will pay to Wadsworth as a minimum fee or royalty, 1 per cent. of the amount received by this company or any subsidiary company for sales of the product in question."

Supplemental clause (a): "It being specifically provided, however, that Wadsworth is to receive no royalty for the use of the grinding and polishing machines (the patents for which are included in the contract) * * * when said machines are used in grinding or polishing any form of glass covered by letters patent issued to Wadsworth and turned over to the company at the time of its formation, September 1, 1902. * * *"

Supplemental clause (b): "And it is further specifically provided that the company shall have free right to use at its present factory (at Morgantown), with a capacity not to exceed 2,000,000 square feet per year, but not elsewhere, any of the inventions herein referred to up to the produce of 500,000 square feet per year in the aggregate, above which amount the above provided royalty shall be paid."

Plaintiff's Contention.

The plaintiff contends that the above general provision merely fixes the rate of royalty (that is, 1 per cent. of the selling price), and that if that provision were considered alone it would obligate the defendant to pay to the plaintiff a royalty of 1 per cent. of the selling price on the entire product of the defendant in the production of which any of the contract inventions were used, even though only a fraction of that product were sold. He also maintains that supplemental clause (b) does not give to the defendant the free right to sell or even to produce finished product to the aggregate amount of 500,000

square feet per year by the use of the patents in question before the obligation to pay royalty shall arise, but that it merely gives the right of free use of the patents up to an aggregate use amounting to 500,000 square feet per year before the obligation to pay royalty shall arise.

This contention of the plaintiff with regard to supplemental clause (b) can better be explained by example. Ornamental prism glass is polished on the patent polishing machines. But that kind of glass is also covered by a certain article patent included in the contract. Under plaintiff's contention with regard to supplemental clause (b), if the defendant within a given year had produced 250,000 square feet of ornamental prism glass, it would have exhausted its free allowance of 500,000 square feet, for the reason that both the articles patent and the polishing machine invention had been used in producing the 250,000 square feet, and that therefore the patents had been used to the extent of 500,000 square feet "in the aggregate."

If the plaintiff's construction of supplemental clause (b) is correct, then he is entitled to an accounting of royalties, as it is clear that if the square footage of glass upon which the casting hall patent was used, and the square footage upon which the grinding and polishing machines were used and the square footage produced under the article patent above mentioned be added together, or aggregated, without regard to duplication, then the full allowance provided for in supplemental clause (b) was exceeded by many thousands of square feet in the year 1912–13.

### Defendant's Contention.

The defendant contends that the above-mentioned general provision of section 4 of the contract not only fixes the rate of royalty, but also specifies the fund upon which the royalty is to be assessed, to wit, "the amount received by this company or any subsidiary company for sales of the product in question," and that if that general provision were considered alone it would obligate the defendant to pay to the plaintiff a royalty of 1 per cent. only upon money actually received in payment for sales of the product in question. The defendant also maintains that supplemental clause (b) gives to it the free right, not only to manufacture, but actually to sell, in each year finished product involving the use of the inventions in question to the aggregate amount of 500,000 square feet, and that royalty is to be paid only on actual receipts from sales made above that amount. If the defendant's construction of supplemental clause (b) is correct, then the plaintiff is not entitled to an accounting of royalties.

### Master's Construction.

After a most careful study of the contract, the evidence, and the briefs of counsel, I have reached the following conclusion with regard to the construction of section 4 of the contract: With regard to the above-mentioned general provision I am of opinion that the construction urged by the plaintiff is erroneous, and that the construction contended for by the defendant is substantially correct. Under that general provision the defendant does not promise to pay royalty on its product, nor, indeed, upon its sales, at the rate of 1 per cent. upon its sales prices. What it does promise is this: That it will pay to the plaintiff "1 per cent. of the amount received by this company or any subsidiary for sales of the product in question." With regard to supplemental clause (b) I am of opinion that neither the construction urged by the plaintiff nor that contended for by the defendant is in harmony with the real meaning of the contract.

If we adopt the plaintiff's construction, we must do violence to the plain language of the clause, which provides that "the company shall have free right to use * * * any of the inventions herein referred to up to the produce of 500,000 square feet per year in the aggregate, above which amount the above provided royalty shall be paid." The general provision above referred to requires royalties to be paid on receipts from sales of product. This supplemental clause allows the free use of the inventions up to a certain amount of product in the aggregate, "above which amount [of what? of product] the above provided royalty shall be paid."

One of the elementary rules of construction requires the harmonizing of the various provisions of the instrument if possible. Here we have the word "produce" used twice in the same section of the contract. To me it seems clear that in each instance this word was intended to refer to the same thing, to wit, finished, salable product. The plaintiff's construction would call for an entirely different meaning to be applied to the word "product" as used in supplemental clause (b) from that to be applied to it as used in the general provision. The plaintiff insists that the use of the term "in the aggregate" supports his contention, and disproves the contention that the word "produce" refers to finished output. I cannot agree with this contention. By the use of the term "in the aggregate" the contract excludes any possibility of a contention that the right of free use of the patents shall be so construed as to allow a product of 500,000 square feet from any one patent or group of patents and another 500,000 square feet from another patent or group of patents, but makes it clear that the free allowance shall be limited to 500,000 square feet of product in all—that is, in the aggregate—no matter how many inventions are used.

If we adopt the defendant's construction of supplemental clause (b), and hold that royalties do not become chargeable to any year unless the defendant has actually sold product to the amount of 500,000 square feet, we must do violence to the plain language of the clause, which provides that free use of the patents may be had, not up to sales of product, but up to "the product," of 500,000 square feet. If the defendant's construction be the correct one, the contract is indeed a hard one on the plaintiff, for under that construction the defendant might manufacture for other purposes than for sale 1,000,000 square feet of glass without being accountable to the plaintiff.

It is my conclusion that under section 4 of the contract the defendant has the right in each year to fabricate and finish free of royalty 500,000 square feet in the aggregate of product involving the use of any or all of the inventions covered by the contract, and to do what it pleases with that amount of product, but that if, in any year, that amount of finished product is exceeded, the defendant becomes chargeable with royalties on the excess as that excess is sold and paid for. For example, if 600,000 square feet had been produced in a given year, and 300,000 square feet sold and paid for, the defendant would be liable for royalties, not on the 300,000 square feet, but on that portion thereof which represents the excess of 600,000 over 500,000, to wit, on 100,000 square feet.

Conclusion with Regard to Royalties.

The burden being on the plaintiff to prove that prima facie he is entitled to royalties, and it appearing from the evidence that, in the only year concerning which evidence in this connection was introduced, the defendant company's aggregate output of product involving the use of any of the patents in question did not exceed 500,000 square feet, I am of opinion, and therefore find, that the plaintiff is not entitled in this case to an accounting of royalties as prayed for.

*Second.* Is the plaintiff entitled to a reassignment to him of certain patents and applications for patents which were assigned by the complainant to the defendant in the said contract, and which cover inventions which have not been substantially used by the defendant?

*Third.* Is the defendant entitled to recover as damages the depreciation in the value of the said patents of which no substantial use has been made?

These two claims will be considered together, for the reason that, if the plaintiff is entitled to a reassignment of patents, he is entitled to damages on account of the depreciation in value of those patents since his right to reassignment accrued. If he is not entitled to a reassignment, he is not entitled to damages.

The plaintiff's claim for reassignment is based on section 9 of the contract, which reads as follows:

"9. In case of any patent assigned to the company by Wadsworth hereunder a period of two years shall have elapsed during which the company shall have made no substantial use of the patent, and there shall have elapsed also

a period of one year after tender to the company of an agreement to license and pay royalty which the company shall have refused, then such patent shall revert to Wadsworth, and the company, upon request from Wadsworth, will duly reassign the same to him, unless the company shall, in writing, claim that its refusal is justified either by the irresponsibility of the proposed licensee or the insignificance in amount or the unreasonableness in condition of the license contract tendered, or by reason of the licensee requiring to be protected in his use of the patent and its being unsafe to license on account of doubt as to infringement. In such case there shall be no reversion unless Wadsworth shall demand in writing an arbitration of the matter, under the conditions therefor hereinafter provided."

The plaintiff claims that he is entitled to a reassignment of all patents covered by the contract and not substantially used by the defendant, on the ground that it is an implied provision of the contract that the defendant will make use of the patents in question. With this contention I cannot agree. It is my opinion that the whole plan of the contract indicates that it was the intention of the parties that it should be optional with the defendant to use or fail to use any of the patents in question as its best judgment might dictate. Section 4 provides for royalty "if it uses any of the inventions," while section 9 sets forth what shall happen in the case of any patent if the company shall for two years "have made no substantial use of the patent." I am of opinion that these two provisions negative any intent to impose a trust obligation to use the patent in question.

The plaintiff also contends that under the terms of section 9, if any license agreement providing a royalty be tendered, and be rejected without the written excuse for rejection being given to the plaintiff, the plaintiff becomes entitled to a reassignment of all substantially unused patents, no matter what patents were included in the tendered license agreement. I cannot agree with this contention. Section 9 provides as follows: "In case of any patent assigned to the company by Wadsworth hereunder a period of two years shall have elapsed during which the company shall have made no substantial use of the patent, and there shall have elapsed also a period of one year after tender to the company of an agreement to license and pay royalty which the company shall have refused, then such patent shall revert to Wadsworth."

Clearly this provision means that if the invention of any given patent is not substantially used, and if an agreement to take license and pay royalty for that patent is tendered and rejected, then that patent shall revert to Wadsworth. The plaintiff contends that there were three instances in which license agreements such as are contemplated by section 9 were tendered to the defendant and rejected by it. These three instances must be dealt with separately. The first is known as the Kahn instance; the second has to do with the Opalite Tile Company; the third relates to the National Glass Machine Engineering Company.

First as to the Kahn incident: There is considerable conflict of testimony with regard to this incident, but I am of opinion that the proofs show the following to be the facts:

(1) Kahn's proposition has not been shown to relate to patents covered by the 1905 contract. On the contrary, the only direct evidence on the question of the identity of the patents in question was the statement of Kahn that his offer related to certain patents known as Wadsworth and Ripley patents, which patents had become the exclusive property of the defendant company under the contract of 1902 and were not included in the contract of October 27, 1905. True, the plaintiff testified that Kahn desired licenses under certain enumerated patents, assigned to the defendant by the 1905 contract; but he (the plaintiff) himself testified that he had no direct information concerning the negotiations under which the Kahn proposition was made, and, further, the plaintiff's contention that the enumerated patents are the ones under which Kahn was seeking licenses is, in my opinion, contradicted by the plaintiff's own written memorandum filed as plaintiff's Exhibit HH, in which, referring to these enumerated contracts, he said to Mr. Kahn: "I understand, however, that you are not particularly interested in this last product."

(2) Kahn is not shown to have made any definite offer of royalty, but seems to have sought the financing of the proposition by the officers of the defendant company.

(3) The plaintiff was a party with the defendant's vice president, Mr. Fisher, to whatever occurred in the way of a rejection of Kahn's proposition, as appears from the plaintiff's letter to Fisher, filed as part of plaintiff's Exhibit L.

(4) There is nothing in the record to indicate that any proposition from Kahn was ever submitted to the defendant's board of directors and rejected by that body. It can hardly be contended that the executive officers of the defendant company had authority to pass upon the granting or rejecting of a license proposition, as it clearly appears that in the other two instances in which license propositions were under consideration the board of directors of the defendant company was reported to by the plaintiff, and formally acted upon the report.

It is my conclusion that the plaintiff is not entitled to any reassignment of patents on account of the Kahn incident.

Second, as to the Opalite Tile Company: The negotiations with this company seem to have been conducted almost exclusively through the plaintiff. On December 10, 1907, he reported to the defendant's board of directors, of which he was a member, that he had had some negotiations with the Opalite Tile Company looking towards a license arrangement. The board of directors authorized him to get a definite proposition on the general line of his report, and directed him to submit such proposition to the defendant. He did secure a definite proposition from Mr. Fry, president of the Opalite Tile Company, but, instead of presenting this to his board of directors, seems to have submitted it to Mr. Fisher, the vice president of the defendant, and at his suggestion to have gone back to Mr. Fry with a counter proposition involving a somewhat larger consideration to the defendant. The evidence seems to indicate that this counter proposition was verbally made and verbally agreed to by Mr. Fry, and possibly by some of the directors of the Opalite Company. On March 7, 1908, the plaintiff reported to his board of directors the terms of that verbal arrangement, and was authorized by that body "to conduct negotiations" along the line of the verbal arrangement. Following this authorization the plaintiff endeavored to induce the Opalite Tile Company to enter into a formal written agreement in line with the verbal arrangement, but was unsuccessful, and on June 27, 1908, he declared that the "deal may be considered as impossible of consummation." No further action was had with regard to this matter.

I am decidedly of opinion that there is no evidence upon which to base a finding to the effect that the defendant company rejected a proffered license agreement offered by the Opalite Tile Company, and therefore find that the plaintiff is not entitled to a reassignment of patents on this account.

Third, as to the National Glass Machine & Engineering Company: The evidence demonstrates clearly that this company was never incorporated. A plan was evolved to incorporate such a company and to assign to it the absolute title to all of the patents held by the defendant, except those of which the defendant was making substantial use. This plan involved, not only the absolute assignment of those patents, but also contemplated the complete annulment of the contract of 1905. The proposed new company was regarded by the defendant's directors as a holding company; it involved an entire reorganization; it carried with it nothing whatsoever in the nature of a proposition involving the taking of a license from the defendant company, and the payment of royalty thereof. The plan was that the holding company was to take absolute title to all of the patents in question. Such a proposition could have no effect upon the rights arising under section 9 of the contract of 1905, which plainly states that the plaintiff's rights to reassignment can arise only upon the refusal of the defendant to enter into an agreement to license and pay royalty. There never was any contract tendered by the National Glass Machine & Engineering Company; there never was any such company. There never was any refusal on the part of the defendant to enter into such an

agreement with such a company, for the reason there never was any such contract tendered.

I am decidedly of opinion that the plaintiff is not entitled to a reassignment of any patents on account of the National Glass Machine & Engineering Company incident.

Conclusion.

Having reached the conclusion that the plaintiff is not entitled to a reassignment of any of the patents in question on account of any refusal on the part of the defendant company to enter into any tendered agreement for licenses and royalty, I am of opinion, and therefore find, that the plaintiff is not entitled to an accounting of damages because of the depreciation in value of any such patents.

[2] *Fourth.* Is the plaintiff entitled to damages on account of the abandonment by the defendant of certain applications and foreign patents which were assigned by the contract of 1905?

The plaintiff's claim for damages in this connection is based on section 5 of the contract. That section reads as follows:

"5. The company also agrees to pay all expenses incidental to applying for and obtaining all the letters patent herein referred to, either specifically or as future inventions, and also to pay all expenses incidental to experimental or development work in connection with said inventions. The company also agrees to pay all the expenses incidental to any suit which may be brought for the alleged infringement of any one of the patents herein referred to, and the entire expense incidental to any suit which may be brought against the company for alleged infringement of any other patent by reason of the use of any one of the inventions referred to in the patents herein mentioned: Provided, however, that all the expenses which the company hereby agrees to pay shall be authorized by the company."

The proofs established the fact that a number of foreign patents covered by the contract in question were allowed to lapse for failure to pay taxes. It was also shown that in three instances the defendant failed to appeal from the adverse decision of the examiner of patents in connection with applications for United States patents. In one of these instances the plaintiff expressly consented to the action of the defendant. The other two instances have to do with applications numbered 206,355 and 291,398, respectively.

With regard to application 206,355 the plaintiff wrote to Mr. Fisher, saying that, if the defendant company ever goes into the manufacture of sidewalk prism glass, it will be of considerable importance to secure a patent on this invention, if one can be secured. In this letter the plaintiff said: "The question now is, do you wish to take an appeal from the decision of the principal examiner?" To this letter Mr. Fisher replied, saying that the cost of the sidewalk prism glass is practically prohibitive, and further than "we thought best not to go to the expense of an appeal, and hope that will be satisfactory to you." The plaintiff again wrote to Mr. Fisher, saying that "he would advise that the case be appealed, as I think that the invention may, in view of the present trade situation, be of considerable importance later on."

With regard to application 291,398 the plaintiff wrote to Mr. Fisher protesting against the "refusal to further prosecute this case." To this letter Mr. Fisher replied, stating that the defendant had diligently attempted to obtain a patent on this application, but that "it now seems impossible to do so, and that an appeal would be merely a waste of money," and offering to reassign the application to the plaintiff. The plaintiff replied, stating that he not only desires a reassignment of the application in question, but also demands a reassignment to him of all inventions, applications, and patents covered by the contract of October, 1905. Some 9 or 10 months later the defendant executed an assignment of application 291,398 and forwarded it to the plaintiff, but the plaintiff refused to accept it, saying not only that it came too late, but also that it alone would be of no use to him standing by itself, "although I do regard it as of value in connection with other inventions covered by my contract."

I am of opinion that the plaintiff is not entitled to damages on account of the failure of the defendant to take appeals in the matter of these two ap-

plications, for at least two reasons: In the first place, I regard section 5 of the contract as in no way obligating the defendant to appeal from the decision of a patent examiner, if in its business judgment it should deem an appeal unwise. The provisions of section 5 were clearly intended to express the understanding that the plaintiff would not be called upon to pay any expenses involved in securing patents, but that all such expenses would be borne by the defendant. The last clause of the section, however, makes it equally clear that the question as to whether expenses in a given case should be incurred, was one for determination by the defendant. In the second place, there is nothing in the case to show that an appeal would have brought about a reversal of the decision of the examiner.

With regard to the foreign patents which were allowed to lapse, the evidence is almost wholly documentary. Prior to 1908 the defendant had entered into an arrangement with a Mr. Wells, under which he engaged in an endeavor to dispose of the foreign patents either by way of license or sale. These efforts were unavailing. The matter of the payment of taxes on the foreign patents became a serious proposition and was opened for discussion in the spring of 1908. In this connection the plaintiff wrote to Mr. Fisher, the defendant's vice president, on April 21, 1908, as follows: "As regular taxes falling due in May, I would abandon the German patent 175,988, and only keep the French and Belgian in any case, and these might be dropped if considered necessary. There seem to be no other taxes falling due until next October, which will give us something of a breathing spell; but, unless something is done soon in a practical way to develop these foreign patents, I would favor abandoning all of them. As no one is coming to us to buy, we must go to them."

During the year 1908 and part of 1909 there was considerable correspondence between Mr. Fisher, the plaintiff, and the company's patent attorneys in reference to the dropping of certain of the foreign patents, some of which were covered by the 1905 contract and some were patents which had been assigned to the company in 1902. Throughout this correspondence (filed as Plaintiff's Exhibit G) it is made clear that it was the policy and practice of the defendant to offer to assign to the plaintiff the patents proposed to be dropped, and to drop them only in case he did not see fit to take them over. I find no case in which the plaintiff either objected to the dropping of the patents in question or elected to take an assignment to himself.

On September 22, 1910, Mr. Fisher wrote to the plaintiff as follows: "We are notified by Foster-Freeman that the government taxes on letters patent in Germany 150,365 prismatic fireproof structure 10,750 must be paid on or before November 5th abroad. Accompanying this the following memorandum: 'This is for wire prism glass, and is the only German patent, except the basic patent, still alive. It is included in the German contract.' This is my general idea: If we have a basic patent on pressed prism glass, any one could put wire into it. If there are any other patents in Germany on wire prism glass ahead of our application of the above number, we would have a weak position anyway. If there were none, we could use wire in our pressed prism glass, and nobody else could. Why not stand pat on the basic patent, and not pay this $107.50? This is Mr. Bond's idea and mine, but I think I would like to have yours before deciding. Please answer as early as possible."

On September 24, 1910, the plaintiff replied as follows: "Your letter of the 22d received. In view of the present situation in Europe, I cannot see any use in any longer paying taxes on our foreign patents, except perhaps the basic patents for the manufacture of prism glass."

From this correspondence and from the letter of Mr. Bond to the master, dated October 8, 1914, and by agreement made part of the record in this case, it seems clear to me that the plaintiff gave his consent and approval to the dropping, not only of the specific patents identified in the letters of 1908 and 1909 (Plaintiff's Exhibit G), but of all foreign patents held by the defendant company except the basic patents for the manufacture of prism glass. That those basic patents were not among the number covered by the 1905 contract can hardly be doubted, in view of the fact that from its very organization the

defendant company was engaged in the manufacture of pressed prism glass under patents assigned to it in 1902.

Conclusion.

I am of opinion, and so find, that the plaintiff is not entitled to an accounting of damages on account of the abandonment by the defendant of applications for United States patents, or on account of the abandonment of any foreign patents assigned by the contract of October, 1905.

[3] *Is the plaintiff entitled to reassignment of stock as prayed for?*

The subjects hereinbefore dealt with have to do with that branch of the case in which the plaintiff seeks relief in connection with the contract of 1905. However, as hereinbefore indicated, the case has another branch bearing on another subject. That second branch will now be considered.

Prior to the year 1909 the defendant company was in a bad financial condition. During the years 1908 and 1909 a reorganization was effected, under which all of the stock outstanding, both preferred and common, was surrendered, and new stock, all of which was common stock, was substituted. Prior to the reorganization the capital stock was $1,000,000, part of which was first preferred and part second preferred and part common. The various stockholders had not made the same actual cash investments in proportion to their respective holdings. There were unpaid accumulated dividends credited to the outstanding preferred stock, which rendered the common stock unsalable. This situation made it necessary that an entirely new adjustment of capital stock be made, in order that there might be placed in the treasury stock which would be attractive to purchasers, to the end that working capital might be secured. A reorganization committee was appointed, of which the plaintiff was chairman. This committee succeeded in working out a plan whereby all of the stock, both preferred and common, should be surrendered, the company recapitalized at $500,000, instead of $1,000,000, part of the new stock (all of which was common stock) issued to the stockholders upon the basis of an adjustment which was worked out by the committee, and the balance of the new stock placed in the treasury to be sold to secure working capital. This arrangement was accepted by the stockholders, and in pursuance thereof the old stock was surrendered and the new stock issued. Under the old organization the plaintiff held $104,000 of stock. Under the reorganization arrangement he surrendered this old stock and took in lieu thereof $15,600 of the new stock.

The plaintiff claims that, notwithstanding the contract of reorganization under which he took as his share $15,600 of stock in the reorganized company capitalized at $500,000, he is entitled to the same proportion of the total capitalization of the reorganized company that he held under the old organization, to wit, 10.4 per cent., or $52,000, and that therefore there should be issued to him $36,400 of stock in addition to the $15,600 which he took under the agreement. His prayer takes the form of a demand for a reissue to him of $36,400 of the stock which he surrendered.

The plaintiff's contention in this regard is based on his claim that he was assured that the new treasury stock was to be applied for certain specific purposes, to wit, the development of certain unused inventions covered by the 1905 contract, but that the stock never was so used, and that, indeed, none of the stock so placed in the treasury was ever sold. The plaintiff therefore claims that he was induced by false representation to make his surrender under the reorganization agreement, and that he is consequently entitled to be put back to his place as the owner of an interest amounting to 10.4 per cent. of the total capitalization of the company.

I find as a matter of fact that the evidence shows that there was a private understanding between the plaintiff and Mr. Fisher, and perhaps Mr. Bond, that a portion of the proposed treasury stock would be used to develop certain unused inventions; but I further find that there is no evidence whatsoever to indicate that these persons, or any of them, had any authority from the stockholders, or even from the directors, to engage in such an arrangement or to make such a promise. The actual contract of reorganization was a written one prepared by the committee of which the plaintiff was chairman,

and was submitted to and signed by the stockholders. That contract, which was issued to the stockholders as a circular, and which is filed as Defendant's Exhibit 19, contained no provision whatsoever which could be construed as an agreement that any portion of the new treasury stock should be used for the development of theretofore unused inventions, or, indeed, for any other specific purpose. The plaintiff, before having the circular printed, submitted it to Mr. Fisher with a paragraph included providing that the treasury stock should in part be used for the development of patents, but this paragraph was stricken out by Mr. Fisher. The plaintiff accepted the circular with the paragraph stricken out, and issued the circular to the stockholders with that paragraph eliminated. The purpose of the reorganization, as expressed in the circular, or contract, was to secure additional capital to develop the business of the company. That written contract was signed by the committee, including the plaintiff, submitted to the stockholders, signed by them, including the plaintiff, and carried into execution by the effectuation of the reorganization.

Conclusion.

I am of opinion, and therefore find, that the plaintiff is not entitled to have issued to him the stock which he demands. In the first place, neither Fisher nor Bond had authority from either the stockholders or directors to enter into a private agreement with the plaintiff as to the specific manner in which the development of the company's business should be effectuated, and the plaintiff knew that fact. In the second place, the contract of reorganization was put in writing by the plaintiff himself, submitted to the stockholders by him, and entered into by the stockholders in that form. In the third place, it would be inequitable to the other stockholders, who made their surrenders and took their new stock under the terms of the written contract of reorganization prepared by the committee and signed by all of them, to issue to the plaintiff the additional stock which he demands; for that would give to him a greater interest in the company, in proportion to the interests held by other stockholders, than he agreed to take under that same contract, and would, on the other hand, impair the value of the stock held by those other stockholders.

The undersigned master files in the office of the clerk of your honor's court, with this, his report, the transcript of all the testimony taken before said master, together with all exhibits filed with the master by the parties to this suit.

We have very carefully examined the record in this cause. The evidence abundantly justifies the findings of fact of the court below, and we concur in such findings. It would be difficult to improve upon the statement of the case made by the master. We are satisfied with the master's interpretation of the contract between the parties. The decree below should be affirmed.

Affirmed.

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## WINTON MOTOR CARRIAGE CO. v. LINDSAY AUTO PARTS CO.

(Circuit Court of Appeals, Sixth Circuit. December 12, 1917.)

No. 2893.

1. PATENTS ⟸328—INVENTION—AUTOMOBILE AXLE.

The Lindsay patent, No. 748,760, for a rear axle for automobiles, claims 2 and 3, in view of the prior art, *held* void for lack of patentable invention.

2. PATENTS ⟸174—INVENTION—CLAIM.

In determining whether the patentee made a material advance, the invention to be considered is that defined by the claim in suit.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 249.]

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

3. PATENTS ⟸49—CLAIMS—STRUCTURAL DETAILS.
When the device commercially accepted included features covered by claims not in suit and by other patents, and the claims in suit rest upon minor structural details, there is little reason to attribute the commercial success to these claims.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 59–62.]

4. PATENTS ⟸26(1)—INVENTION—IMPORTANCE.
In determining whether changes involve invention, it is of some importance that they relate to assembly rather than to operation.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30.]

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 equity by the Lindsay Auto Parts Company against the Winton Motor Carriage Company. Decree for complainant, and defendant appeals. Reversed.

F. P. Fish, of Boston, Mass., for appellant.

Charles Martindale, of Indianapolis, Ind., for appellee.

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

DENISON, Circuit Judge. Suit for infringement, brought by the Lindsay Company against the Winton Company, on claims 2 and 3 of Lindsay patent, No. 748,760, dated January 5, 1904, on application filed August 18, 1902, covering a rear axle for automobiles. The District Court held both claims valid and infringed, and the defendant brings this appeal.

[1] The rear axle of an automobile is a shaft which is driven by power, suitably transmitted from the engine, and which, in turn, revolves the rear wheels rigidly attached thereto. Before Lindsay's time the rear axle had been evolved into a two-part structure comprising the revolving shaft itself and a surrounding (fixed) tubular casing, which directly supported the car body above and contained the "live" axle within it. It was also common practice, from almost the beginning of the art, to cut this driving axle across, making two half axles, one of which drove the right-hand and the other the left-hand wheel, and to connect these two parts centrally by some differential means so that both halves would normally be driven at the same speed, but one part might revolve faster than the other. This differential unit consisted of gearing of diameter larger than the axle shaft, so that the surrounding tubular casing must either be cut away from that part of the shaft or else must be enlarged so as to surround the differential. Repairs to this central gearing were often necessary, and, under the original practice, the body of the car was otherwise supported while the rear axle carrying both wheels was removed and taken apart. Lindsay made his tubular casing of shape to swell out around and cover the differential, and he also divided it vertically into three sections, the central and larger portion constituting one section and each tubular end portion another. The central part was again subdivided horizontally into upper and lower halves, and, along all meeting edges,

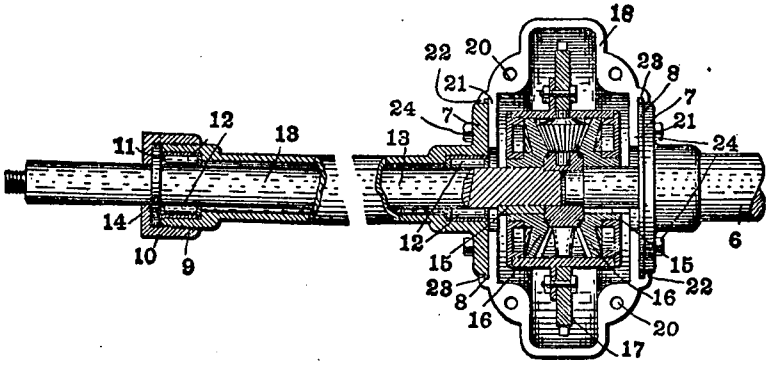
facing flanges were provided with registering bolt holes, whereby the parts could be bolted together.

It had also been common that the inner end of each shaft section should be more or less permanently attached to the adjacent bevel gear of the differential unit. Wishing this attachment to be separable, Lindsay employed a spline—in the form of a key in an open-ended slot—so that the shaft end might be drawn out lengthwise from the gear, and yet, before withdrawal, shaft and gear must rotate together. To stop or to permit this axial motion of each shaft section, he rigidly fixed upon each a collar just outside the end of the tubular casing and surrounded this with a cap which screwed down over the collar and on the outside of the casing end. When this cap was removed, the shaft section was free to come out. By this construction, when his tubular end sections and his divided central casing were bolted together, the completed casing was strong and self-supporting, one-half of the central part—the upper or lower—could be removed like a cover for access to the central gearing and the remaining half would still support and hold in line the tubular end sections. By moving each shaft section outwardly just enough to disengage it from its bevel gear, the differential could be removed through the cover opening.

In the same way repairs in either shaft section were facilitated.

With this preliminary description and by reference to Fig. 2 of the patent here reproduced, we can understand Lindsay's claim 2, which reads as follows:

"In a motor-driven vehicle, the combination, with a pair of tubular axle structures, of a pair of casing-sections connecting the adjacent ends of said tubular axle structures, and one of said casing-sections being detachably connected, a pair of shaft-sections revolubly mounted in the axle structures and projecting into the casing-sections, and axially separable driving connection between the shaft-sections from which the shaft-sections may be outward axially withdrawn, and independent means for normally retaining the shaft-sections against axial displacement, said means being removable to permit the outward withdrawal of each shaft-section from the structure."




The history of this claim in the Patent Office demonstrates that both the patentee and the Patent Office thought it was new in this arrangement of parts to permit either shaft-section to be disconnected from its gear and withdrawn axially by operating a simple engaging device

and to permit the central part of the casing surrounding the differential to be opened so that the differential could be easily inspected, and, if necessary, could be withdrawn through the opening by merely disengaging the shaft ends. In this both were mistaken. Substantially the same longitudinal division of the casing into three sections, and subdivision of the central part into upper and lower halves, and for the purpose of allowing one-half of the central section to be removed to permit easy access to the differential, were disclosed in at least two earlier patents, one of them to Lindsay; and an earlier patent to Winton, taken in connection with the structure built in supposed conformity to the Winton patent and the public use of which, antedating Lindsay, is abundantly proved, discloses, approximately, the combination of the claim. The differences between this Winton structure and the Lindsay patent are those now to be discussed, and whether such differences show patentable improvement is the controlling question.

As to general features and general function of parts, the earlier Winton and the later Lindsay are the same; the differences are two. The first is that the splined engagement between shaft-section and its bevel gear is, in Lindsay, made detachable by the above-described collar and cap at the wheel end; and, in Winton, by a set screw passing through the hub of the gear and bearing upon or extending into the shaft. To break the engagement, Winton opened the cover in the central casing and unscrewed the set screw, while Lindsay unscrewed the cap at the outer end. In view of the fact that before either Winton or Lindsay, Cate and others had provided detachable engagement between the tubular casing and the half section of the axle therein in precisely the form shown by Lindsay, it is doubtful whether invention could be predicated on his substitution of his collar and cap for Winton's set screw; but the form of this claim makes that inquiry immaterial. Several of the other claims not in suit distinctly call for this collar and cap connection, while claim 2 specifies "independent means for normally retaining the shaft-sections against axial displacement; said means being removable to permit the outward withdrawal of each shaft-section from the structure." It is true that no other claim is identical with claim 2 in every particular, except this, and so there is no hard and fast rule making it impossible to limit claim 2 by considering it as contemplating only the collar and cap, as its "means"; but a comparison of claims shows clearly that the four-member axle casing—the "pair of tubular axle structures" and the "pair of casing sections"—furnished the characterizing identity of this claim, and that it was deliberately drawn as it is for the express purpose of escaping the very limitation which it is now said should be imported in order to support validity. Hence it must be said that the set screws of Winton are "means for normally retaining the shaft-sections, etc."; and since Winton could not, in this particular, escape the charge of infringing Lindsay, if Lindsay had been earlier, the claim must have the same scope when we look in the other direction, and is—so far—anticipated, unless because of some distinguishing force in the word "independent." Defendant says that "independent" means "independent of each other," referring to the function whereby either shaft-

section can be withdrawn without disturbing the other—and Winton did this. Plaintiff says that the word has reference to the differential, and refers to a retaining device outside of and away from the differential unit—and Winton had none. In this conflict of construction we cannot agree with plaintiff. Whether the removable means that holds the shaft against axial motion is carried by the differential or by the casing, and in what particular way, cannot be functionally important, and that either merit or difference should lie in that distinction would not be the natural thought of the inventor. On the other hand, the thought that each half section was removable separately is repeatedly brought out in his specification and claims and affords a natural meaning for this limitation. True, there was nothing in itself new in making each axle-section separately detachable, and it follows that "independent," if used in this sense, did not carry novelty; but it is equally true that it was old to make detachable engagement between axle-section and casing independently of any retaining means in the central gearing (Elliott, De Dion), and that sense of the word is equally futile to indicate an added novel feature. To give this word the meaning now proposed by plaintiff would limit the claim in a way and to an extent foreign to the patentee's thought.

The second point of difference between Winton and Lindsay is in the form of the central casing. Winton's two end sections of his tubular casing were originally and permanently connected by a yoke rectangular in form. To each side of this yoke there was attached the half of an inclosing case made of wood and thin metal stamped into shape, but having no structural strength. These parts of Winton's structure served the purpose of inclosing the differential to protect it from dirt and to protect adjoining parts from oil, and served, also, the purpose of permitting easy access to the differential for inspection or removal, but they did not rigidly support the two end sections; that was done by the yoke. If it had been new with Lindsay to make a self-supporting and weight-carrying axle casing by uniting his four rigid and strong parts bolted together, we might concede invention in this change from Winton to Lindsay; but that was not new. The same thing had been done by Lindsay himself, by Perret, and by others years before; and to apply this to Winton's structure seems to us clearly within the skill properly to be attributed to the worker in this art. If there were a new result achieved, we might see more than mere skill, but the only new result claimed is that the shaft-sections could be pulled out and the differential thereby became removable from the casing—and Winton had done this.

Even if we regard Winton's side covers as materially variant from the central inclosing case of Lindsay, the situation then takes this shape: The complete structure embodies two units. The live axle and its central gearing form one unit. The casing, comprising the tubular end portions and the central enlarged portion, is the other unit. This casing unit surrounds, protects, and carries (or is carried by) the live axle unit. There were in existence several examples of a live axle unit having the shaft-sections detachably connected with their

bevel gears. These were surrounded by whatever kind of casing the builder thought proper. All the casings had the end portions in tubular form. For the central enlarged portion, Winton used an open yoke leaving the gear exposed, excepting for his rather imperfect covers (which we are now leaving out of consideration); Elliott used a form in which the central portion was divided vertically and the two parts could be separated horizontally "to facilitate the manufacture of the machine and permit of the introduction or subsequent examination of the internal parts"; De Dion does not describe his central inclosure; Frantz made it of globular form, apparently integral with the tubular end portions, but having an opening and cover on top of the globe. Every casing which inclosed the gearing provided some separability at this point; otherwise the device could never be assembled. Among the variety of such forms Perret had shown substantially the form used in the Lindsay patent in suit, and Lindsay himself, by his 1898 patent, had shown exactly this built-up, four-member casing. It results that what Lindsay did, by the patent in suit, was to take a common form of live axle and surround it with one instead of another common form of casing. This could not be invention, excepting as some peculiarity of the selected form of axle unit united with some peculiarity of the selected form of casing to bring a new result; and we have seen that this did not occur. This conclusion is confirmed by the fact that many of the types of axles now in common use which do not employ this built-up construction, and so do not infringe, yet give the same result. One of them is the Winton casing of 1898 without material change, excepting that the caps are made of heavier metal and attached more closely.

[2] We do not get the right view of this question, unless we observe that the invention, defined by the two claims in suit, pertains essentially to this sectional construction of the casing. Lindsay thought his invention consisted in uniting any live axle unit, where the shaft-sections were detachable from their bevel gears, with any surrounding casing where the central part could be opened to take out the differential, and several of the claims granted show that the Patent Office had the same view. Not only does the present record show that such a broad claim was unfounded, but plaintiff (for the purposes of this suit) practically concedes the validity of these other claims to be doubtful by not bringing suit upon them, although they are plainly infringed. When this situation is taken into account, there is so much the less room for thinking that the invention now in suit should be regarded as a material advance, entitling Lindsay to substantial credit.

[3] The same consideration affects the force to be given to commercial use. As so often happens, plaintiff says there is a strong inference of that utility which is a "new result," because the device has gone into extensive use, and defendant says we should infer that there was no novel utility, because the device has not been commercially accepted. The fact is, a few axles in the form shown by this patent, and embodying, also, other Lindsay patents, were sold by the Lindsay Company; and then that company went out of business. Later, the Tim-

ken Company took a license under this and two other Lindsay patents, and under them, and in connection with designs and improvements of its own, made an axle which was widely sold and was bought and used by defendant for one year; but there is slight room to infer that its commercial acceptance was due to the merits of this particular patent rather than of the other patents and improvements which it embodied, and still less to attribute its commercial success to the comparatively minor structural detail, viz. the peculiar sectional casing, without which it would not have responded at all to the two claims in suit. The commercial success of this Timken axle throws no light on the validity of this claim.

We do not hold that Lindsay's association of elements is an aggregation, in the sense in which that word is distinguished from combination; but rather that what Lindsay did displayed only the judgment to be expected from one skilled in the art. Nor do we overlook the argument that the combination is new although the elements are old. If Lindsay had taken an existing combination of axle parts, and, for the first time, had joined with them two elements, the removable cover for the differential case and the removable means for holding the shaft-section in longitudinal position, both of these elements being old, we would have a case of more difficulty; but what he did was to take an existing complete combination, and, for one element of it, substitute a known equivalent.

[4] In determining whether Lindsay's changes involved invention, it is of some importance that this is an assembly patent rather than one for interoperating mechanism. This may be illustrated by comparing with Cadillac v. Austin, 225 Fed. 983, 141 C. C. A. 105. There the related parts, in their novel features, co-operated with each other while running, and there were involved problems of effective and economical power transmission—problems of the class which every one knows are sometimes modified by unforeseen conditions, so that a seemingly simple question may turn out to be difficult and complicated. We took this view of the substitution there made between internal and external gears, and were unwilling to say that the change was an obvious expedient. On the other hand, this Lindsay patent belongs to the class of assembly patents, one of which we recently considered in Ft. Pitt Co. v. Ireland Co., 232 Fed. 871, 147 C. C. A. 65. When the Lindsay axle is in operation and the car is running, the only features claimed to be novel are of no importance; no one wants to take out the differential or remove the axles. Lindsay's whole object was to provide for simple and easy taking apart and putting together of the structure so that it would be ready to run or ready to be repaired as desired. We do not by any means say that there can be no invention in the device because its only novel utility is for convenient assembling and disassembling; but the lack of other utility, coupled with the known ability of good mechanics to bring about this result in a great variety of ways, must make it more difficult to convince that anything more than skill was involved. If any one negative definition of "new result" is settled, it is that such result is not found

in the change from integral to sectional, or vice versa, merely to facilitate manufacture or assembly; and upon only that change the patentability of claim 2, when differentiated from the broader view now abandoned, at last rests.

We are content to rest our conclusions upon the reasons stated, without reference to the French Chaboche patent of 1899. This is confessedly a perfect anticipation (as to all features, except the casing form), unless it loses that character because of a mistake or obscurity in the drawing. If it were vital, we should hesitate to reject it for that reason.

Of course, it is not important, as against the Winton patent and public use of 1898, Lindsay's 1898 patent, the Chaboche patent, etc., that Lindsay can antedate them with his conception or even reduction to practice. The statute has fixed an absolute limit of two years, and an inventor, who delays his application more than two years after the statutory published description or public use, forfeits his contingent right to a monopoly.

Claim 3 differs materially from claim 2 only in that it adds, as an element, a tongue and groove connection between the flanged or headed inner ends of the tubular casing sections and the adjacent faces of the central members (22, 23 in Fig. 2). Where two parts are to be joined endwise, and the joint must resist lateral strain, it is the commonest expedient to use tongue and groove, lug and recess, dowel pin and socket or telescoping joint, and such use cannot make patentable an otherwise unpatentable combination. If this claim contemplates specifically (and we think it does) an annular tongue (23) on the outer surface of the tube head, and a corresponding groove on the interior surface of a flange or collar (22) projected from the central member so as to surround the tube head, the plane of both being at right angles to the axial line, defendant does not infringe.

The decree below is reversed, and the case remanded, with instructions to dismiss the bill.

## C. S. PIERCE CO. v. BELCHER.

(Circuit Court of Appeals, First Circuit. January 6, 1917.)

No. 1228.

PATENTS ⊂328—INFRINGEMENT—SHOE FORM.

The Legg patent, No. 946,235, for a shoe form, is limited to the particular combination described, and as so construed *held* not infringed.

Morton, District Judge, dissenting.

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

Suit in equity by the C. S. Pierce Company against George E. Belcher. Decree for defendant, and complainant appeals. Affirmed.

The following is the opinion of Dodge, Circuit Judge, in the court below:

The defendant is charged in this bill with infringing claims 4 to 7, inclusive, of United States patent No. 946,235, issued January 11, 1910, to Alfred G. Legg, for an improvement in shoe forms, which patent is now owned by the plaintiff company.

The alleged infringing device, marked "Plaintiff's Exhibit No. 4," has been made and sold by the defendant under United States patent No. 1,118,582, issued November 24, 1914, to Louis W. Reinhardt, assignor to the defendant, for a shoe form.

Legg says in his specification that:

"Shoe forms as now made, which are adapted to fill the shoe and thus keep the fore part, sides and heel distended in substantially the same position which they occupy when the shoe is on the foot of the wearer are so far as known to me so constructed that they may be slipped into the shoe and then mechanically adjusted so as to fill the shoe and press the fore part, sides and heel outwardly and maintain them in a distended position. This adjustment is effected by the operator mechanically and it is not only more or less complicated and expensive in construction but is liable to be so used as to apply too great a pressure to the interior of the shoe to the injury thereof.

"By the employment of my invention I provide an automatically adjustable shoe form which may be readily inserted in the shoe and which will expand sufficiently to fill the shoe and maintain it in proper form."

The shoe last or form which he goes on to describe has a fore part intended to fill the forward and shank portions of the shoe. This, he says, is preferably a shell, formed from a material which may be molded to shape. As shown in the principal figures of his drawings, it is hollow, but a modified form is also shown wherein the fore part may be either solid or hollow, or partly solid, and the statement is made that the invention is not limited to a hollow form or to one of any precise shape. It is in the remaining rearwardly projecting portion, which is to extend into the heel of the shoe, and the method of its attachment to the fore part, that the essence of the invention may be said to consist.

The patent refers to this rearwardly projecting portion as a "yoke-shaped piece," to be preferably made from a strip of metal of yoke shape, and to comprise a curved rearward portion and two legs. The curved rearward portion is to extend into the heel of the shoe for the purpose of keeping the latter distended. Its attachment to the fore part of the last is effected by means of a lengthwise slot in the free end of each leg, through which is to pass a stud on each side of the fore part of the form, at the rear portion thereof, having a

riveted head on the outside of the form, projecting through the shell inwardly a sufficient distance to permit the slotted end of the leg to slide upon it; and also having, at its inner end, a relatively large head which serves to keep the leg in position, and a spring, preferably a spiral spring, bent first around the stud so as to be held in engagement therewith, then bent downwardly in preferably two convolutions, then upwardly until its other end engages with an offset portion of the leg at the inner end thereof. The tendency of these springs, acting upon the ends of each leg, is to force the curved portion of the yoke-shaped piece against the inside of the heel portion of the shoe when the form is in position therein; while the yoke-shaped portion may be swung on the stud as a pivot, so as to have its bearing at the back of the shoe, either near the top of the counter, or close to the sole, or in any desired intermediate position. The slots and studs serve to guide the forward or rearward motion of the yoke-shaped piece, as the spring against which its legs bear is compressed or expanded.

Modified forms of the invention are shown, in one of which legs of the yoke-shaped piece enter slots or recesses in the fore part of the last, containing spiral springs at the bottom, and provided with pins which project across them through slots in the legs. In the other form, the studs and springs are carried in two legs or projections extending rearwardly from the fore part of the last, at each of its sides; and in this form the position of the spring is preferably reversed so as to bring its convolutions uppermost when the form is in position.

The scope of the invention is in controversy. From the inventor's statements above quoted, it might be gathered that he supposed himself the first to provide a shoe form capable of quick insertion and automatic adjustment by reason of its power of expansion after being inserted; as opposed to forms which require mechanical adjustment after insertion. The plaintiff has hardly claimed as much as this, but it has insisted that none of the prior art patents "show the combination of elements which has resulted in a successful commercial article," as the patent in suit is shown to have resulted.

The evidence shows without dispute that the plaintiff company, for many years a large producer of shoe forms, began to make forms according to the patent in suit in 1910, the year of its issue; that such forms were less than 20 per cent. of its output for that year; but that in 1911 the proportion increased to 30 per cent., in 1912 to 55 per cent., and in 1913 to 75 per cent., though it charged 5 per cent. a pair more for the patented than for any other of its forms. Both its total output and the percentage of patented forms made have been somewhat less since 1914, in which year the defendant began making and selling the forms now complained of, under the Reinhardt patent mentioned above.

But whatever the plaintiff's success in marketing the patented device, it is difficult, in view of the prior art, to find anything patentably new in the combination it embodies, so far as function or mode of operation are concerned. Two prior patents have been particularly relied on by the defendant, i. e., No. 649,373, issued May 3, 1900, to Thurell, and No. 711,025, issued October, 1902, to Tyler. Both described shoe forms consisting of a fore part and a rearwardly projecting portion for extension into the heel of the shoe, neither needs mechanical adjustment after being placed in position; both are capable of ready insertion in the shoe, and of automatic expansion and adjustment after being inserted; nor does it appear that the patented device is materially less complicated or expansible in construction than either. In both there is a pivot or hinge connection between the fore part and the heel portion, enabling the latter to be swung upwardly and forwardly relatively to the former; and in both there is also a spring so disposed between the two members as to make the form compressible and expansible lengthwise. While in the Tyler device both members are solid, and are provided with sockets wherein the hinge and spring connections are disposed, in the Thurell device the fore part is a shell, adjacent the inner surface whereof the pivot and spring con-

nection with the heel member are arranged. To substitute for the U-shaped part of Thurell's heel member a yoke-shaped metallic strip, like that of the patent, would involve only a mechanical change; whatever view be taken regarding the different means of connection between the legs of the heel member and the fore part of the form.

The patent in suit has in all seven claims, whereof the four now sued on are the broadest in terms; the three others being by their terms more expressly limited to the specific construction shown. In view of all that had been accomplished in the prior art, I think the utmost that any of the claims can be taken to cover is the construction which the patent describes. This conclusion prevents the defendant's device from being held an infringement, unless it must be regarded as having adopted the patented construction without any but colorable variations, not amounting to substantial differences.

The defendant's heel member and fore part are both of "shell" form. Extensions or tongues from each of them overlap, those from the heel member passing inside those from the fore part. On each side of the form a short link connects the two overlapping extensions, pivoted to each respectively near its end. Each link is adjacent the inner surface of the extension belonging to the heel member, below which its lower end projects enough to be there pivoted to the extension from the fore part. The links, rocked on their pivots, permit the heel part to move toward or from the fore part, while holding the two parts in connection with each other. Coiled springs also adjacent the inner surface of each extension from the heel part, in the rear of each link, are engaged at one end with the link, and at the other with the extension from the heel part, so as to be compressed when the form is shortened and to force the heel part backward when the pressure is removed.

The movement of the heel member relatively to the fore part is thus guided, not by pins in straight slots, as in the patent, but by the movement of the links around their respective pivots. It is said in the Reinhardt patent that "the mechanism for effecting this adjustment is materially different both in principle and construction from the pin and slot constructions of the form now in use." On the whole, I must regard this statement as well founded. I think the defendant's means for securing flexible and expansive connection between the two parts of the form differ no less substantially from those used in the patent than from the means used in any of the prior devices; and that they cannot properly be held covered by the claims in suit, notwithstanding the language therein employed for the purpose of making them cover as much as possible beyond the construction which Legg describes.

This conclusion requires dismissal of the bill, and there may be a decree accordingly.

George P. Dike, of Boston, Mass., for appellant.

Ellis Spear, Jr., of Boston, Mass., for appellee.

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

ALDRICH, District Judge. This case has to do with devices for holding shoes in shape while in nonuse, the idea being to keep the shoe substantially in the shape produced by wearing, and to accomplish this through means creating outward and extension pressure.

Although, upon hearing below, the validity of the plaintiff's patent, known as the Legg patent, was not drawn directly in question, it is quite apparent that the view of the District Court was that it was difficult to find anything patentable and new in the combination which the patentee described; yet that court was not called upon to do so,

and did not undertake to pass upon the question of the validity of the plaintiff's patent.

Leaving the question of patentable invention undecided was entirely consistent with the theory of the defense, which was, in view of the state of the art, that the Legg patent should be construed as confining itself to the device which the patentee described, with the provisional contention that, if the Legg claims were given the breadth of scope claimed by the plaintiff, the patent would be void. The District Court reached the conclusion that the claims of the Legg patent, from 4 to 7, inclusive, which were the only ones in issue, should be limited to the particular combination described, and, being so limited, that the defendant's device did not infringe; and, as a consequence, all questions of the validity of the Legg patent became entirely immaterial.

The question of infringement thus becoming the only question in issue, it depended largely, if not altogether, upon the construction of the claims in the Legg patent, and the question of construction was reasonably and necessarily influenced by the prior state of the art.

It is very clear that the Legg patent did not hold such a relation to the idea of preserving the shape of shoes in nonuse as, under the rules of liberal interpretation, would justify a broad construction of its claims. In short, it was not in any reasonable or substantial sense a pioneer patent, because there were other patents and devices which had in view the idea of holding shoes in such shape or form as had been created by the wearer. The District Court refers to the earlier patents of Tyler and Thurell, with the observation that both described shoe forms with mechanical adjustments and means for automatic expansion.

At most, the patentee in the Legg patent, as he explains it in his specification, relies upon novel features of his adjustable shoe form as improvements, and he particularly describes his mechanical means for creating and guiding the expansive and contracting movement.

The learned judge presiding in the District Court considered and elaborated the state of the art, and made a careful analysis of the elements of both the plaintiff's device and that of the defendant's alleged infringing form and combination, with the result of finding and holding, in effect, that the defendant's means for securing flexible and expansive connection between the two parts of his form—which were combined in accordance with the Reinhardt patent of November 24, 1914—differed no less substantially from those in the patent than from the means used in devices prior to both the Legg and Reinhardt patents. That court's appreciation of the prior art is so clearly expressed, and the elements mechanically combined and arranged in both the device of the plaintiff and that of the defendant are so carefully analyzed and stated by that court, that we need not cover such ground in detail at the necessary expense of reiteration; and this is so because, if the state of the art was such as to justify a construction limiting Legg to the combination which he described, and we think it was, the conclusion plainly and unmistakably results from

an examination of the two devices that the defendant's combination does not infringe.

It is our conclusion that the result reached in the court below was right; and—

The decree of the District Court is affirmed, with costs of this court.

MORTON, District Judge (dissenting). The problem was to make a shoe form which would support the shoe throughout the entire length, which could be easily inserted into the shoe by bending and compressing without unduly stretching the shoe, and which, having been inserted, held the shoe in shape under a slight tension. The art had advanced to a point where forms were best made hollow, so that it was necessary to provide the qualities above named in a hollow form. This had never been done prior to Legg's invention.

Only three prior patents are referred to. As far back as 1885, Rogers had made a hollow shoe form having toe and heel pieces which were hinged together. Apparently it was inadequate and never went into extensive use. It had to be forced into place, and it had no capacity to adjust itself longitudinally to the shoe. Thurell, in 1900, with the Rogers device before him, and with the same problem in mind, did not combine heel and toe pieces. His form consists only of a toe piece kept in place by a wire bent to conform to the inside of the heel; it has no heel piece at all in the ordinary meaning of the words, and seems to have had no practical value. Two years later, in 1902, Tyler got up a wooden form, having sliding hinges and a separate spring between them for forcing apart the heel and toe pieces. Tyler's hinges and spring were inserted in recesses in the wood of the heel and toe pieces. His construction is wholly inapplicable to a hollow form, and his mechanism is radically different from that of the patentee. He evidently saw the need, but was unable to supply it in a commercial form.

This was, so far as appears, the entire development of the art, when, in 1907, Legg made the invention here in question, in which he united hollow heel and toe pieces by hinges of simple and practical construction which allowed the two parts of the form to be bent and compressed, and which were so arranged as to force them apart by spring tension when the form had been placed in the shoe. There is no evidence of any earlier hinge combining flexibility and extensibility, nor of any shoe form in which such a hinge had been used, nor of any flexible and extensible shoe form of commercial value. The Legg patent admittedly describes the first commercially successful article of its particular kind. Legg made the advance which achieved that result, and he made it where others had failed.

Legg's device was apparently just what the trade was waiting for. The evidence of prompt adoption and use by the public is usually strong and convincing. Evidence of commercial value is, of course, often exaggerated, and patentees are apt to puff their inventions in arguing infringement cases. At the same time, when the facts of un-

successful prior efforts and of prompt and widespread public adoption of the patented device are satisfactorily proved, they constitute weighty evidence of invention. I do not think that evidence is overthrown by other facts in this case.

In the circumstances, I think the Legg patent entitled to a more liberal construction than that given to it by the majority opinion. Reinhardt, who had been employed by the complainant, adopted Legg's idea and proceeded to embody it in a structure which is clearly within the specification and claims of the Legg patent, and is, in my opinion, nothing but a mechanical equivalent for the Legg device. To say that Reinhardt's structure, which the defendant is making, differs no more from Legg's than Legg's did from those preceding it, is, it seems to me, to lose sight of what the Legg invention really was.

For these reasons I am unable to concur in the opinion of the court.

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## WRIGHT v. WISCONSIN LIME & CEMENT CO. et al.

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

No. 2393.

1. PATENTS ⟸310(9)—SUIT FOR INFRINGEMENT—DISMISSAL ON MOTION.
Where a bill for infringement states a prima facie case and the patent discloses no invalidity on its face, the court is not justified in dismissing the bill on motion on the ground that the patent is invalid for lack of invention in view of the prior art unless the facts upon which invalidity is predicated are so widely and commonly known that the court may take judicial notice of them, and are such as to preclude the possibility that complainant can produce any competent and relevant evidence to sustain the presumptive validity of the patent.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 535–540.]

2. PATENTS ⟸328—VALIDITY—ROOFING MATERIAL.
The Wright patent, No. 1,022,764, for a roofing material, is not so clearly invalid for lack of invention as to warrant the dismissal of a bill for its infringement on that ground on motion.

3. WORDS AND PHRASES—"PULVERIZED BRICK."
"Pulverized brick" is brick that has been reduced to a powder.

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

Suit in equity by Stephen G. Wright against the Wisconsin Lime & Cement Company and others. Decree for defendants, and complainant appeals. Reversed.

The bill, which is in the usual form, charges infringement of Wright's patent No. 1,022,764, for roofing material, and prays injunction against further infringement. The claims of the patent, as appears from the bill, are:

"1. As a new article of manufacture, roofing composed of sheet water-proof material having its surface composed of comparatively coarse particles of baked earthy material of predetermined coloring whereby a roofing surface is produced presenting a coloring permanent under wear, for the purpose set forth.

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

"2. As a new article of manufacture, roofing composed of sheet water-proof material having its surface composed of particles of baked earthy material of predetermined coloring, said particles being partially embedded in a water-proofing coating and extending above the plane thereof, whereby a roofing surface is produced presenting a coloring permanent under wear, for the purpose set forth."

The specification suggests 10 to 12 mesh as the size of the particles, but states that this may vary as desired. It variously sets forth the particular virtues of roofing equipped with this material typically as follows: "The surface-coatings thereof, by reason of the materials of which the particles 4 are formed, retain their original color indefinitely, as each particle is of homogeneous color throughout, and the wearing away of these particles under the action of the elements has no effect in the way of impairing the preservation of the color originally presented by the roofing. Another advantage due to the use of the material stated, in its preferred form, for the surface coating of the roofing is that of durability, in that such material, when crushed, presents not only an irregular fracture, but a roughened surface due to its porosity, and thus a tenacious bond between the particles 4 and the coating 3 is produced when these particles are embedded therein."

The defendant company answered, denying invention and the validity of the patent, and it thereupon filed its motion to dismiss the bill for the following stated reasons:

"First. That it does not appear from the said bill that the patent alleged to be infringed describes and claims anything patentable in view of the art of roofing material well and commonly known at the time of the alleged invention by the said Stephen G. Wright.

"Second. That the roofing material described and claimed in the patent of the United States No. 1,022,764, to Stephen G. Wright, dated the 9th day of April, 1912, was well known and in common use the time of the alleged invention of the same by the said Stephen G. Wright.

"Third. That the said patent No. 1,022,764 sued upon is void and of no effect for that it describes and claims a roofing material well known and embodying neither novelty or invention in view of the well-known art at the time of the alleged invention by Stephen G. Wright.

"Fourth. That it does not appear from the bill of complaint herein that the plaintiff, Stephen G. Wright, is entitled to any relief whatever."

Upon hearing the motion, the court dismissed the bill, and plaintiff appeals.

Russell Wiles, of Chicago, Ill., for appellant.
Luther V. Moulton, of Grand Rapids, Mich., for appellees.

Before MACK, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] The bill aptly and broadly charges infringement by defendant of the patent therein recited, which appear on their face to be in due and regular form. The letters patent themselves reveal nothing because of which, as a matter of law, they are void; and the conclusion of invalidity must, if at all, flow from facts apart from the letters patent. But as the dismissal was upon motion, the facts upon which to predicate the invalidity must be such as are so widely and commonly known that courts will take judicial notice of them without proof of their existence. Of such a situation this court said in Lange v. McGuin, 177 Fed. 219, 101 C. C. A. 389:

"Of course, every bill is written against the background of common knowledge; and in that view a demurrer may be said to invite the chancellor to take judicial notice of the background. But if a bill, in and by its own aver-

ments, states a prima facie case, that case cannot properly be overthrown by the chancellor merely on the ground that he judicially knows of facts that would support an answer. His judicial knowledge must go farther, and be so broad and all-embracing that he can properly hold that no facts exist that would tend to controvert the supposed answer and support a replication and the bill. This is so because, if such facts exist, the complainant is entitled to a hearing where he can present and argue the facts, and such a hearing cannot be had on demurrer to the bill."

To the same effect is Bronk v. Charles H. Scott Co., 211 Fed. 338, 128 C. C. A. 17, decided in this court.

[2] To sustain the motion to dismiss, the court must take judicial notice, either that before the alleged invention of Wright particles of baked earthy material of predetermined color, applied as described and claimed in the invention, were used or known in the roofing material art, or that in the employment of such particles after the manner of the patent there is merely the substitution of one for another of old well-known materials, whereby invention is not involved.

The court judicially knows that long before Wright there were roofs, and that various roof surfacings were made by compounding different materials; and it likewise knows that baked earthy materials are among the earliest of manufactures, more ancient indeed than recorded history itself, and that such baked materials are very lasting, and are generally of permanent and uniform color throughout. But does the court judicially know that granular particles of such materials were in use for surfacing composition roofing prior to Wright's invention?

It may be that prior to Wright the baked earthy particles of the patent were in common use for such purpose, but, if so, is that fact so well and commonly known among well-informed persons that a court may judicially notice the fact and predicate a final decree thereon? We venture to say that aside from those skilled in the roofing material art there are comparatively few well-informed persons who know whether or not such baked earthy particles were then or are even now so used. That the fact may have been known to those familiar with the art is not alone enough to warrant judicial assumption of the fact.

Perhaps some judges, like some others in various professions and occupations aside from this particular art, may have had occasion for observation, bringing to them special knowledge on the subject not possessed by persons generally. But this would fall short of that general and widespread knowledge of a fact or condition which would warrant a court, without proof, in taking judicial notice of it.

It is quite true that, as claimed for appellee, courts will take judicial notice of books and other published works of well-recognized merit and authority. But practically, courts with human limitations of their members, do not in all cases instinctively or otherwise know of all such works and their contents. Presumably, able, earnest, and diligent counsel will direct the attention of the court to such works and the parts thereof which are claimed to be pertinent. On this subject we quote from the brief of the appellees:

"The court is at liberty to refer to and consult well-known text-books, encyclopedias, dictionaries, etc., accessible to the public, such as Knight's Ameri-

can Mechanical Dictionary, p. 1973, 'Roofing Fabrics,' Houghton, Noffin & Co., 1881, or Suisbaugh's Digest of Paving and Roofing Compounds, 1873, in each of which pulverized brick is mentioned as a surfacing material for tarred roofing, showing that the device of the patent was old and is anticipated in the art."

The "Digest" referred to was not before us on argument, and we have been unable to find a copy of it. The members of the court sitting herein have no familiarity with it, and although it may be that the work is indeed one of merit and authority, a court could not well predicate action solely upon its revelations, without definite and certain knowledge of what they are. Counsel merely gave their version of what is alleged to be there stated; without quoting the language, from which we might be able to determine for ourselves whether in fact the device of the patent is there so clearly shown or suggested that the court may judicially find it was old in the art. But, at any rate, if this work, however authoritative, does not show the prior art more definitely than is claimed for it in the above quotation from the brief, the court could not judicially say that the alleged novelty of the patent is thereby shown or suggested, any more than it is in Knight. Knight is admitted on both sides to be a work of standard authority. In appellees' brief attention is not directed to any particular part of this very voluminous work, which it is claimed affords a sufficient basis for the court's judicial knowledge of the prior art. In volume 2 of the edition of 1877, p. 1973, under the general title "Roof," we find this:

"Among other kinds of roof coverings may be cited fabric or paper saturated in tar and covered with sand and gravel. Fabric or paper treated with a material which will resist sun, rain, and frost. Among the compositions for this purpose are the following."

Then follow 23 formulæ, of which the one which to us seems the nearest the patent is the following: "Sifted gravel, 3; pulverized brick, 0.5; litharge, 0.12; linseed oil, 0.25; Japan varnish, 0.08"—the numerals evidently indicating the number of parts of each ingredient.

[3] Whether all of these ingredients are to be mixed into a mass and thus applied, or whether the dry materials are to be mixed together and then spread upon a sticky substance applied to the roofing sheets, is not apparent from the article. If the former, then the court surely could not judicially say that such a product would suggest the patented device. "Pulverized brick" is brick which is reduced to a powder, and this ingredient of a mixture, as appears from Knight, does not of absolute necessity suggest the "comparatively coarse particles of baked earthy materials of predetermined coloring" of the patent claim 1, spread upon and adhering to the sheet. Nor does the Knight formula require or permit the court of its judicial knowledge to adjudge that such a mixture of various materials, of which pulverized brick is so small a component part, is the product of the patent, or would necessarily suggest the patented article, whose surface is composed of the particles of baked earthy materials, unmixed with other things.

It may be possible that through evidence of those skilled in the art connection between the Knight formula and the patented article would abundantly appear. But this cannot be adjudged from the face of the bill.

It is urged that the court judicially knows that gravel and the like substances for surfacing roofs, through being spread upon a sticky coating such as tar were in long and common use before Wright, and that brick and other baked earthy substances, being likewise old, the employment of brick particles in the place of gravel and like substances was simply and only the substitution of one for another of well-known materials, not involving any invention. Conceding that gravel and such substances were in well-known and general prior use for such purpose, and, of course, that brick is old, can it be judicially said that in thus surfacing the roofing sheets with coarse baked earthy particles as provided in the patent a novel and useful result has not been achieved, and that therein invention is in no event involved? The Patent Office presumably found novelty and utility in Wright's invention, and the presumption of the validity of the patent which it granted may not lightly be set at naught.

We deem it within the range of possible conception that there may be extant evidence which might bring this patent within the class of cases of which Westmoreland Specialty Co. v. Hogan, 167 Fed. 327, 93 C. C. A. 31, is typical. There a patent was upheld for a celluloid cap for salt shakers because it appeared from the evidence that by the substitution of celluloid for metal as theretofore used a distinctly novel and beneficial result was achieved involving invention, even though such result or possibility was not pointed out in the patent, and at the time of the grant was unknown to the patentee.

In George Frost Co. v. Cohn et al., 119 Fed. 505, 56 C. C. A. 185 (2d C. C. A.), the patent consisted in the substitution of rubber for metal in a hose supporter, and the court, sustaining the patent, said:

"It is not necessary to the patentable novelty of a device, which consists in employing a new material for an old one in constructing one of its parts, that the substitution should involve the discovery or utilization of an unknown or unexpected property of the material. This is one of the tests of patentable novelty, but it is not the only one. Whether the feature of novelty is the employment of a new material, or a change of adaptation in other respects, the inquiry always is whether what was done involved the exercise of inventive faculty as distinguished from the ordinary skill of the calling."

Hotchkiss v. Greenwood, 11 How. 248, 13 L. Ed. 683, the "door knob" case, urged as here controlling, is hardly applicable at this stage of the litigation. That involved an action at law for damages for infringement of a patent granted for door knobs of baked clay or porcelain material. The court charged the jury inter alia that if from the evidence the jury believe "no more ingenuity was required to construct a knob in this way than that possessed by ordinary mechanics acquainted with the business, the patent was invalid, and the plaintiffs were not entitled to a verdict." The jury found for the defendant, and the Supreme Court sustained the judgment rendered on the verdict, saying in concluding the majority opinion:

"If the foregoing view of the improvement claimed in this patent be correct, it is quite apparent that there was no error in the submission of the questions presented at the trial to the jury; for unless more ingenuity and skill in applying the old method of fastening the shank and the knob were required in the application of it to the clay or porcelain knob than were possessed by an ordinary mechanic acquainted with the business, there was an absence of that degree of skill and ingenuity which constitute essential elements of every invention. In other words, the improvement is the work of the skillful mechanic, not that of the inventor."

In Krell Auto Grand Piano Co. v. Story & Clark Co., 207 Fed. 946, 125 C. C. A. 394, with reference to an appeal from a decree dismissing on demurrer a bill for infringement of patent, we said the following, which accurately describes the situation in the instant case as we view it:

"Granting that appellees' showing and argument, in the absence of other evidence, might justify a finding that the defense of want of invention was sustained, we cannot find as a fact that judicial knowledge extends to the point of knowing that appellant can produce no competent and relevant evidence in support of the patent's presumptive validity and in antagonism of the inference of ultimate fact sought to be drawn from the evidence for the defense."

The decree of the district court is reversed, and the cause remanded, with direction to deny the motion to dismiss the bill.

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## ASBESTOS SHINGLE, SLATE & SHEATHING CO. et al. v. ASBESTOS SHINGLE CO.

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

No. 2398.

PATENTS ⊂=313—SUIT FOR INFRINGEMENT—DISMISSAL ON MOTION.

The dismissal of a bill for infringement of a concededly valid patent on motion based on complainants' answers to interrogatories propounded under equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv) *held* error, as not justified by such answers.

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

Suit in equity by the Asbestos Shingle, Slate & Sheathing Company and Hans Hatschek as executor against the Asbestos Shingle Company. Decree for defendant, and complainants appeal. Reversed.

This is a suit for alleged infringement of reissued patent No. 12594 to Ludwig Hatschek for improvements in the manufacture of imitation stone plates, slabs, or tiles, for the process as well as for the product. The process covered by his patent consists in mixing hydraulic cement with comminuted fibrous substance such as asbestos, in the presence of a large bulk of water, and the continued agitation of the mixture until there is formed a watery pulp capable of being worked through a cardboard machine, whereby the thin paste containing the cement and fiber is conveyed to and upon an endless rotating porous fabric through which the water flows off, leaving a layer of the intermixed

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

fiber and cement, which layer is wound upon a rotating cylinder, and, when the superposed layers have attained sufficient thickness, are removed from the roller, and cut and pressed into the desired shape, whereupon the layers, though apparent in the product, become thoroughly amalgamated, the cement in the embedded fiber sets and the product becomes hard, but somewhat elastic and tough, capable of being cut, sawed or nailed, specially adapting it for use as a substitute for wooden shingles, slate, tile, and the like.

The bill is in the usual form, asking injunctive relief against future infringement, and to it defendant filed answer, denying infringement, and alleging that its product is produced by a process shown in certain letters patent of the United States to one Norton, all applied for and issued more than three years after the date of the reissued patent, Norton's patents being Nos. 979,547, 979,548, 1,140,702, 1,140,703 and 1,140,704, and copies thereof are attached to the answer as exhibits. The answer further states that all of the alleged infringing product which the defendant is charged with having made and sold is like a specimen of such product which is made a part of the answer as "Defendant's Exhibit, Defendant's Product."

Norton's patent No. 979,547 is for a process for producing stone slabs suitable for shingles and the like, by thoroughly mixing together dry cement and finely divided asbestos, and in the dry state feeding it upon a belt which passes through rolls which compress the band of mixed dry materials, after which sufficient water is applied from above to saturate the moving band of mixed materials, which then passes through another set of compressing rolls, and is cut into the desired lengths and pressed into shapes as required. One of the other Norton patents is for the process of passing the dry material on to the belt, and the other Norton patents are for various machines for making the product in accordance with the said Norton processes.

After filing the answer, defendant, pursuant to Equity Rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), filed interrogatories to be answered under oath by plaintiffs, which are as follows:

"(1) By your allegation in the paragraph marked 'Fifth' in the bill of complaint herein that the defendant since the issuance of the plaintiffs' reissued letters patent in suit has manufactured according to the process of said letters patent, and has offered for sale, within the Northern District of Illinois, and elsewhere in the United States asbestos shingles of material containing, embodying, and employing the inventions claimed in said reissued letters patent, do you mean that the infringement consisted in the manufacture according to any of the processes set out in any of the copies of Norton patents marked and filed as exhibits herein (copies of which have been served on your solicitor) of asbestos shingles or other material, or in the sale of the product or products of such process or processes as represented by the specimen marked 'Defendant's Exhibit, Defendant's Product.'

"(2) If your answer to the first interrogatory herein is in the affirmative, then which process or processes set out in said Norton letters patent, or the manufacture or sale of what product, or products of said processes, infringe plaintiffs' reissued letters patent in suit.

"(3) If your answer to the first interrogatory herein is in the negative, then what other process or processes has defendant used, and what other product or products has it made and sold which you do charge to infringe the reissued letters patent in suit?

To these interrogatories plaintiffs filed the following answers:

"I. To interrogatory 1, yes, and in the use of the machines described in all of said patents in such manner and accompanied by such acts as to perform the process and produce the product of the said Hatschek patent in suit."

"II. In answer to interrogatory 2 all of the said patents and the products thereof, and the process and products resulting from the use of the machines and the performance of the acts set forth in the above answer I."

"Plaintiff does not intend by this bill of particulars to limit its rights to show at the trial performance of any and all acts in conjunction with said machines tending to show the use of the same in such manner as to practice the process and produce the product of the Hatschek patent in suit. Plaintiff

also reserves the right of applying at any time before trial to move for leave to modify its bill of particulars hereinbefore set forth."

Defendant then moved to dismiss the bill, and the court granted the motion and dismissed the bill for want of equity.

Clifton V. Edwards, of New York City, for appellants.

A. Parker Smith, of New York City, for appellee.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). The procedure under equity rule 58, as followed in this case, was sanctioned by this court in Bronk v. Charles H. Scott Co., 211 Fed. 338, 128 C. C. A. 17, where it is said:

"If the decree cannot be sustained by an application of the law to the facts admitted by appellant in her bill and in her answers to appellee's interrogatories, the cause must be remanded for trial in due course. Undoubtedly the purpose of authorizing interrogatories was to enable the court to make a summary disposition of a cause by applying the law to an admitted state of facts; but, when the facts are not admitted, neither that rule nor any other warrants a summary disposition on affidavits or other untested showings by the party moving for the summary disposition, in lieu of proofs duly taken with proper opportunity for the adversary to cross-examine."

In the instant case no question arises of the validity of the patent in suit. It was the subject of litigation in Asbestos Shingle, Slate & Sheathing Co. v. Rock Fiber Mfg. Co. (D. C.) 217 Fed. 66, where Circuit Judge Baker, sitting in the District Court for the Northern District of Illinois, held it to be an invention "that is broad and meritorious"; and its validity is here conceded. The defense of noninfringement is the only one which this record raises. The bill broadly and aptly charges infringement, and is upon its face entirely sufficient. To dismiss it on motion would be unwarranted, unless from the answers to the interrogatories it so clearly appears that the defendant did not infringe the patent in suit that the court can say that under no admissible evidence which might by any possibility exist can the conclusion of noninfringement be avoided.

If it were conceded that the process of the Norton patents and the product of the Norton machines produced through following such process do not and cannot infringe the Hatschek process and product, we are nevertheless first confronted with the inquiry whether from the answers to the interrogatories it does conclusively appear that the alleged infringing process follows exclusively the Norton patents, and that the product is the result solely of the Norton processes.

In its first interrogatory defendant asked, in substance, whether by its charge of infringement plaintiffs meant that the infringement consisted in the manufacture according to any of the processes set out in the Norton patent, or in the sale of products of such processes as represented by the specimen filed and marked "Defendant's Exhibit, Defendant's Product." To this interrogatory plaintiffs replied:

"Yes, and in the use of the machines described in all of said patents in such manner and accompanied by such acts as to perform the process and produce the product of the said Hatschek patent in suit."

If what follows the word "yes" were discarded, the answer then might be considered an unequivocal admission by plaintiffs that the alleged infringing process and product followed strictly the Norton patents. But by what right may we disregard this part of the answer? The entire answer is in effect a statement that, while the machines of the Norton patent were used in producing defendant's product, yet the machines were also used in such manner, accompanied by such acts, that the machines performed the processes and produced the product of the Hatschek patent. Whether in fact the machines can or cannot be so operated as to produce such result we do not know, and surely the court cannot, of its judicial knowledge, alone determine. Possibly on further application to the court plaintiffs might have been required to amplify their answer by stating the nature of the use of the machines, and of the accompanying acts which the answer charges result in the infringement of Hatschek's patent. But the record discloses no steps to require such further disclosure, and we must consider the answers as we find them, giving effect to each and every part thereof.

The answer to the second interrogatory does not afford further light. Plaintiffs are there asked to point out which, if any, of the processes or products of the Norton patents are claimed to infringe the reissued patent in suit, and the answer is, "All of them," and this answer again asserts infringement, as it is asserted in the first answer after the word "yes." The third interrogatory was not answered. From these answers it cannot be concluded that the general charge of infringement as made in the bill is limited to such infringement, if any, as would arise from a strict following of the teachings of the Norton patents, and by no possibility from a deviation therefrom in such manner as to involve infringement of Hatschek.

Under these circumstances there was error in dismissing the bill on motion, and the decree is therefore reversed, with direction to the District Court to deny the motion to dismiss the bill.

## VACUUM CLEANER CO. v. INNOVATION ELECTRIC CO., Inc.

(Circuit Court of Appeals, Second Circuit. December 20, 1916.)

No. 132.

1. PATENTS ⊂328—VALIDITY AND INFRINGEMENT—VACUUM CLEANER.
The Kenney patent, No. 847,947, for a vacuum cleaner, was not anticipated, and discloses invention of a fundamental character, which entitles its claims to a broad construction; also *held* infringed.
2. PATENTS ⊂176—CONSTRUCTION OF CLAIMS—"NARROW."
The word "narrow," as used in the claims of a patent in describing the inlet slot of a vacuum cleaner, is not to be regarded as imposing an exact mathematical limitation, or as depriving the patentee of any variation consistent with the principle of operation of the device.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 250⅔–252.
For other definitions, see Words and Phrases, Second Series, Narrow.]

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

Suit in equity by the Vacuum Cleaner Company against the Innovation Electric Company, Incorporated. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 234 Fed. 942.

This is an appeal from a decree of the District Court for the Southern District of New York, adjudging valid the fourth claim of letters patent No. 847,947, and granting a permanent injunction against infringement and an accounting of profits and damages subsequent to October, 1915. The patent is for a vacuum cleaner, and was before Judge Mayer, who heard the present case, in the prior case of Vacuum Cleaner Co. v. American Rotary Valve Co. (D. C.) 227 Fed. 998, where it was held valid as to claims 1, 3, and 4, and infringed.

Francis W. Parker, of Chicago, Ill., and A. L. Kent, of New York City, for appellant.

Charles Neave, William G. McKnight, and Frank C. Cole, all of New York City, for appellee.

Before WARD and ROGERS, Circuit Judges, and AUGUSTUS N. HAND, District Judge.

AUGUSTUS N. HAND, District Judge. [1] The fourth claim of the patent, which alone is in question in this suit, reads as follows:

"4. A cleaner comprising a suction chamber, provided with a narrow inlet-slot, the slot being bounded and defined by lips which lie in the contact-surface of the cleaner, with the outward mouth of the slot lying in the plane of this contact-surface substantially as described."

The patentee in his specification says:

"The object of the invention is to provide an apparatus by which the cleaning or removing of dust may be accomplished with ease and dispatch and to practically clean any suitable surface, object, or article from every adhering particle of dust or dirt which can be removed."

"In the present invention suction is utilized, so that the dust or dirt is sucked into the apparatus and entirely removed from the compartment or room in which the dust was originally. The apparatus employed comprises in

combination a suction-nozzle adapted to be moved over the surface to which it is applied for cleaning and having a narrow inlet-slot, a suction-creating device capable of maintaining a sufficient vacuum, and impurities-collecting means between the nozzle and suction-creating device and suitably connected therewith for removing the impurities from the air. When the apparatus is employed for cleaning carpets or other fabrics, the air is forced to penetrate the fabric at the suction-nozzle, whereby the dust is removed from the body of the fabric as well as from the surface without subjecting the fabric to any mechanical action that will wear it away."

* * * * * * * * * *

"The slot is restricted and narrow, and the bounding and defining lips thereof are so disposed that the outward mouth of the slot lies in what when the cleaner is in use constitutes the contact-surface of the implement, so that it will hug the surface to be cleaned."

Defendant earnestly insists that the vital elements of claim 4 are:

(1) A suction chamber of large cross-section as compared with its inlet-slot and as distinguished from an open-mouthed box.

(2) A narrow slitlike slot less than one-half inch, and preferably not more than one-eighth inch in width.

(3) Lips protruding at the sides of the slot so close together that they can be forced down into cracks and crevices and deep into the carpet, and will permit the tool to be rocked by its rigid handle without displacement of the lips.

In regard to the suction-chamber, claim 4 of the patent in suit first appeared as claim 1 of Kenney's application, serial No. 147,968, filed March 16, 1903, which afterwards resulted in patent No. 847,948. The only difference in the language of the two claims is that claim 1 originally described the inlet-slot as "restricted," whereas, later, it was, upon amendment, described as "narrow." In the application for patent No. 847,948, Kenney said:

"The suction-chamber in the stock is merely a communicating passage-way for the air between the slot and the tubular portion of this passage-way. It is of sufficient capacity to freely allow the air to pass, and is without sharp corners or enlarged portions where the velocity of the air can become reduced and the dust deposited."

This claim was rejected by the primary examiner on the patents to Howard and Thurman, among others. On appeal from his decision, the board of examiners said (Record page 1002):

"Claim 1 is rejected by the examiner upon the patents to Howard and Thurman.

"Thurman's patent was granted on an application filed December 17, 1901. This applicant has on file another application filed November 29, 1901, serial No. 84,058, disclosing the subject-matter of this claim. Thurman's patent is therefore too late in date to be an anticipation.

"The patent to Howard shows a suction-nozzle for use in a device of this kind, which has a long narrow slot, but instead of lying in the plane of the contact-surface, the end of the nozzle is arc-shaped. While the difference in structure is small, the curve on the end of the nozzle would render the device inoperative for the appellant's purpose. This claim is, in our opinion, allowable."

The examiners in chief thereupon reversed the examiner as to claim 1, and ordered it transferred to the application for the patent in suit, and it was so transferred and became claim 4 hereof. It seems clear therefore that the statement in the specification of the application from

which this claim was taken, to the effect that a suction chamber "is merely a communicating passage-way for the air between the slot and the tubular portion of this passage-way," is to be fairly regarded as the construction put by Kenney himself upon the words "suction-chamber." It may be added that the definition of a suction-chamber given above is the only specific definition given of it throughout the various Kenney applications in which the word is used, and nowhere is it said that it must be relatively large. The argument advanced by defendant that the definition of "suction-chamber" referred to above related only to certain structures in application, serial No. 147,968, is not convincing. Not only do these structures resemble those in the patent in suit, but the transfer of the claim to the patent in suit by the direction of the board of examiners naturally leads to the conclusion that the claim as there construed was especially applicable to the present patent. Furthermore, it seems to be agreed by both experts that the equalization of the suction at the mouth of the slot is principally regulated by the closeness of the contact of the lips of the slot to the carpet or other contact-surface, and that a large chamber is not necessary to prevent an inequality between the flow of air in the middle and at the extreme ends of the slot, except in cases where there is not a sealing-contact. A large suction-chamber would appear, therefore, to be unnecessary for the practical working of the vacuum cleaner, as well as not embodied in several of the complainant's devices shown in the patent drawings, or in certain of those in commerial use.

As for the width of the slot, it is true that Kenney in his arguments before the Patent Office recommended a slot not more than one-sixteenth, and in another place not more than one-eighth of an inch wide. No width of the slot, however, is prescribed either in the claim or the specification. It must be a "narrow inlet-slot." That it need be of no fixed width, however, is manifest from the specification which provides:

"By adjusting the front or toe section *25b* of the bottom plate to or from the section *25a* the slot may be narrowed or widened according to the work required."

The term "narrow inlet-slot" is one of degree, and while the complainant's cleaner in commercial use has a narrow slot not exceeding one-half inch, and the file wrapper indicates that he had a preference for a slot only one-sixteenth of an inch in width, yet the defendant's slot is, comparatively speaking, narrow. Defendant's cleaner "Liberty" has a slot of 1⅝ inches, and the "Magic" of three-fourths to seven-eighths of an inch. The complainant was the first to design a commercially successful vacuum cleaner and is entitled to have a broad interpretation given to the claims of the patent. The defendant has produced a device operating on a like principle, which removes less dirt from the carpet than complainant's device because it employs a lower vacuum. It employs this lower vacuum to prevent the larger slot from sticking to the door.

The contention of the defendant that the patent in suit calls for a device with protruding lips is wholly untenable, for the reason that the specification in discussing the hand implement says:

"* * * The slot, where the shoe has a flat bottom of considerable extent, may be provided with projecting lips *24a*, *24b*, formed, respectively, on the bottom sections *25a*, *25b*."

Not only do the words of the specification make the use of protruding lips optional, but the drawings, figures 9 and 11, apparently indicate no such lips. The inventor undoubtedly contemplated a machine that made a close contact with the carpet. He says, on page 2, line 38, of the specification:

"The slot is restricted and narrow, and the bounding and defining lips thereof are so disposed that the outward mouth of the slot lies in what when the cleaner is in use constitutes the contact-surface of the implement, so that it will hug the surface to be cleaned."

This result is accomplished by both the complainant's and defendant's devices. While the cleaner of the defendant is elevated upon rollers, it still comes in close contact by the suction which brings the carpet up to the lips of the cleaner.

The Cummings patent, No. 460,935, the British patent to Howard and Taite, No. 10,271, of 1896, and the American patent to Thurman, No. 695,967, of March 25, 1902, are relied upon by the defendant to establish anticipation of Kenney's patent, or at least lack of invention on the part of Kenney.

The Cummings patent does not seem to have met with any commercial success, or to have been a practicable device. The son of Cummings testified that his cleaner was mounted upon a truck, and had a hood that was about 8 inches wide by 12 inches long. Indeed the original device was 12 by 14, and the narrower slot was the result of reduction after experiment. The inventor, of course, found that the cleaner stuck to the floor, and had the power reduced accordingly. He attempted to market this device for about 2½ years without success, although his financial resources seem to have been quite as great as Kenney's. Neither the specification, drawings, nor the history of the Cummings' device, as related by his son, indicate that he understood the vacuum cleaner process which Kenney first made practicable.

The patent to Howard and Taite calls for a suction chamber having a flattened, flaring front, on the lower side of which is an elongated narrow inlet aperture that may be of arc-shape. While the specification does not require an arc-shape apparatus, yet all the diagrams indicate that design, and there is no evidence that any other design was ever used, or that the device ever met with any commercial success. The examiners in chief allowed claim 4 in spite of this reference, and overruled the primary examiner, saying that "the curve on the end of the nozzle would render the device inoperative." (Record, p. 1003).

We do not find that Howard and Taite realized the value of a sealing contact between the cleaner and the carpet, which their device certainly did not show.

The Thurman patent is clearly not applicable. The specification describes a blast nozzle, and the inventor does not appear to have attempted to design a vacuum cleaner, or to have understood the process of vacuum cleaning.

[2] It is further contended by the defendant that the words "narrow inlet-slot" should either be confined to a very narrow slot of one-half

inch in width or under, or should be regarded as void for indefiniteness. It was said by this court in the recent case of Eibel Process Co. v. Remington-Martin Co., 234 Fed. 624, —— C. C. A. ——, where it had been urged in argument that such words as "substantial elevation," "high elevation," and "rapidly" rendered the claims void for indefiniteness and uncertainty:

"It is difficult to lay down a rule, and it is best to confine the test of indefiniteness to the facts of a particular case. Where, as here, the principle of operation is made clear, * * * and the worker in the art has no difficulty in following the directions, then a claim using the phraseology of claims 1, 2, and 3 will not be held invalid. Any other construction might readily result in depriving a meritorious invention of its commercial value."

The District Judge, upon the application for a preliminary injunction, said:

"Obviously, 'narrow' cannot be defined within exact mathematical limits. Kenney produced a vacuum as distinguished from an air current. The tool had a narrow inlet-slot and made a sealing-contact with the surface to be cleaned. The specification and the claims did not limit Kenney to exact mathematical dimensions, for to have done so would have rendered the patent useless, and would have amounted to an open invitation to avoid infringement by means of slight changes. Narrow, of course, does not mean as wide as the Atlantic, nor as restricted as the eye of a needle. It means the width relatively which, in conjunction with the other elements relied on produces the vacuum result, whereby the dirt is sucked up and not blown up as in the air-current principle; and, of course, the device must be operative because patents are not abstractions but real things."

The Cummings device, as originally made, had an opening 12 inches by 14. In other words, it was practically a square box. Kenney taught the art that such were not the proper proportions, and that the slot should be narrow as compared with its length. He showed this by drawings accompanying his application. Neither the drawings, the terms of the specification, nor any of the elements in the claim under consideration limited Kenney to a slot of any definite width. Notwithstanding this, his patent is not open to charges of indefiniteness, for he gave to the world the new idea of a narrow inlet-slot "with the outward mouth of the slot lying in the plane of this contact-surface," and illustrated it in such a way that any skilled mechanic could make a practically operative vacuum cleaner. If such a valuable invention is to be protected, variations in the width of the slot rendered operative by decreasing somewhat the vacuum should not be held to lie outside of the claims of the patent.

It was demonstrated at the trial that a vacuum properly localized at a narrow slot results in the most complete elimination of dirt and dust. The narrower the slot, the more completely this is done. The defendant's devices, having wider slots than the complainant's, do not remove dirt which is seated deeply in the fabric as well as do complainant's cleaners. Nevertheless, they operate in the same way. In view of the state of the art at the time Kenney applied for his patent, it can fairly be said that he taught it the value of a narrow slot which could be readily moved without sticking to the carpet, or causing abrasions of the carpet, and of a sealing-contact. The defendant's devices all do this. They can be prevented from sticking to the carpet by decreasing

the vacuum which complainant uses. This renders the device less efficient, but still efficient enough to remove considerable dirt. It operates in exactly the same way as complainant's, only less well.

The defendant says that complainant's patent belongs to one class of suction-cleaning machines, while the machines of defendant belong to another. He insists that there are two classes of sweepers, one in which several sweeping tools work upon a single pump, the other in which but one sweeping tool works from a sweeping pump, and, distinguishing the two systems, says that the high vacuum multiple system of Kenney requires the narrow slot in order that more than one tool may be used at the same time. This argument is not one which goes to the character of the invention, or the disclosure of the patent in suit. It is rather a comparison between the amount of vacuum required for a large multiple tool plant and that required for a hand device. Furthermore, Kenney's patent nowhere sets forth the amount of vacuum required, which is to be determined by experiment in each particular case. Complainant's patent discloses a mode of operation equally suited for both a large plant and a hand cleaner. It is possible that a wider slot may be more desirable for one purpose than for another, but that a comparatively narrow slot is practically requisite for each was taught by Kenney, and has been proved by experience.

We have not discussed the comparative merits of the vacuum theory as contrasted with the air-current theory, nor do we think it is from any point of view necessary. Complainant's expert, Prof. Reeve, convinced the District Judge that the vacuum principle was the true one, and appears to have demonstrated it by his experiments. Reeve said:

"Whichever be true, the fact remains that air currents are produced only by differences in air pressure, and air currents, as well as vacuum, can operate on the dirt in the carpet only at the lip of the sweeper, so that in either event, or in either aspect of the case, there must be concentration of vacuum at the lip, and the efficiency of the power transmission of the whole apparatus is measured by the proportion of the original vacuum available which is made effective at the lip of the nozzle." Record, p. 195.

Kenney, with little or no capital, invented a cleaner which has met with great success by reason of the novelty and intrinsic merits of the device. The hand implement under consideration is one of the forms of the Kenney invention. We think Kenney's contribution to the art of vacuum cleaning has been sufficiently fundamental to entitle his patent to a broad interpretation, and, when given such interpretation, there can be no doubt that the defendant's devices infringe.

The decree is affirmed.

## PIERCE v. BELL.

(District Court, S. D. New York. January 18, 1917.)

No. 27.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—SEWING MACHINE ATTACHMENTS.
The Pierce patent, No. 1,154,337, for a picot cutting attachment for sewing machines, was the invention of the patentee and is valid; also, *held* infringed.

2. PATENTS ⊂=328—VALIDITY OF REISSUE—SEWING MACHINE ATTACHMENT.
The Bell reissue patent, No. 14,194 (original No. 1,111,432), for a sewing machine attachment, in the claims added goes far beyond the invention claimed in the original patent and is invalid.

3. PATENTS ⊂=136—REISSUES—GROUNDS.
The general purpose of the statute providing for reissues is to correct mistakes and errors, not to enable the inventor to extend his monopoly so as to cover progress by others in the art.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 198½.]

4. PATENTS ⊂=147—REISSUES—VALIDITY.
The introduction in a reissue patent of claims for invention which are described, but which the patentee neither claimed nor intended to claim by the original patent, is unauthorized and void.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 220.]

In Equity. Suit by William L. Pierce against William J. Bell, and cross-bill. On final hearing. Decree for complainant.

Samuel E. Darby, of New York City, for plaintiff.
Thomas A. Hill, of New York City, for defendant.

MANTON, District Judge. Plaintiff, owner and inventor of letters patent No. 1,154,337 issued on September 21, 1915, brings this action for infringement. Defendant, owner of patent No. 1,111,432 granted September 22, 1914, answers and files a cross-bill alleging infringement by the plaintiff on a reissue of defendant's original patent which is numbered 14,194 and was granted September 26, 1916.

[1] The invention relates to an attachment for a sewing machine and is described as a picot cutting attachment. It is used in connection with sewing machines for making hemstitching. The defendant's invention is a similar device which it is alleged contains all the features of the plaintiff's patent in suit. The defendant contends, first, that he and not the plaintiff is the inventor of the lifting attachment of the patent in suit; second, that the plaintiff obtained the idea of the patent in suit while in his employ and constructed the invention by using his tools and material, and that he stole the idea from the defendant because he knew that defendant had constructed a working model of the device and had seen the same before plaintiff applied for his patent; and, third, that the attachments which are alleged to infringe are the subject-matter of the reissued patent No. 14,194 dated September 26, 1916, which is a reissue of the original patent No. 1,111,432 granted to him September 22, 1914, and that the plaintiff infringes the said reissued patent.

I am not impressed with the testimony that tends to support the claim of the defendant as to the first and second defenses, and, from the evidence in suit, I am of the opinion that plaintiff invented the lifting attachment of the patent in suit. Nor do I think that the plaintiff constructed the invention by using the defendant's tools and material, or that he stole the idea from the defendant because he knew that the defendant had constructed a working model of the device and had seen the same before the plaintiff applied for his patent. As to plaintiff's patent No. 1,154,337, he says in his specifications:

"This invention relates to attachments for sewing machines and particularly to devices of this class known as picot cutting attachments used in connection with sewing machines designed for making hem stitching and employing two needles which have the usual vertical and lateral movement. The object of my invention," says the patentee, "is to provide an improved attachment of this class which is simple in construction and automatic and efficient in operation."

Claims 1 and 4, which are said to be infringed, read as follows:

"1. The combination with the presser foot bar of a hemstitch sewing machine of the usual rock shaft and presser foot bracket attachment having two presser feet, the lower end of said bar being also provided with a vertical slot, and two blades pivoted in said slot and operating between said feet, one of said blades being in operative connection with the rock shaft and the other being provided with a tensional connection rearwardly of the presser foot bar, and means for throwing the last blade in a raised position."

"4. The combination with the presser foot bar of a hemstitch sewing machine having the usual rock shaft and two presser feet, of two blades pivotally supported and operating between said feet, one of said blades being in operative connection with the rock shaft and the other being provided with a tensional connection rearwardly of the presser foot bar, and means for raising the front end of the last-named blade and holding the bottom edge above the bottom surface of the presser foot."

In the specification of his patent, plaintiff points out its construction as follows:

"In the drawing forming part of this specification, I have shown at *a* the presser foot bar of a hemstitch sewing machine, and at *b* the rock shaft, and I have also shown at *c* the throat plate of the machine and at *d* a workpiece placed thereon. I have also shown at *e* the usual presser foot bracket which is connected with the bar *a* in the usual manner, and which is composed of two similar side pieces $e^2$ with the lower ends of which are connected oppositely arranged presser feet $e^3$, and the presser feet $e^3$ are pivoted to the side members $e^2$ of the bracket *e* in the usual manner, but as all these parts are of the usual construction and form no part of my invention this pivotal attachment is not shown.

"In the practice of my invention, I form in the lower end of the presser foot bar *a* a vertical slot $a^2$ and pivoted therein, as shown at $a^3$, are blade members *f* and *g*.

"The bracket *e* is provided with a backwardly directed arm $e^4$ through which the bar *a* passes and the blades *f* and *g* are provided with upwardly directed lugs or projections *h* which limit the movements of said blades, and the arm $e^4$ of the bracket *e* forms stops in connection with which said lugs or projections operate.

"The blade *g* extends backwardly beyond the blade *f* as shown at $g^2$, and connected therewith is a crank rod *i*, and secured to the rock shaft *b* as shown at *j* is a yoke $j^2$ having a short arm $j^3$ with which the rod *i* is connected, as shown at $i^2$, and a spiral spring $j^4$ is connected with the rear end of the blade *f* and with the rod *i* at a predetermined point above the connection of said rod with the rear end $g^2$ of the blade *g*.

"The blade $f$ is provided at its front end with a forwardly directed nose piece $f^2$ having a downwardly and forwardly tapered top cutting edge $f^3$ at the rear end of which is a vertical shoulder $f^4$, and the blade $g$ is provided with a forwardly directed nose piece $g^3$ having a bottom cutting edge $g^4$ which is tapered forwardly and upwardly.

"In the top edge of the rear end of the arm $f$ is a notch or recess $f^5$, and pivoted to a part $e^5$ of the bracket $e$ as shown at $e^6$ is an arm $k$, the lower end of which is provided with a notch or recess $k^2$ and the upper end of said arm is provided at one side edge thereof with an extension $k^3$ with which is connected a spiral spring $k^4$ which is also connected with the bracket $e$ at $k^5$, and the object of the arm $k$ is to lock the blade $f$ in inoperative position when it is desired to make hemstitching and not desired to cut said hemstitching to form picot edges, and in order to do this the arm $k$ is thrown into the position shown in dotted lines in Fig. 4, in which position the rear end of said blade is forced downwardly and the nose piece $f^2$ raised above the workpiece or fabric in which the hemstitching is being formed, and in this position of the parts the cutting attachment is not in use or in operation."

[2] The Pierce invention is the provision of a combination of elements in a picot attachment for sewing machines which permits the raising out of cutting position the knives of the attachment so that the sewing machine may be employed for other purposes besides cutting picot edging. With this invention, it is unnecessary to remove the attachment from the hemstitching machine as was necessary in the prior devices. Bell's original patent, No. 1,111,432, states its object to be:

"The primary object of this invention is to provide a cutting or trimming attachment for sewing machines which is especially adapted for use in connection with a two needle machine and which is of extremely practical and efficient construction.

"Another object of the invention is to provide a trimming attachment including a reciprocating rod movable through a hollow presser bar and provided upon its lower end with a knife which co-operates with a cutter plate to cut such work as may be desired."

He states the construction of his invention as follows:

"1. In combination with a sewing machine having a hollow presser bar, a rod slidable through said bar, means for reciprocating said rod, a knife secured to one end of the rod, and a slotted cutter plate for co-operation with the knife.

"2. In combination with a sewing machine having a hollow presser bar, a rod slidable through said presser bar, means for reciprocating the rod, the lower end of the rod being bifurcated, a knife, means for adjustably securing the knife to the bifurcated end of said rod, and a slotted cutter plate for co-operation with the knife."

It will be seen that his invention, as claimed, consists of the following elements: (a) A hollow presser bar; (b) a rod slidable through said bar; (c) a knife secured to one end of the rod; (d) means for reciprocating said rod; and (e) a slotted cutter plate for co-operation with the knife.

Referring to his slidable bar, Bell states:

"In carrying out my invention, I provide a rod *9*, which extends through the hollow presser box *8*, and which projects some distance beyond each end thereof. The lower end of the bar *9* is bifurcated to form the opposed ears *10* between which a knife *11* is secured by means of a screw *12*."

Referring to the knife secured to the bar, he states:

"The screw extends through alined openings formed in the ears and the knife and when tightened holds the knife rigidly against movement relative to the rod *9*. By loosening the screw *12* in the alined openings formed in the ears *10*, the knife *11* may be adjusted to conform to the thickness of the material being cut. Referring to Fig. 2 it will be seen that this knife extends rearwardly from the bar *9*, converges toward its rear extremity, and had its cutting edge inclined rearwardly and downwardly. The extremity *12* of the knife is extended downwardly to form a sort of bill or hook."

Referring to the element as stated in his claim as "a slotted cutter plate," Bell describes this feature of his invention as follows:

"This knife co-operated with a cutter plate *13*, mounted upon the needle plate *14*, and provided with a longitudinal slot *15* through which the knife passes."

Bell then describes the operation of his device as follows:

"From the foregoing description the construction of my trimming attachment for sewing machines will be clearly understood, and its operation may be briefly described as follows: Supposing the machine to be used for forming picot edging; the needles *4* co-operating with the remainder of the stitching mechanism, will form two parallel rows of stitching connected by cross-stitches, and as the work is fed rearwardly under the presser foot *6*, the knife *11* will raise and lower and sever the cross stitches, which pass over the slot *15* formed in the cutter plate *13*. It will, of course, be understood that my attachment may be used for other purposes than that of trimming picot edging."

From this Bell's invention consisted in providing a hollow presser bar through which operated a rod provided at its lower end with a knife which co-operated with a slotted cutter plate mounted on the needle plate of the machine for the purpose of cutting between the stitches of the picot edging.

Next considering the defendant's contention that the attachments which are alleged to infringe are the subject-matter of a reissued patent granted to him on his original patent and that the plaintiff infringes this reissued patent, we find that, three days after this action was started, the application for the reissue of this patent was filed in the Patent Office.

Can it be said that Pierce's invention was an infringement of Bell's original patent No. 1,111,432? From a description as given herein of each patent and a statement of its construction, it cannot be said to be an infringement, except it may be found that the reissue of the patent as herein stated was legal and properly allowed. Referring to the reissued patent, it will be found that the only change made therein was two more claims; the specifications remain the same as contained in the original patent. The two claims are as follows:

"3. The combination with the presser foot bar of a hemstitch sewing machine, of the usual rock shaft, and presser foot bracket attachment having a presser foot, cutting mechanism comprising a member operatively connected to said rock shaft, another cutting member in cutting relation with said first mentioned member, and both of said members in the line of feed beyond said presser foot.

"4. The combination with the presser foot bar of a hemstitch sewing machine, of the usual rock shaft, and presser foot bracket attachment having a presser foot, cutting mechanism comprising two members, one of said mem-

bers operatively connected to said rock shaft, and both of said cutting members in the line of feed beyond said presser foot."

These claims as contained in the reissued patent are much broader than the original claims. Analyzing the claims, it will be seen that they are composed of the combination with a presser foot bar of a hemstitch sewing machine, (1) the usual rock shaft and presser foot bracket attachment, having a presser foot, and (2) the cutting mechanism comprising a member operatively connected to said rock shaft, another member in cutting relation with the first mentioned member, and both of said members in the line of feed beyond the presser foot.

In this, Bell has gone far beyond the claims of the original patent where he limited himself to a hollow presser bar, a rod slidable through said bar, a knife secured to one end of the rod, and a slotted cutter plate for co-operation with the knife. Instead, here he claims a "presser foot bar of a hemstitching sewing machine," "the usual rock shaft cutting mechanism operatively connected with the rock shaft," and "another member in cutting relation with the first mentioned member."

Provision is made in section 4916 of the Revised Statutes (Comp. St. 1913, § 9461) for the reissuing of a patent, where it is said:

"Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee, or, in * * * case of his death or of an assignment of the whole or any undivided part of the original patent, then to his executors, administrators, or assigns, for the unexpired part of the term of the original patent. * * * Every patent so reissued, together with the corrected specification, shall have the same effect and operation in law, on the trial of all actions for causes thereafter arising, as if the same had been originally filed in such corrected form; but no new matter shall be introduced into the specification, nor in case of a machine patent shall the model or drawings be amended, except each by the other; but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the Commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid."

[3] The object of this statute is to protect and secure for the inventor adequate protection which through some inadvertence, accident, or mistake he has not secured, but this must occur without any fraudulent intention. The invention cannot cover another invention than that of the original, nor can it cover what was described and claimed after long delay. The general purpose of the statute providing for reissue was to correct mistakes and errors, not to enable the inventor from time to time to extend his monopoly so as to cover progress by others in his art. Miller v. Brass Co., 104 U. S. 350, 26 L. Ed. 783; Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; Crown Co. v. Aluminum Co., 108 Fed. 845, 48 C. C. A. 72.

Bell had notice of plaintiff's device, for the suit was started when he applied for the reissue. He apparently did not discover any mistake or error in his patent, but at that time and prior to this suit there

was evidence which shows that plaintiff's article was on the market. Indeed, his reason at the trial for applying for a reissue of the patent is not convincing, and I am inclined to the belief that the reissued patent was applied for solely for the purpose of including the plaintiff's patent within its scope and thereby avoid a charge of infringement. Newton v. Furst, 119 U. S. 373, 7 Sup. Ct. 369, 30 L. Ed. 442; Electric Gas Co. v. Boston Electric Co., 139 U. S. 491, 11 Sup. Ct. 586, 35 L. Ed. 250; Matthews v. Ironclad Mfg. Co., 124 U. S. 347, 8 Sup. Ct. 639, 31 L. Ed. 477.

[4] Indeed, no inadvertence, accident, or mistake is shown, and this reissued patent is therefore invalid. Worden v. Searls, 121 U. S. 14, 7 Sup. Ct. 814, 30 L. Ed. 853. The introduction in a reissued patent of claims for invention which are described but which the patentee neither claimed nor intended to claim by the original patent is unauthorized and void. Ide v. Trorlicht, etc., Co., 115 Fed. 137, 53 C. C. A. 341; Clements v. Odorless Apparatus Co., 109 U. S. 641, 3 Sup. Ct. 525, 27 L. Ed. 1060. There is another rule of law that is an obstacle to the defendant's claim. The doctrine of laches may well defeat the defendant even though it may be said that his reissued patent is legal. Coon v. Wilson, 113 U. S. 268, 5 Sup. Ct. 537, 28 L. Ed. 963; Ives v. Sargent, 119 U. S. 653, 7 Sup. Ct. 436, 30 L. Ed. 544.

We find from his original patent that the defendant has two claims limited to the structure as described in the specifications and pointed out in the drawings. The reissued patent must be assumed to have been applied for and obtained because the patentee believed the claims of his original patent, when failing to construe any connection with other parts of the specification, could not be made to include the plaintiff's structure. Claim 3 of the reissued patent says:

"The combination with a presser foot bar of a hemstitching sewing machine of the usual rock shaft and presser foot bracket attachment having a presser foot. Cutting mechanism comprising a member operatively connected to said rock shaft."

The Pierce device has a cutting mechanism having a member operatively connected with the rock shaft. The reissued patent further states:

"Another cutting member in cutting relation with said first mentioned member."

The plaintiff has another member in cutting relation with the other cutting member and the claim further says "and both of said members in the line of feed beyond said presser foot."

By reference to the Abercrombie patent of the prior art, there appear all the elements of the reissued claims 3 and 4 of Bell. The distinction between Bell's and the Abercrombie is the fact that the cutting members of the Abercrombie are between the presser foot, while in the Bell the cutting member as described in his patent and shown in his drawing are beyond the presser foot. Pierce's structure follows Abercrombie and has his cutting mechanism between the presser foot.

This element contained in the reissued claims seems to defeat Bell in his attempt to expand his claims in order to bring Pierce's device within the scope of his patent. In other respects, the claims of Bell are covered by Pierce's structure. Pierce's invention consists in the provision of engaging elements in the picot cutting attachment for sewing machines which permits the raising out of cutting position the knives of the attachment so that the sewing machine may be employed for other purposes besides cutting picot edging. Bell's patent contemplated the use of one knife and a slotted cutter.

Pierce entered the service of Bell under a contract by which he was to sell the defendant's original invention outside of the territory of New York, under commissions stated in the contract. This would not forbid his making and having patented an invention as claimed by the plaintiff. He left the city June 1, 1914, for Philadelphia, and remained until June 28th, or a day or two after, and was gone until July 28th. Bell's shop was closed during July and August. It further appears that Pierce made his first model at the Pansy Waist Company about September 1, 1914, and later worked in the shop of Max Grundfast.

I am not impressed therefore with the claim that the plaintiff used the tools of the defendant in working on his invention. The testimony opposed to this given by the defendant's witnesses is not satisfactory. I do not think that Pierce knew or saw the defendant working on or experimenting on the cutting off attachment. Indeed, Bell said on the trial that the plaintiff never saw him working or experimenting on the model referred to; he claims that the plaintiff saw the device laying around in the shop in his tool box, and that was how the plaintiff "conceived the idea."

I am of opinion that the sale of defendant's attachment is an infringement of plaintiff's patent, and that the reissued patent is illegal and void; and I will, accordingly, grant a decree of infringement to the plaintiff against the defendant and dismiss the cross-bill filed by the defendant.

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## WENDELL et al. v. AMERICAN LAUNDRY MACHINERY CO. et al.

(District Court, E. D. Pennsylvania. January 23, 1917.)

No. 1451.

1. PATENTS ⟸81—ANTICIPATION BY PRIOR USE—MEASURE OF PROOF.
The issuance of a patent gives to the patentee the prima facie right to the invention, of which he cannot be deprived on the ground of prior public use of the same machine by others except upon clear evidence.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 104.]

2. PATENTS ⟸83—VALIDITY—"ABANDONMENT" OF INVENTION.
The fact of prior public use of a machine with permission of the inventor prior to the application for a patent may justify a finding of abandonment, but such public use for a period of more than two years

prior to the application is itself an "abandonment" in fact, unless such use is shown by clear, unequivocal, and convincing evidence to have been for experimental purposes only.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 108, 109.

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

3. PATENTS ⊜328—VALIDITY—PRIOR PUBLIC USE—IRONING MACHINE.

The Wendell patent, No. 1,137,438, for an ironing machine, is void for prior sale and public commercial use of the machines for more than two years prior to the application.

In Equity. Suit by Theresa S. Wendell, administratrix, and the Willey Company, Incorporated, against the American Laundry Machinery Company and the Locust Laundry Company. On final hearing. Decree for defendants.

J. Bonsall Taylor and E. Hayward Fairbanks, both of Philadelphia, Pa., for plaintiffs.

Harold E. Stonebraker and Church & Rich, all of Rochester, N. Y., for defendants.

DICKINSON, District Judge. This proceeding involves the validity and infringement of letters patent No. 1,137,438, issued April 27, 1915, to the plaintiff as administratrix of the deceased inventor Fred. C. Wendell. The patent is for an improved ironing machine. A discussion of the many features of this case, which might otherwise be called for, is rendered unnecessary by the finding of one fact. The application for the letters patent was filed February 1, 1913. The fact referred to is that machines embodying all the possibly inventive features of the patented machine had been commercially sold and were in public use following these sales for more than two years prior to the date of application for letters patent.

The difficulties against which the plaintiff struggled in the first place to secure the issue of these letters patent and since to assert their validity against other users are such as to make a strong appeal to the sympathies of any one whose duty it is to find the facts, and because of this predisposes the trier of the facts to make every allowance for these difficulties, and not to exact of her a higher measure of proofs than one so situated could be reasonably asked to furnish.

A proper first inquiry is into what the standard of the strength of such proofs is, and more particularly upon whom the burden of proof rests. To establish clearly the proper application of the adjudged cases and to get a firm grasp of the controlling principles of law which are to be deduced from the cases, certain well-defined distinctions must be kept in mind. The existence of a machine or device prior to the date of application for letters patent may have any one of several different bearings upon the question of the validity of the patent when issued. One of the bearings may be upon the question of invention, or, more accurately speaking, upon the novelty of the device in the sense of priority of invention. The patentee must show a machine or other product of his brains which not only discloses invention, but the in-

vention must have been his own, and, in addition to that, he must have been the first inventor. If therefore a machine is shown to have been in existence before the time the patentee conceived of the invention involved in the construction of it, the fact of this existence would destroy the validity of the patent because it would negative the thought of novelty in the patented machine. This would be true whether this fact of existence was widely known or even known at all. Although the fact may appear that the patentee invented a machine and it possessed novelty and utility and was otherwise patentable, if the patentee had previously to his application permitted the constructed machine to pass into such general use as that it could be held that he had abandoned it to the public, his letters patent would be invalidated. The policy, or at least part of the policy, which is back of this provision of the law, is that an inventor cannot give to the general public the right of every one to make, use, or vend his machine, and thus promote and encourage them to go into an extended manufacture of and investment in it, and when a profitable market is thus created for the machine to step in and monopolize the whole of it.

[1] A third bearing of such prior existence of a patented machine arises out of the provision of the patent law that if the patentee desires to assert the exclusive right to make, use, or vend his machine, he must make his application for letters patent not later than two years before the time he makes commercial use of it or puts it into public use. Different principles of law apply to each of the three conditions of fact which we have instanced. The issuance of the letters patent, supported by the oath of the applicant that he is the first inventor, raises a presumption of the truth of that fact, and gives him the prima facie right to the invention which he claims. When therefore his letters patent are attacked by the averment of the fact that he had been anticipated in the field of invention and that some one else had produced the same patented machine before he conceived the idea of constructing it, the rule is that he cannot thus be deprived of the right conferred upon him by his letters patent, unless the evidence of the prior existence of his patented machine is so clear as to produce a strong conviction of the truth of the asserted fact in the mind of the tribunal passing upon the question, and all doubts arising from the evidence are to be resolved in favor of the patentee. It is sufficient to cite in support of this principle the cases of Morgan v. Daniels, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657; Deering v. Winona, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153.

[2] The second and third instances referred to are in one sense alike, as each may result in a finding of abandonment to the public. There is, however, this statutory distinction: The fact of public use prior to the application may justify a finding of abandonment, but public use existing for a period of more than two years before the application is itself an abandonment in fact. There is, because of this distinction, a difference in the legal principles applicable. That difference is that he who asserts abandonment because of a public use within the two-year period must assume the burden of establishing, not merely the fact of public use, but the essential fact of abandonment involv-

ing the element of intention on the part of the inventor. Where, however, we have the fact of commercial sale, or the fact of public use for more than the two year period, then the objecting party is held only to the burden of proving the fact of commercial sales or of public use beyond the two year period, and when this fact is established the inference follows as a matter so much of course as that it may be said it follows as a conclusion of law. This conclusion can only be escaped by the inventor showing that the use was merely experimental, and for the purpose of subjecting the machine to a practical test of its utility, or otherwise accounting for the use of the machine in such a way as to destroy the value of the evidence of the use as predicating abandonment. The burden, therefore, here shifts to the inventor, and the fact of a commercial sale and of public use beyond the two-year period requires of the inventor to make his exculpating evidence in the language of the adjudged cases "full, clear, unequivocal, and convincing." A subsidiary but very helpful principle of the law to be here applied is that the inquiry is to be directed to the sale or to the use. Was it primarily for testing or experimental purposes, and was any sale or any use merely the incidental accompaniment of the act, the main motive and purpose of which was to experiment or to apply a test, or was the main and primary purpose to commercially profit from the sale or use, and was whatever benefits flowed from it as a test or experiment the incidental accompaniment? Many cases might be cited in support of these principles. It is sufficient to refer to Swain v. Holyoke, 109 Fed. 154, 48 C. C. A. 265; Id., 111 Fed. 408, 49 C. C. A. 419; Egbert v. Lippmann, 104 U. S. 333, 26 L. Ed. 755; Smith v. Sprague, 123 U. S. 249, 8 Sup. Ct. 122, 31 L. Ed. 141; American v. Davy, 220 Fed. 887, 136 C. C. A. 453.

[3] The situation of the plaintiff in this case, as has already been stated, has in it that which makes a very strong appeal to any one to make sure that she has accorded to her all her rights. However strong this appeal, it nevertheless cannot overcome the duty to do justice to all whose rights are concerned. The fact of sales of this patented machine two years prior to the date of her application is too well established by the evidence to be doubted. That the machines thus sold were essentially, so far as involves the claimed inventive features of the patented machine, substantially identical with the machine as patented, likewise cannot be doubted. The testimony of the president of the licensee of the patentee makes this clear. On the face of the pleadings he was testifying against his own interests. The fact would seem to be that there is a considerable sum of money, the ultimate payment of which is dependent upon the final disposition of this case. Just how this fact on a balancing of the financial interests of the witness leaves him is not disclosed; but, independently of this, the documentary evidence in the case, and the absence of any clear-cut statements even, to the contrary, all go to the establishment of the fact that the machines as sold to the trade prior to the two-year period and the machine as patented differ, if they differ at all; only in the bettering of certain mechanical parts, and do not differ in any of the features in which invention is claimed to be shown. Moreover, the machines as sold and

as used were sold as operative machines, and the work done by them justified the claim of merit then made and compels the finding that they were workable.

Counsel for plaintiff have made a very laudable effort to find some principle of law upon which the validity of this patent could be sustained. Supplementing their efforts, we have made a careful examination of all the cases to which we have found reference, and a close analysis of each one of them, and have been unable to find a single case which supports the contention of the plaintiff. There are cases, of course, of which Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000, is an illustration, which support the proposition that a purely experimental or testing use, although extending over a number of years, would not justify a finding of abandonment as a fact nor constitute a public use within the meaning of the two year provision of the patent law. This case recognizes the distinction of which it is in itself a good illustration between a public use and a use by the public. There the use was of a pavement which had been laid in a turnpike or public highway. It was, of course, used by the public traveling that highway, and was laid there for the very purpose of being subjected to such use because in no other way could the merits of a road pavement be subjected to the practical test of travel. The finding there was that, although the pavement was down for a considerable length of time, the circumstances and surrounding conditions of its construction and of its use compelled the finding that this was neither an abandonment to the public of the invention nor a public use within the meaning of the statute. The difference in the state of facts there and in the instant case forces the conclusion that the ruling there is not authority for a like ruling here, but, on the contrary, is an authority for the opposite ruling.

There are other defenses to the validity of this patent which are as strongly urged and upon which as much stress and insistence is laid as upon that branch of the defense which we have discussed. This defense, however, goes to the whole merits of the bill and seems to be so clearly and fully established that a discussion of other matters of defense would seem to be a waste of time.

The bill of complaint is dismissed, with costs, and a decree to this effect may be submitted.

TURNER v. LAUTER PIANO CO. et al.

(District Court, D. New Jersey. January 25, 1917.)

No. 35.

PATENTS ⊂⊃321—SUITS—DECREE—REOPENING.

Where after decree had been directed dismissing a suit for infringement of a patent defendants asked to reopen the case for additional testimony to show an abatement of the suit by the assignment of the patents to a corporation, and the corporation filed a petition of intervention but the date of the assignment did not appear, and its effect on the right to recover for infringement was not shown, but it did appear that the assignee was incorporated some time before the decree, and that plaintiff was one of the original directors, the applications will be denied, because unreasonably delayed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 742–745; Dec. Dig. ⊂⊃321.]

In Equity. Suit by Claude A. P. Turner against the Lauter Piano Company and others. On motion by defendants to reopen the case for further testimony after decree had been directed (236 Fed. 252). Motion denied.

Charles J. Williamson, of Washington, D. C., for complainant.

A. C. Paul, of Minneapolis, Minn., and Edward Rector, of Chicago, Ill., for defendants.

ORR, District Judge. Some months after the opinion was filed in this case, directing that a decree should be presented dismissing the bill, and before any form of decree was submitted, the solicitors for the defendants moved "to suspend the decree and and reopen the case for additional testimony to show abatement of suit." The motion was based upon affidavits tending to show that the plaintiff had assigned the patents in suit to a corporation called the C. A. P. Turner Company, which was organized under the laws of South Dakota, in January, 1915. Shortly after said motion was presented, the plaintiff presented a petition praying that said corporation be permitted to intervene in the present case. Neither the affidavits in support of the defendants' motion nor the petition to intervene exclude the probability that the assignment by the plaintiff to the corporation has not carried with it all damages and profits which might have accrued to the plaintiff prior to the assignment. Neither fixed approximately the time when such assignment was made. It does appear, however, from a certificate of the department of state of South Dakota, that the corporation was formed in January, 1915, and that C. A. P. Turner, of Minneapolis, was one of the original directors.

Inasmuch as the case at bar had been finally heard and was ready for final action, the applications of the parties hereto seem to have been unreasonably delayed. Therefore they have been refused, and a formal decree in accordance with the opinion heretofore filed has been entered this 17th day of January, 1917.

WAVERLY STONE & GRAVEL CO. v. WATERLOO, C. F. & N. RY. CO. et al.

(District Court, N. D. Iowa, E. D. February 9, 1917.)

No. 121.

1. REMOVAL OF CAUSES ⟸79(1)—PROCEEDINGS—TIME FOR TAKING—EFFECT OF DELAY.

It is imperative that the application for removal of a cause from a state court be made within the time fixed by Judicial Code (Act March 3, 1911, c. 231) § 29, 36 Stat. 1095 (Comp. St. 1913, § 1011).

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 135, 136, 139, 140.]

2. REMOVAL OF CAUSES ⟸79(2)—PROCEEDINGS—TIME FOR TAKING—"RULE OF THE COURT."

Under Judicial Code, § 29, requiring a petition for removal of a suit into the District Court to be filed at the time, or any time before, the defendant is required by the laws of the state or the rule of the state court in which the suit is brought to answer or plead to the declaration or complaint, the term "rule of the state court" does not include an order extending the time for pleading in the particular case; but the section means that the petition for removal must be filed before the time to answer or plead, as fixed by statute in states where such time is governed by statute, or as fixed by general rule of the state court in states where the time is fixed by court rule, and a petition for the removal of a cause from the Iowa district court, not filed before noon of the second day of the term in which defendant is cited to appear and answer, which is the time fixed for answer, demurrer, or motion by Code Iowa 1897, § 3550, is too late, though filed within the extended time given for answer.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 141, 142.

For other definitions, see Words and Phrases, Rule of Court.]

3. COURTS ⟸366(1)—RULES OF DECISION—CONSTRUCTION OF STATE STATUTE—TIME FOR PLEADING.

A decision of the state court, construing its statute fixing the time in which a defendant shall answer or plead in the state court, must be followed by the United States court in determining whether the petition for removal was filed in time.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 956, 957.]

4. REMOVAL OF CAUSES ⟸107(5)—PROCEEDINGS—TIME FOR TAKING—PETITION—RULE OF COURT.

An allegation in a petition for removal that under the rules of practice adopted in the state district court the defendant was not required to answer or plead until 15 days after the time fixed therefor by state statute does not prevent remand, where no such rule appears in the record, and no authority is shown by which the state district court can change the plain statutory provision.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 228.]

5. REMOVAL OF CAUSES ⟸92—FILING TRANSCRIPT IN FEDERAL COURT—TIME FOR FILING.

A transcript not filed in the United States court within 30 days after filing the petition and bond for removal in the state court, as required by Judicial Code, § 29, is too late, though the state court took no action on the petition at the time it was filed, since the filing of a sufficient petition and bond in a removable cause operates to remove the cause without further action of the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 190, 223.]

6. REMOVAL OF CAUSES ⊂⊃103—REMAND—GROUNDS NOT SPECIFIED.
The United States court may and should remand to the state court upon its own motion a case which, though removable, was not properly removed.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 221.]

At Law. Action by the Waverly Stone & Gravel Company against the Waterloo, Cedar Falls & Northern Railway Company, the Cedar Valley Railway Construction Company, and another, begun in the state court and removed to the United States District Court, on motion of the Cedar Valley Railway Construction Company, as to that defendant. On plaintiff's motion to remand to the state court. Motion sustained.

Paulsen & Wood, of Waterloo, Iowa, for the motion.
Edwards, Longley, Ransier & Smith, of Waterloo, Iowa, opposed.

REED, District Judge. This action was commenced by the plaintiff for the January term, 1916, of the district court of Iowa in and for Black Hawk county (a court of record of that state), which began on January 3d of that year, to recover from the defendants jointly damages for their alleged wrongful acts in preventing the plaintiff from redeeming certain property from a bill of sale given by plaintiff to the defendant Cedar Valley Railway Construction Company, which will be called the Cedar Valley Company, as security for a loan of money made by the defendant Waterloo, Cedar Falls & Northern Railway Company, an Iowa corporation, which will be called the Railway Company, to plaintiff. In a general way the petition alleges that the defendant Railway Company agreed to make a loan of money to the plaintiff, and that plaintiff was to make to the company or to the Iowa Investment Company, a bill of sale upon certain property of the plaintiff as security for the loan, but when the transaction was closed, the security to be given by plaintiff for such loan was, at the request of the Railway Company and the Iowa Investment Company, made to the Cedar Valley Company for the benefit of the Railway Company, and that all of the defendants thereafter wrongfully refused to permit the plaintiff to redeem the property from said bill of sale as provided therein, to the damage of the plaintiff in the sum of $25,000, for which wrongful acts judgment is asked against all of the defendants jointly.

The defendant Cedar Valley Company filed in the office of the clerk of said state court a petition and bond for the removal of said cause to this court upon the ground of diverse citizenship, which petition is indorsed by the clerk as filed January 17, 1916. Nothing further appears to have been done in the case at the January term of the state court. At the May term of said court, which began May 1, 1916, the state court made and entered an order as follows:

"On the 12th day of the May term, May 16, 1916, the defendant Cedar Valley Railway Construction Company presented in open court its petition for the removal of this cause, so far as said defendant is concerned, from this court to the District Court of the United States for the Northern District of Iowa, Eastern Division, and also a bond with good and sufficient surety, in

the penalty of $500, conditioned as required by the act of Congress in such case made and provided; and said petition having been presented at or before the time the said defendant is required by the laws of the state of Iowa, or the rules of this court, to answer or plead to the declaration of the plaintiff in this suit, it is ordered and adjudged by the court that said petition be filed, that said bond (which was duly proved in open court) be accepted, that this suit be removed from this court to the District Court of the United States for the Northern District of Iowa, Eastern Division, at Dubuque, that the clerk of this court forthwith transmit to that court a full, true, and perfect copy of the record in this suit, duly certified according to law, and that no further proceedings be had in this suit in this court as to the said defendant the Cedar Valley Railway Construction Company."

A transcript of the record in said cause, including said order, was thereafter made by the clerk of said court, duly certified by him on May 19, 1916, and filed in this court May 25, 1916. January 3, 1917, the plaintiff first appeared in this court and filed a motion to remand said cause to the state court upon the ground that there was no separable controversy between the plaintiff and the removing defendant; and this is the only ground upon which plaintiff has invoked the action of this court.

Section 29 of the Judicial Code (U. S. Compiled Stats. 1916, § 1011) provides:

"Whenever any party entitled to remove any suit mentioned in the last preceding section [28 of the Judicial Code] * * * may desire to remove such suit from a state court to the District Court of the United States, he may make and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the District Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such District Court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto. * * * It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within the said thirty days as aforesaid in said District Court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."

Under this section a party having the right to remove a cause from a state to a federal court must file the required petition and bond therefor in the state court at the time or any time before the defendant is required by the laws of the state, or the rule of the state court, to answer or plead to the petition or complaint of the plaintiff.

The Code of Iowa (1897) provides:

"Sec. 3550. The defendant shall, in an action commenced in a court of record, demur or answer to the original petition, or assail the same by motion, before noon of the second day of the term."

"Sec. 3554. The court may extend the time for filing any pleading beyond that herein fixed, but shall do so with due regard to making up issues at the earliest day practicable."

[1, 2] The act of Congress fixing the time within which a party entitled to remove a suit from a state to a federal court is of course controlling, and it is imperative that the application therefor shall be made within the time so fixed or the cause cannot rightly be removed. Kansas City Railroad v. Daughrtry, 138 U. S. 298-303, 11 Sup. Ct. 306, 34 L. Ed. 963. But for the words "or rule of the state court," in the Removal Act, there would seem to be no debatable question in this case. What, then, is meant by the phrase "the rule of the state court," as used in the Removal Act? The decisions of the Circuit and District Courts of the United States upon this question are not in harmony, and cannot easily be reconciled. In some of such decisions it is held that, when the state court in its discretion extends the time fixed by the statute in which the defendant shall answer or plead to the petition in a state court, when authorized by law to grant such extension, such extension, when granted, is a "rule of court" within the meaning of the Removal Act, and that a removal may be had within such enlarged period. Among the causes so holding are Rycroft v. Green (C. C.) 49 Fed. 177; Wilcox & Gibbs Co. v. Phœnix Insurance Co. (C. C.) 60 Fed. 929; Lord v. Lehigh Valley Railroad Co. (C. C.) 104 Fed. 929; Dancel v. Goodyear Shoe Machinery Co. (C. C.) 106 Fed. 551, and other cases.

Rycroft v. Green, above, was decided without discussion, and upon the practice then said to obtain in the New York courts. That case, however, is distinguished, and in part, at least, overruled, by the same court in Schipper v. Consumer Cordage Co. (C. C.) 72 Fed. 803. In Wilcox & Gibbs Co. v. Phœnix Insurance Co., above, it is held in a case coming from a state court in South Carolina that the right to remove such a suit exists as long as the defendant is not in default in the state court for want of an answer or other pleading to the plaintiff's petition; and if defendant obtains an order of the state court extending the time in which he may answer or otherwise plead to the plaintiff's petition, the cause may rightly be removed during such extended period. This ruling seems opposed to the great weight of the authorities, and the reason given therefor is not persuasive.

Pullman Palace Car Co. v. Speck, 113 U. S. 84, 5 Sup. Ct. 374, 28 L. Ed. 925, arose under the Removal Act of 1875, which required that a party desiring to remove a cause to act at the first term at which the cause could be tried and before the trial thereof. The Supreme Court, speaking by Mr. Justice Miller, quoting approvingly from Murray v. Holden (C. C.) 2 Fed. 740, 1 McCrary, 341, said:

"One of the objects of the act of 1875 was to prevent the abuses which had been practiced under the acts of 1866 and 1867, which allowed a removal at any time before the final hearing. It was evidently the purpose of Congress to fix an earlier and a definite time, which would not permit the litigant to experiment in the state court until satisfied he would fail there, and then change his forum. In all the states there is, by law or rule, a trial term—i. e., a term at which a cause may for the first time be called for trial. In practice, but few contested cases are tried at the first trial term, and it often happens that controversies arise upon questions of pleading, so that, as in this case, no issues of fact are joined at that term. It is nevertheless the term at which, within the meaning of the law, such cases could first be tried, and therefore is the term at * * * which the petition for removal must be filed."

And of the case then before the court it is said:

"It appears by a stipulation in the case that the first Monday in every month is the beginning of a new term of the superior court of Cook county, from which this suit was removed. It also appears that the suit was brought to the September term, 1883, of that court, and the defendants, who were the removing party and are also appellants here, obtained an extension of time by order of the court for 30 days from September 20th to answer the original bill, and like time was granted to the defendants in a cross-bill to answer that. This time was extended afterwards in both cases by agreement of counsel until January 11, 1884, and on that day they were filed. The application for this removal was made in the February term, 1884. It thus appears that, including the appearance term at which the case might have been tried, if appellant had answered according to the rule, instead of obtaining an extension of 30 days by order of the court, there were five terms of the court at which the motion could have been made for removal, in which no such motion was made. We see no reason why this case was not triable at any of those terms according to the due course of proceedings in such cases. The only reason why it was not so tried was the time beyond that of the usual course prescribed by rule, which was obtained by order of the court or by agreement of the parties. The case was certainly triable at the January term, after the answers were all in, for it could have been then tried on bill and answer, or the plaintiff have been forced to file replication, which could have been done instanter."

The order of the court remanding the case to the state court was affirmed. This ruling is followed in Gregory v. Hartley, 113 U. S. 742, 5 Sup. Ct. 743, 28 L. Ed. 1150. See, also, Velie v. Manufacturers' Indemnity Co. (C. C.) 40 Fed. 545; Spangler v. Railroad Co. (C. C.) 42 Fed. 305; Austin v. Gagan (C. C.) 39 Fed. 626, 5 L. R. A. 476; Pilgrim v. Ætna Life Insurance Co. (D. C.) 234 Fed. 958; Charrion v. Romort Mfg. Co. (D. C.) 236 Fed. 1011; Williams v. Wilson Fruit Co. (D. C.) 222 Fed. 467.

In this case the statute of Iowa required the Cedar Valley Company to answer or otherwise plead to the plaintiff's petition in the state court on or before noon of the second day of the January term, 1916, which was January 4th of that year; on that date defendant's attorneys entered their appearance for that company, but filed no answer or other pleading. On January 17th, pursuant to an alleged local rule of the state court, they filed in that court a petition and bond in behalf of the Cedar Valley Company for the removal of the cause to this court. Nothing further appears to have been done in the case until the 16th day of May, 1916, which was the twelfth day of the May term of that court, which began May 1, 1916, when the state court entered an order removing the cause to this court, and directed its clerk to forthwith transmit to this court a transcript of the record in such cause, and that no further proceedings be had in the state court. A transcript of the record in the state court, duly certified by the clerk of that court May 16, 1916, was then filed in this court May 25, 1916, nearly five months after the defendant was required by the Removal Act to file in the state court its petition and bond for removal. That the removal of the case from the state court was not within the time required by the Removal Act of Congress seems entirely clear under the decisions of the Supreme Court above cited.

[3] In Wilson v. Coal Co., 135 Iowa, 532, 113 N. W. 348, 14 Ann. Cas. 266, a case in which the district court ordered the removal to the federal court, the Supreme Court of Iowa, speaking of the present

Removal Act, which is the act of 1875, except as to the time within which the application for removal must be made, said:

"It is provided that a defendant, seeking to remove a cause from a state court to the federal court, may file his petition and bond therefor in the state court at or before the time when he is required, by the laws of the state or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of plaintiff. * * * Under the laws of this state [section 3552, Code of Iowa 1897] the defendant to an action brought in a court of record must" assail the petition by motion or demurrer, or take action "upon it by answer before noon of the second day of the term. By Code, § 3554, the court is authorized to extend the time for filing any pleading beyond that fixed by the statute, having due regard to making up the issues at the earliest time practicable. In the case at bar, it will be observed that the application for removal was not filed until some 30 days after the second day of the term; but it is the claim of the appellant that the granting of further time to plead to the petition had the effect to extend the time in which application for a removal to the federal court could properly be made. * * * It is to be conceded that this proposition finds support in the decisions of some of the inferior federal courts, but we are persuaded that it is clearly against the weight of authority, and cannot be upheld by any fair construction of the federal statute. There is but one time fixed by our Code before which the defendant duly served with notice must appear and plead, and that time or date is noon of the second day of the term to which he has been summoned. * * * The reference in the federal statute to the rule of the state court in which suit is brought to answer or plead clearly relates, not to special orders granted upon application or stipulations of parties in any given case, but rather to a general rule fixing the date at which all defendants are required to appear in order to avoid being held in default."

This is an interpretation of the Iowa statute fixing the time in which a defendant shall answer or otherwise plead to plaintiff's petition in the state court, which, if there was any doubt of its meaning, should be followed by this court. As said in some of the authorities, the time in many states in which the defendant shall answer or otherwise plead to the plaintiff's petition is fixed by a "rule of court"; but in other states, as in Iowa, the time is fixed by statute, and the obvious purpose of the Removal Act is to require a defendant, who desires to remove a cause from a state to a federal court, to apply therefor at the time he is required by the statute of the state to answer the plaintiff's petition when that time is fixed by statute, and when fixed by "rule of court" he shall then apply therefor within the time fixed by such rule.

[4] In this case it is alleged in the petition for removal:

"That under the rules of practice adopted, in vogue, and in control in the district court of Black Hawk county, the defendant is not required to answer or plead to the petition of the plaintiff until 15 days shall have elapsed after noon of the second day of the term of said court at which the defendant is cited to appear, and that the defendant Cedar Valley Railway Construction Company was required by the original notice filed in this case to appear on or before noon of the second day of the January, 1916, term of said district court of Black Hawk county, which commenced on Monday the 3d day of January, 1916. Wherefore this defendant prays the removal of the cause * * * to the District Court of the United States, as provided by the act of Congress," etc.

Such a rule of court appears nowhere in the record, nor is any reference made thereto, except as recited in the petition for removal. If any such rule exists or is published, it has not been otherwise called

to the attention of the court, and there is no statute of Iowa, so far as the court is advised, which authorizes the district courts of the state to change by a "rule of court" a plain statutory provision fixing the time in which defendants in courts of record shall appear and answer or otherwise plead to actions brought against them, that will enlarge the time in which they may apply for the removal of causes to the federal courts. If the district court of the state may adopt such a rule, and should do so, it is obvious that there would be no uniformity in the time that defendants shall answer in the state courts to causes of action brought against them; nor would there be any uniformity in the time which a defendant entitled to remove a cause from a state to a federal court in that state shall make application therefor in the different judicial districts.

[5] Under the Removal Act the Cedar Valley Company was required to file a copy of the record in the federal court within 30 days after filing a sufficient petition and bond in the state court for the removal of the cause. If such petition was filed on January 17th, and the cause was a removable one, then defendant was required to file a copy of the record in this court by February 18th, unless for excusable delay; but it was not filed until May 25, 1916, more than three months after it was required by the act of Congress to be filed, and is therefore too late, no excuse for the delay being shown. If the cause is a removable one, the filing of a sufficient petition and bond for its removal in the state court operates to remove the cause at once to the proper federal court, and there is no occasion to wait until the state court has acted on the petition. Kern v. Huidekoper, 103 U. S. 485, 490, 26 L. Ed. 354; Baltimore & O. R. R. Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643.

[6] The plaintiff has not moved to remand the cause upon the ground above considered; but the court may and should remand the cause upon its own motion, if the case, though a removable one, is not properly removed. Crehore v. Ohio, etc., Ry. Co., 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144; Burnham v. First National Bank, 53 Fed. 163–167, 3 C. C. A. 486; Barth v. Coler, 60 Fed. 466, 9 C. C. A. 81.

It is also urged by the Cedar Valley Company that the record shows a separable controversy between the plaintiff and that company, because it appears from the plaintiff's petition that the bill of sale made by the plaintiff to secure the loan from the Railway Company was taken in the name of the Cedar Valley Company, and that company alone was the owner of the property. This question need not be considered, for, if it be true, it does not enlarge the time within which the Cedar Valley Company must apply for the removal of the suit. But see, however, Louisville & N. Ry. Co. v. Ide, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63; Hyde v. Ruble, 104 U. S. 407, 26 L. Ed. 823; Alabama Great Southern Ry. Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147; Little v. Giles, 118 U. S. 596, 601, 7 Sup. Ct. 32, 30 L. Ed. 269; Plymouth Mining Co. v. Amador Canal Co., 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. Ed. 232.

The motion to remand must be and is sustained, at the cost of the removing defendant; and it is so ordered.

## DE GANAY v. LEDERER.

(District Court, E. D. Pennsylvania. February 14, 1917.)

No. 3472.

1. INTERNAL REVENUE ⟸7—INCOME TAX—PROPERTY OF NONRESIDENT—STOCKS AND BONDS.

The provision of Act Oct. 3, 1913, c. 16, § 2, 38 Stat. 166 (Comp. St. 1913, §§ 6319–6336), levying a tax on the entire net income from all property owned in the United States by persons residing elsewhere, imposes a tax on the income from corporate stocks and bonds owned by a nonresident alien, where the stock certificates and bonds were kept in this country by an agent, who collected the income thereon for the owner, since the certificates and bonds have come to be commonly spoken of as the property, which, strictly speaking, they merely represent.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8–10.]

2. STATUTES ⟸188—CONSTRUCTION—KNOWN MEANING OF WORDS.

Where words are used in an act of Congress which have a well-known and universal use, and which, so read, express a meaning which Congress may have intended, the court is justified in assuming that they were used to express that meaning.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267, 276.]

3. STATUTES ⟸225¾—CONSTRUCTION—LEGISLATIVE CONSTRUCTION.

While legislative construction of prior acts is of value, the enactment of a subsequent more definite provision is not necessarily a construction of the former provision, but may be the enactment of a different provision, and should be so held to avoid retroactive legislation, if it differs from the judicial construction given to the former act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 306.]

4. STATUTES ⟸219—CONSTRUCTION—EXECUTIVE CONSTRUCTION.

Great weight and due deference is given to departmental or other executive construction of statutes, but the acceptance of such construction is limited by the principle that the intention of the Legislature must govern.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297.]

5. STATUTES ⟸245—CONSTRUCTION—REVENUE LAWS.

Revenue statutes are to be so construed as to promote their main purpose, not strictly construed in favor of the taxpayer.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 326.]

6. TAXATION ⟸93(1)—SITUS OF PROPERTY—PERSONAL PROPERTY.

Notwithstanding the legal maxim that the situs of intangible personal property is the domicile of the owner, such property may be given a special or particular situs for taxation, if the taxing power has jurisdiction over the rem as a practical fact.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 182.]

At Law. Action by Emily R. De Ganay against Ephraim Lederer to recover the amount paid under partition as income tax. On final hearing. Judgment rendered for defendant.

J. W. Bayard and John G. Johnson, both of Philadelphia, Pa., for plaintiff.

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

DICKINSON, District Judge. This case was tried under the provisions of the statutes by the court without the intervention of a jury. The main facts are few and not in dispute. There is but one question in the case, and that one of law. The formal findings of fact, which are necessary, are found in the answers to the requests submitted by the parties, leave to file which, together with requests for conclusions of law, after the views of the court upon the one question discussed at the argument had been made known to counsel, was allowed by the court.

[1] The plaintiff is a nonresident alien. She is the owner of property, the income from which is collected for her by the Pennsylvania Company as her agent or attorney in fact, or by whatever term the company is designated in its relations with her. The defendant demanded the amount now sued for as the tax on this income directed to be levied and collected by section II of the act of October 3, 1913. The tax was paid under protest, and its return demanded in accordance with the provisions of the statutes on the subject. It is conceded that, if the sum paid was lawfully collectible, the plaintiff cannot recover, but otherwise is entitled to judgment. The collection is justified, if at all, by the provision of the act above cited. The pertinent provision is:

"The entire net income from all property owned and every business," etc., "carried on in the United States by persons residing elsewhere."

No other question than the proper construction of the statute is involved. It is admitted (at least arguendo) that Congress could have lawfully imposed this tax upon the income of plaintiff. The sole question is: "Has it done so by this act?"

There is always a temptation, in the discussion of questions of this kind, to wander into the domain of economics or invade the realm of metaphysics. A yielding to this temptation would result in a discussion which would be well-nigh interminable. Two or more supposititious cases as crude illustrations will speed us to the point. A nonresident alien is the owner of omnibusses, which are run as public conveyances; the line being operated for the owner by his employés and agents. The income derived therefrom is admittedly subject to the payment of the tax. The same line of omnibusses belongs to a corporation, the stock of which is owned by the same alien. The dividends are asserted not to be subject to the tax.

Take two other cases to which the same distinction applies: A nonresident alien owns real estate (assuming alien ownership was permissible). The yield in rentals is conceded to be subject to the tax. The same alien recovers the same sum from the same property in the form not of rentals (in the sense before expressed), but in the form of ground rent. It is, of course, not asserted that the income is not subject to the tax, because the latter form of property is itself real estate, but this illustrates the distinction made in its double aspect. The argument is that the tax is payable in the one case, but not in the other, because in the one case Congress has imposed the

tax and in the other has not. The minor premise on which the argument proceeds is asserted, because Congress has seen fit to tax not income derived by an alien from property belonging to him (which might be beyond its reach, long as the arm of the taxing power is known to be), but only such property if in the United States.

The further assertion that property of this incorporeal, intangible kind is not here, but in the country in which the alien is domiciled, is backed by the maxim of the law that "personal property follows the person." The admission that property, whether real or personal, owned by a nonresident alien, might be in this country, and, in consequence, be made taxable by the act, enforces the argument because the distinction between the two kinds of property lays ground for the inference that Congress meant to tax the one and not the other.

The argument has more than plausibility; it has real force, not merely because of the language chosen by Congress in which to express its thought, but also because the considerations which may have moved Congress to make such a distinction are obvious. The distinction between a physical thing and the usufruct, or between what a corporation (assuming all its possession to be of the physical kind) and what a stockholder owns, is clear enough. The word "property" is used to designate not only the right of a person in or to a thing, but also is applied to the thing itself, at least when it can be visualized. Property of the kind with which we are now concerned is not a thing in any physical sense, but is an abstraction, a concept. The thought that it can have no abiding place other than that arbitrarily assigned to it by the quoted maxim appeals strongly to any one trained to think in terms of the principles of the law. The retort that the maxim is no maxim at all, but a mere fiction, is of no aid to us, because, granted that it be a fiction, there is no other fiction, and no maxim of the law which locates property of this kind elsewhere. As property of this kind is merely a concept or a right, the truth is that it cannot be "in" any place other than the mind of the person to whom the right belongs. The phrase that the right of property is in a person, or in the owner, or even that it resides in him, is an allowable one. To give it any other abiding place requires the ipse dixit of the law. The quoted maxim really is a phrase which voices a principle of the law that, when the locus in quo of property of this kind is spoken of or becomes important to find, it is to be understood to be wherever the owner resides, and to be regarded as if it had physical existence at that place.

The fictions which form part of the science of the law have been the subjects of many a eulogy, and this is one which has been universally accepted and acted upon from time out of mind. The accepted and conventional meaning of any expression used in a statute must, of course, yield to the legislative mandate; and it is urged that we must look in every law for what the lawmaker meant, and, when this is found, words which may before have been used in a different sense from that in which he has used them must be given the meaning which he has attached to them. In this way, "white," as it is argued, may be even read to mean "black."

Resort has been had to the later act of Congress as expressive of the meaning sought, and as declarative of what was meant by the act of 1913. Resort is also had to the executive construction placed upon the act now under consideration.

It is further pressed upon our attention that it is proper to assume that Congress had in mind a practical purpose, and had no thought of an idle and fruitless enactment, and that when a law is open to two constructions, one of which is promotive of its main and general purpose, and the other wholly destructive of it, that construction should be accepted which gives the law real meaning and not one which emasculates it. This principle of construction is appealed to because of the statistical fact that a tax upon so-called investment and like sources of income would yield a substantial sum, but one confined to physical things would be negligible.

[2] These supports of the contention of the defendant are attacked by the answer that at least one, and the preferred, place in which to look for the meaning of Congress is the language employed to express that meaning. When we find words which have a well-known and universal use, and which, if so read, express a meaning which Congress at least may have intended, we are justified in assuming they were so used, and not justified in giving them a strange and before unheard-of meaning, in order to force a construction which, if that meaning was in fact intended by Congress, might have been expressed in other and apt words.

[3] Legislative constructions of prior acts have all the value of expressions of opinion by those to whose opinions weight and importance is attached. Inasmuch, however, as such an opinion is that of an autocrat who can impose his will by changing the law, the distinction must always be observed between an opinion of what the law has been and a new enactment. If such subsequent statute gives to the prior one a meaning different from its found meaning as judicially construed, the later statute is a new enactment, no matter what its form. Any requirement to read into the former a meaning which is found only in the latter partakes, as do all retroactive statutes, too much of the ex post facto vice. In criminal statutes indulgence in this vice is forbidden by the Constitution, and the courts will not ascribe such purpose to the legislative branch, if a different purpose can be found. The later taxing act admittedly imposes a like tax to that collected in this case. There is, however, as much warrant for saying that it imposes a new tax as that it reimposes the same tax. The real state of mind of Congress may have been, and probably was, that the executive enforcement of the act of 1913 brought to light an ambiguity in that act which it was deemed wise to clear up, and that Congress had no thought of construing the former act, but was content to leave it to the courts to be judicially construed, and was merely guarding for the future against the at least possible construction for which this plaintiff contends.

[4] Great weight and due deference is always given to departmental or other executive constructions of laws. The acceptance of such

constructions is, however, always limited by the thought that the imposition of a tax is a legislative and not an executive act, and we are brought back again to the judicial construction of the statute. A like observation may be made with respect to the thought that Congress must have intended this law to yield revenue, and because of this should be given such a construction as will advance this purpose and not nullify it.

The at least doubt still remains of whether Congress did not at first either overlook the species of property now under consideration or accept the politico-economic view entertained by many minds that it is a futile thing to attempt to tax some species of property (as, for instance, moneys at interest), because the final result is to impose a double tax upon the interest payer, or work to the disadvantage of the country by retarding the inflow of capital. The fact that Congress afterwards discovered what they had at first overlooked, or changed its mind as to its taxing policy, throws no helpful light upon the first law, by which we are able to read it differently from what we otherwise would. It is thus seen that, no matter by what path we seek to reach an answer to the question involved, it leads back every time to the act of Congress.

This case was argued by counsel, not only with ability, but in that spirit of frankness and open-mindedness which is always the accompaniment of great abilities. Counsel for the United States feel free—indeed, feel compelled—to confess that there is such an ambiguity in the act as to make its meaning doubtful. The differing constructions contended for by counsel are asserted with equal confidence. If a proposition of law be, as it has cynically been defined to be "any proposition confidently advanced and plausibily supported," we are not aided by the arguments, able as they are, because we have been subjected to the allurements of two charmers equally enticing.

[5] We accept the general principle advanced by counsel for the United States that in the federal jurisdiction, as in that of some of the states, although it is otherwise in most jurisdictions, revenue statutes are to be so construed as to promote their main purpose, and that the principle of a strict construction in favor of the taxpayer is repudiated. Even this, however, will not justify the courts in refusing to recognize the expressed will of Congress, and we are sent back again to the enactment to gather this will.

Human language is a living thing, and not an unyielding mummy cloth in which thoughts are enwrapped. Language changes and grows, and words shift in meaning with the changing ideas of the people out of whose expressions of their thoughts through the use of words the language is evolved. It is a familiar experience that things which exist at first and are spoken of as theories or mere concepts soon become recognized facts, and are given in thought and words body and substance. Physical science abounds in illustrations of this, and in both business affairs and in the law we meet with them. It is really the same tendency as the disposition to personify things, and to reduce the abstract to the concrete. This concept of property as an in-

tangible thing belongs to this same category. A chose in action becomes a concrete book account or note. The stockholder in a corporation owns property, of which his certificate of stock is but the evidence and still exists in all its fullness, whether the certificate be lost or destroyed. A bank note is but a promise to pay, but the concept of it soon changes to that of regarding it as itself concrete property, occupying space and having a situs. The same concept is readily extended to deposits in bank and to bonds, and indeed to what are known under the generic term of investments, mortgages, and ground rents, and the like. They all come to be visualized, until they have an existence as real as that of physical things. Indeed, it is allowable in common speech, and just as intelligible, to speak of a person having ground rents in America, or indeed investments in America, as it is to say he had or owns a farm in America.

This, of course, is not the strictly scientific view, nor does a person speak with scientific accuracy when so speaking, but none the less they are expressing a definite thought clearly. Indeed, if a person were to speak in scientific terms of some of the commonest things of life, he would not merely be thought to be pedantic, but would be utterly unintelligible to many. A professor of economics would have difficulty in convincing persons who were indeed persons of intelligence that they did not have money in their pockets if they felt crisp bank notes crinkling in their fingers. The same person, if his ownership of bonds or stock was questioned, would think he had settled the dispute by producing the bonds or stock certificates. He would produce them, not as if he was bringing forth evidence of his ownership, but the very property which he owned. Laws, particularly those by which the common people are to be guided, are to be interpreted as the common speech is understood, and are not to be translated into scientific jargon.

The courts, in the interpretation of tax laws, have recognized this, and made the grasp upon the thing to be taxed turn upon the fact of jurisdiction rather than upon the character of the property. Property is "in" the United States when it can here be reached, whether that property be a house and lot, or whether it be bonds and mortgages. It may result in what in a sense and a very practical sense is double taxation; but such may be the result of a law which taxes both a house and lot, and a ground rent issuing thereout or a mortgage thereon. The thought now in mind is a different thought from that which would be uppermost, if the attempt were made to tax a man on the personal property he owned, without regard to its situs, but merely because he owned it in a jurisdiction other than that of his domicile.

To return from these abstractions to the precise question before us, our conclusion is that this act of Congress, if read in the light of critical accuracy, does not tax the property on which this tax was levied; but if the language is interpreted in the light of the commonly accepted meaning of the words used, it does tax it, and the tax was properly collected. This finding results in a judgment for the defendant, with costs, which judgment is directed to be entered.

[6] We feel that this conclusion is compelled by the necessity to get into harmony with authoritative rulings, among which the following may be cited:

The thought is that, notwithstanding the legal maxim, or fiction, or fact (call it what you will), that the situs of intangible personal property is the domicile of the owner, the state may nevertheless give to property (such as corporate stocks, bonds, and the like) a special or particular situs for the purposes of taxation, and this power is limited only by the jurisdiction of the taxing power over the rem as a practical fact. Corry v. Baltimore, 196 U. S. 466, 25 Sup. Ct. 297, 49 L. Ed. 556; In re San Antonio Co. (D. C.) 228 Fed. 984; In re Berthoud (D. C.) 231 Fed. 529; Lynch v. Turrish, 236 Fed. 653, — C. C. A. —; Pullman's Co. v. Pennsylvania, 141 U. S. 22, 11 Sup. Ct. 876, 35 L. Ed. 613; Buck v. Beach, 206 U. S. 392, 27 Sup. Ct. 712, 51 L. Ed. 1106, 11 Ann. Cas. 732; Van Allen v. Assessors, 70 U. S. (3 Wall.) 573, 18 L. Ed. 229; Liverpool v. Orleans, 221 U. S. 354, 31 Sup. Ct. 550, 55 L. Ed. 762, L. R. A. 1915C, 903.

Nor do we think the cases cited by plaintiff to be in conflict with the conclusion reached, if the distinction between taxing jurisdiction exercised because of jurisdiction of the person and that exercised because of jurisdiction of the rem be kept in mind. Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. Ed. 558, may be distinguished on this ground.

The opinion in Cleveland v. Pennsylvania, 82 U. S. (15 Wall.) 300, 21 L. Ed. 179, undoubtedly contains expressions which support the argument of counsel for plaintiff here. The case was, however, ruled upon the principle of the inviolability of the obligations of contracts, and upon the power to tax, not upon whether the law did tax. The case, therefore, if the argument is pushed to its logical limits, rules that Congress was without the power to levy this tax. This conclusion is not only not pressed, but the question before us was expressly limited to whether Congress had taxed, not whether it could. It is interesting to note (what was before not observed) that Mr. Justice Field, who delivered the opinion of the court, recognized that not only tangible personal property might have a situs different from that of the domicile of the owner, but that state and municipal bonds and other forms of intangible property were recognized as in themselves physical property, and known as such in common speech, and therefore also capable of having a situs of their own. He distinguishes between municipal bonds, and the other property of like kind enumerated by him, and corporate bonds. This opinion was delivered in 1872. What was recognized by him as true of municipal bonds in 1872 seems to be equally true of corporate bonds and stocks in 1913. It would be an interesting confirmation of the truth of the observations hereinbefore made if public usage, which in 1872 included state and municipal bonds and bank notes among tangible possessions, had progressed in 1913 to the point of embracing all stocks and bonds in the same classification.

Union Co. v. Kentucky, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493, would seem to be rather in accord with the con-

clusion we have reached than out of harmony with it. It clearly recognizes the separate situs of tangible property, and carries the practical principle of the power to tax being dependent upon jurisdiction to the limit of holding property out of the jurisdiction not to be taxable. It places what may be called the right to tax upon the practical fact of control of the person or grasp of the rem, and seems to recognize mortgages and stocks as so far tangible as to have a situs of their own.

Provident v. Kentucky, 239 U. S. 103, 36 Sup. Ct. 34, 60 L. Ed. 167, L. R. A. 1916C, 572, was the case of an attempt by the state to tax a corporation for the privilege of doing business within the state. It was recognized that a state had the power to so tax, if the corporation was so doing business, but was held that the state could not tax if the corporation was not so doing business, and that the mere collection of premiums before earned, although still unpaid, was not such doing of business. We see no command in this case to find for the present plaintiff.

The question before us is recognized as a close one. Where the meaning of a statute is doubtful, and either of two constructions may be given it, the choice is always more or less an arbitrary one, and the ruling made partakes too much of the "rescript" character to be entirely satisfactory. The choice, however, must be made, and we have made the best choice we could.

## UNITED STATES v. PENNSYLVANIA R. CO.

(District Court, E. D. Pennsylvania. February 14, 1917.)

No. 4042.

1. MASTER AND SERVANT ⟸13—REGULATION—HOURS OF SERVICE—CONSTRUCTION OF STATUTE.

The Hours of Service Act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [Comp. St. 1913, §§ 8677–8680]), which was intended to avoid the danger resulting from exhausted employés, must be liberally construed to repress the evil and advance the remedy.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14.]

2. MASTER AND SERVANT ⟸13—REGULATION—HOURS OF SERVICE—"EMPLOYÉ WHO BY TELEPHONE DELIVERS ORDERS."

A yardmaster of a railroad yard, on entering which all trains are required to be brought into such control that they can be stopped within the range of vision, to whom the company's rules gave the charge of the movement of trains within the parts of the yard limits assigned to him, and whose orders freight conductors are required to obey, and who is furnished by the railroad with a telephone to use in performing his duties, is within the provision of the Hours of Service Act, limiting the time of continuous service of any operator, train dispatcher, or other employé who by the use of telephone delivers orders pertaining to train movements.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14.]

At Law. Action by the United States against the Pennsylvania Railroad Company to recover the penalty for noncompliance with the Hours of Service Act. On trial hearing without a jury. Judgment rendered for plaintiff.

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

John Hampton Barnes, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This action is to recover the penalty for a noncompliance with the Hours of Service Act. The sole question may be characterized as one of law, involving the proper construction of the act of Congress, or as an ultimate fact finding of whether the employés with whom the case concerns itself are engaged in the kind of train service defined in the act. The case was by agreement tried before the court without the intervention of a jury, the right to a trial by jury having been waived. The stipulations entered into dispense with the necessity for any other findings than the one above indicated. This will be determined both as a conclusion of law and as a finding of fact. There is no controversy over the evidentiary facts. If either party, however, desires any special findings to be made part of the record, leave to present requests is granted, and the requests and answers will be made part hereof.

[1] The question is whether the yardmasters, whose number of hours of service exceeds that of "operators and train dispatchers," should be limited to a like number. The pertinent words of the act are:

"Operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements," etc.

The general purpose of the act is to provide against the danger described in the phrase "he was asleep at his post," by limiting the hours of continuous service. There is a recognition of the fact that man, regarded as an instrument of service, cannot be an efficient or dependable instrument if exhausted or "dead from loss of sleep." The command had issued to all trial courts to liberally construe this act of Congress so as "to repress the evil and advance the remedy." Baltimore v. I. C. C., 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878.

[2] There is also, however, recognition of the fact that railroading is a very practical occupation, the work of which must be governed by a system or organization which is necessarily very complex, and service in which will not readily lend itself to arbitrary time limits. The effort is therefore made to have the act apply to a class having a recognized existence in such systems, and to enlarge it by adding those who perform the kind of service, the hours of which Congress, for the public good, was seeking to regulate. The general thought is clear enough. The persons desired to be reached are those whose duties have to do with "train movements." Inasmuch, however, as in such an organization every one connected with it is working toward the accomplishment of a common end (which necessarily involves "train movements"), the work of every one "pertains to or affects" such movements. Such a designation of the persons meant is in consequence far more broad than intended. The risk which Congress had in mind to minimize is one flowing from the wrong moving of trains, resulting in collisions or other causes of injury to persons and property. Such movements could be made only at the will of some employé. In the final analysis this would be the engineer or other operator of the mechanism, but, as he moves at the direction of some other employé, without exercising any other will of his own than that of obedience, the "order" to move, of which we are in search, comes from such other employé. This other employé, in his turn, does not act, except upon knowledge of the conditions, and this he gathers from information conveyed to him by still others. There is here a distinction. As before observed, there must be a mind which directs the movement. Whenever this is manifested, there is an order to move. The distinction is between the information upon which the mind acts and the act.

There are times when the two are difficult to distinguish, and the one blends into the other, and each becomes both. Take the instance of a train run on schedule and by the block signal system. The signal is both information and an order to the engineer. If it is not against him, it tells him the track is clear, and orders him to run to the next block. If some one, not a signalman, stands on the track waving a flag or his hat, the engineer will stop the train; but this could not be said to be an order to stop. The distinction and the difference and the test are here alike obvious, assuming the general orders to be that the engineer must obey the signal. Where the brakeman of a stalled train goes back to signal a following train, or a switch-

man waves to the engineer after throwing a switch, the distinction remains, and the test is the same, but the difference practically disappears. Railroad parlance supplies us with the required phrase—the brakeman is said "to flag" the train. Another illustration is afforded by a station agent, who informs the engineer that a train ahead of him is in difficulties and may become stalled. Still another is afforded by the rule (not in the Book of Rules) put in evidence by the defendant and relied upon to support the defense. This rule informs those in charge of the train that it is likely to meet other trains within yard limits, and orders them to so run their train as that it may be stopped within the range of their vision.

The test, of course, is whether, in the cases instanced, the engineer uses his own judgment upon the information given, or whether he is without choice, and has no discretion in respect to what he will do. Practical railroading recognizes the distinction and classifies employés accordingly. Dispatchers and operators of block signal towers are recognized as those who direct, and because of this give "orders" for, train movements. Switchmen and brakemen do not give "orders." Congress, wishing to apply the act, not only to those who in the railroad sense directed train movements, but also to those through whose acts trains did in fact move, designated "dispatchers" and "operators" eo nomine, and added all employés whose duty it was to give information which pertained to or affected train movements, through being the practical equivalent of an order. It was at once seen, however, that if the enactment was so phrased the language was entirely too broad and general, and it was because of this limited to those who conveyed the information by telegraph or telephone. There were several reasons for a limitation of this kind. One was that it defined the class with practical precision, and excluded employés not meant to be embraced, because it was impractical to embrace them. Another was that this limitation confined the act to a class who were, because of the character of their employment, required to be mentally alert and wide awake, and were most likely to succumb to the strain of long hours, because they would be without the physical activity which would keep them alert and on the move. This gives us the fair meaning of the act of Congress, and it only remains to apply that meaning to the employés with whom we are now concerned.

In railroad parlance they are neither dispatchers nor operators, nor have they to do with train movements. They are what the name by which they are known implies—"yardmasters." The question, therefore, is whether they are brought into the class by the description of their duties. They are employed, as the name given to them indicates, within the limits of a yard. Within this yard there are tracks set apart for a variety of purposes. They have primary uses and occasional or emergency uses. One such primary purpose and use is to arrange the cars in convenient trains compacted of cars having destinations such as will facilitate deliveries. This is the classification of cars and making up of trains. Another purpose is to store cars. Another is for yard movements. There are also tracks which extend through the yard without being in the strict sense part of it. Two

of these are main tracks used for passenger service having nothing to do with the yard. These others (two known as west-bound, and one as east-bound) are used for freight service, which goes through the yard without being of the yard operations. These three tracks are, however, also used for yard movements (as also are at times even the passenger tracks), and are so used at times without regard to the indicated intended direction of travel. This latter movement is called "bucking the track."

When the tracks, which have been spoken of as extending through (without being part of) the yard, are used for through travel, the movement of the trains is directed by the dispatcher in the usual way. All employés connected with such movements are in the short hours class. Normally these tracks are open to and free for through yard movements. The yard movement of trains is regulated by the special rule and the Book of Rules already mentioned.

The pertinent rule, upon which the defense is based, is that, before spoken of, requiring conductors and engineers to assume, when they enter a yard limit, that they will meet with other cars upon the track, and to so regulate the speed and movement of their train as that they will be able to stop it within the range of their vision. There is also rule 706 and (although not specifically put in evidence) rule 707, hereinafter discussed, referring to yardmasters. To aid and inform such operators of trains, and enable them to regulate and control such movements, the yardmasters are given certain duties to perform and certain instrumentalities to assist them. Structures or buildings are provided at convenient points at which the yardmasters are stationed. These buildings, when necessary, are equipped with telephones and speaking tubes, and the yardmasters are given the assistance of clerks and switchmen or signalmen. They know the track equipment of the yard, and the changing conditions affecting train movements. They are kept informed by being given advance information of what is coming into the yard, and know what is to be done and what tracks can be used and when. They direct what track is to be used and the signal is set accordingly. This indicates to the engineer on what track his train will move and that it is clear. If the intended movement takes the train beyond the point at which the next yardmaster is stationed, the information is passed on to him. The telephone is used by the yardmasters, although they may give the message in other ways and frequently do so. Trains and cars are thus moved to wherever in the yard they are to go, and trains are moved through the yard if the destination is beyond. While moving within yard limits (unless moved by the train dispatcher), the movements are regulated by the beforementioned rules. This presents the question: Are these yardmasters "employés dispatching, reporting, transmitting, receiving or delivering orders by telephone pertaining to or affecting train movements"?

If the yard rule relied upon by defendant was the only rule which had application, there would seem to be at least room for the argument that "yardmasters" are without the act. It is, however, not the only rule, for we have also rule 706, which seems to be directly in point, and, if so, certainly puts an entirely different phase on the

case, and to expressly classify "yardmasters" among employés who give orders "affecting train movements," for it expressly provides that they "have charge of the movements of trains" within the parts of the yard limits assigned to their charge respectively. Rule 707 further provides that freight conductors "must obey the orders of yardmasters."

The argument addressed to us by counsel for defendant is convincing so far as the character of the employés is involved. We are in entire accord with him that yardmasters do not belong to the class of dispatchers or operators who have to do with train movements. If the words "other employés" are to be given this significance, we think the viewpoint of the defendant to be the correct one. Much may be said in support of this. It is a resulting consequence of the ejusdem generis doctrine. We do not think, however, the doctrine to have application. The word "other" is, we think, not used in the sense of "others of the same class," but in the "and also" sense. Congress did not command that train dispatchers and operators and other employés of the same class, but that dispatchers and operators and also all employés, whether of the same class or not, who directed train movements, and who used the telegraph or the telephone in the discharge of their duties, should be subject to this provision of the act. Under rule 706 we feel compelled to find that yardmasters "transmit, deliver and receive by telephone orders pertaining to and affecting train movements."

Following the analysis of counsel for defendant, we find (1) "yardmasters" are included in "other employés," and (2) they give, by authority of rules 706 and 707, orders pertaining to and affecting train movements, and use the telephone for this purpose. The remaining question (3) is whether operations within a yard are "train movements" within the meaning of the act of Congress. If the operations in this yard were confined to that of breaking and making up trains, as distinguished from moving, then we would be able to find that yardmasters moved cars, but not trains. The operations in this yard, however, undoubtedly include the movement of trains in every sense of the word. This we say, mindful of the fact that some of the trains are moved by the dispatcher through the yard, usually on the tracks provided for that purpose, but (should occasion arise for such use) also on any tracks in the yard.

This is a close case. We say this, not only because counsel have so characterized it, but also because the conclusion we have felt compelled to reach is opposed to the impressions received at the trial. As remarked before in other cases, a given case may require us to stand so near the dividing line that its ruling partakes too much of the character of a "rescript" to be altogether satisfying. If we have correctly interpreted the will of Congress, it should be enforced, and the wise public policy imposed by this act should not be obstructed in its operation, unless the rights of others are in the way, and there is no invasion of the rights of the defendant, if the construction placed upon the act of Congress be the true one, as we believe it is.

The findings of facts and conclusions of law to be filed herewith are incorporated herein. Plaintiff may enter judgment in its favor and against the defendant for $100 with costs.

The conclusion reached, we think, to be in harmony with the construction placed upon the act by the Interstate Commerce Commission and with the adjudged cases. I. C. C. Ruling of March 16, 1908, No. 287–D; I. C. C. "Hours of Service" Pamphlet, page 48; United States v. Houston, 205 Fed. 344, 125 C. C. A. 481; Chicago v. United States, 226 Fed. 27, 141 C. C. A. 138; Brooklyn v. United States, 239 Fed. 287, — C. C. A. — (Hough, C. J., January 9, 1917, Second Circuit).

We do not understand the ruling in United States v. Erie, 237 U. S. 402, 35 Sup. Ct. 621, 59 L. Ed. 1019, to be in conflict with the construction placed upon the present act. That case involved the Safety Appliance Act. There are air brake, and also automatic coupling and "grabhold," provisions in the act. The court distinguished between these requirements, holding the one to refer to the train and the others to the car, as the unit. The air brake was required only when the company was about "to run a train." This was held to have a different meaning from the intra-yard movement of cars in assembling or classification work in the mere make-up of trains, or in the mere switching operations in the breaking up of trains.

It is worthy of remark, however, that the Supreme Court held (reversing the court below) that the movement of a number of cars forming a train from one yard to another was a train movement within the meaning of the air brake provision, although the yards were so intimately and closely connected that both the District Court and the Circuit Court of Appeals found them to be only one yard.

The general expressions employed in the opinion in Missouri v. United States, 211 Fed. 893, 128 C. C. A. 271, may well be quoted in support of the defense here. We are always, however, as has frequently been observed, to read the language of every opinion in the light of the facts of the case. The case as ruled was that a mere switchman is not within the act, although he, in addition to the work of a switchman, gives by telephone information upon which a train movement is made. His primary duty was to throw a switch. He certainly gave no "orders" by telephone, and there is nothing in the case to indicate that he thus received any. The likeness which the court found between him and the brakeman, who is sent to flag a train, makes clear the thought upon which the ruling was based. The want of likeness between him and a dispatcher emphasizes it. The general expressions used have reference, we think, to the likeness there must be between a dispatcher and the "other employés" meant by Congress. We have held (and we do not find Missouri v. United States necessarily to be read to mean otherwise) that "other employés" does not mean an employé of the same class as dispatchers or an employé who is properly classified as a dispatcher, but means one whose message or act operates as a command to others, or is sent or done in obedience to a command received by him, when the command is electrically trans-

mitted. We have not held that there is no likeness between one designated by the act as operator and one designated as "other employé." There is and necessarily must be a likeness, both with respect to an "order" being transmitted and the mode of transmission. To repeat the attempt to make the distinction clear, we decline to hold that both must belong to the same class, and hold that they are in different classes; but we also hold that there is not only a likeness between, but also an inclusion of one class with the other. "Operators," as named in the act, belong to the "other employés" class; but an "other employé" need not belong to the "operator" class, although there is the likeness indicated. Each is an employé; each gives, receives, or transmits orders; and the transmission to or from each is by telegraph or telephone.

The Missouri case rules that the switchmen in that case did not belong to any of the classes to which the act confines itself. The application of that case to the present one may be summed up in the expression there made use of with respect to the case of United States v. Houston: "The facts of that case differ from the facts of this." The same comment may be made upon the ruling in United States v. Chicago (D. C.) 219 Fed. 1011, and emphasized.

All of these cases recognize, as does United States v. Florida, 222 Fed. 33, 137 C. C. A. 571, the substantial difference, as well as distinction, between a conductor or switchman and the "other employés" whom Congress had in mind. The primary and real character of the employment is not changed by the occasional emergency use of a telephone. Here, again, we are dealing with an entirely different state of facts, as the regular and primary duty of these yardmasters is to direct train movements, and they do so by the use of the telephone.

## THE STRATHEARN.

(District Court, N. D. Florida. January 2, 1917.)

1. SEAMEN ⊂=24—WAGES—PART PAYMENT AT INTERMEDIATE PORTS—CONSTRUCTION OF STATUTE.

Under Seamen's Act March 4, 1915, c. 153, § 4, 38 Stat. 1165, which provides that every seaman shall be entitled on demand to receive one-half part of the wages which he shall have then earned at every port where the vessel shall load or deliver cargo, and that a refusal of his demand shall release him from his contract and entitle him to full payment of wages earned, "provided such a demand shall not be made before the expiration of nor oftener than once in five days," a seaman is not entitled to make such a demand until the vessel has been in port for at least five days.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 123–128; Dec. Dig. ⊂=24.]

2. ADMIRALTY ⊂=25—SUIT BETWEEN FOREIGNERS—DISCRETIONARY JURISDICTION.

The practice, in case of the institution of a suit in admiralty between citizens of a foreign country, of notifying the consul of that country that he may if desired make objection to the taking of jurisdiction, has for object the speedy adjustment between the parties, and, where no such objection is made until final hearing and after one of the parties has left the jurisdiction, the court may properly, if justice to the other party requires it, retain jurisdiction of the case.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 260–264; Dec. Dig. ⊂=25.]

3. SEAMEN ⊂=21—WAGES—DESERTION.

Seamen on a British vessel who left their ship in an American port without good cause *held* deserters and not entitled to recover wages under the British law.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 92–110; Dec. Dig. ⊂=21.]

4. SEAMEN ⊂=21—"DESERTER."

The word "deserter," as applied to seamen, means one continually and intentionally absent from the ship, constituting a quitting of the service of the vessel.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 92–110; Dec. Dig. ⊂=21.

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

In Admiralty. Suit by Hugo Ronlund, John Hoikkla, and John Dillon against the British steamship Strathearn. Decree for respondent.

Blount & Blount & Carter, of Pensacola, Fla., and Ralph James M. Bullowa, of New York City, for the steamer.

Frederic R. Coudert and Howard Kingsbury, both of New York City, as amicus curiæ on behalf of British Consul.

SHEPPARD, District Judge. This case concerns two seamen and a carpenter of the British steamship Strathearn, who assumed that

they were entitled to invoke the provisions of the new so-called Seamen's Act of 1915, under which they made demand on the master of the Strathearn for wages under section 4 of the act. Upon the master's refusal to comply with their demands, they quit the service of the ship and libeled.

The Strathearn arrived in the Port of Pensacola between 5 and 6 o'clock July 31, 1916, and shortly thereafter the libelants left her under the following circumstances:

Hugo Ronlund went ashore on the morning following the ship's arrival in Pensacola, without permission and against the express command and orders of the master. Ronlund was dissatisfied with the hours of service on the ship, and upon a dispute with the master regarding the matter proceeded to the consul. While ashore for this purpose, he learned that there had been passed by Congress an act conferring great benefits upon seamen. He then sought a lawyer's advice. Thereupon the seaman's trouble over the hours of service was overshadowed by the prospects of payment of half wages in port. Ronlund then proceeded aboard ship to demand half wages due him up to that date. The master refused. Thereupon Ronlund left the service of the ship and libeled.

John Koikkla left the ship without permission on the morning of August 1, 1916, within 24 hours of the Strathearn's arrival on the 31st of July, ostensibly to see a doctor. The whole day of August 1st passed with Hoikkla on shore and without his having seen a doctor. The day following, Hoikkla saw a doctor about some injuries he had received, and returning to the ship, ignorant of the beneficent provisions of the Seamen's Act, was "put wise" to the "American law." In consequence of which Hoikkla followed Ronlund's example.

John Dillon, not as sagacious as the author of the work on Municipal Corporations, but content with the distinction of ship's carpenter, likewise left the Strathearn on the morning of August 2d. Dillon's right to recover depends upon his conduct at the time. There is testimony that Dillon subsequently returned to the ship and worked, but that he made no claim for wages for such time. He worked aboard, it appears, simply for food and lodging, intending to pay for same when he recovered from the ship. Dillon, it seems, had some trouble with the boatswain. The master did not adjust the matter satisfactorily, and he also came ashore to see the consul, but received no "satisfaction" from that source. While ashore for this purpose, Dillon met the other two libelants, who advised him of the salutary provisions of the new Seamen's Act. Thereupon Dillon hied himself to a lawyer's office. Afterward he, too, returned to the ship and demanded half of his wages due and, upon a refusal by the master, quit the ship and her service.

The foregoing is a brief summary of the evidence.

Counsel on both sides have argued at great length on the rights of the libelants to recover under the La Follette Act March 4, 1915, c. 153, 38 Stat. 1164, and, if not under that act, then under the general British law.

For reasons of expediency the case will be treated with a view to liability of the ship under the Seamen's Act of 1915; and, secondly, the right of libelants to recover under the British law.

[1] First, it is contended by libelants that they are each entitled to recover under the La Follette Act, § 4, which is as follows:

"Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void: Provided, such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. * * * And provided further, that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement"

—because, upon the arrival of the Strathearn in Pensacola, and after occurrence of the facts recited in the summary, each seaman demanded of the master one-half part of his wages, which request was refused; and because of such refusal they rightfully left the service of the ship, for the act ipso facto put an end to libelants' respective contracts for service and entitled each of them to recover full wages for the time on board.

The respondent questions primarily the applicability of the Seamen's Act on constitutional grounds; and, secondly, denies the right of libelants to recover wages under the British law, which is the law of the contracts in this case.

Pretermitting the subject which evoked most of the argument, viz. whether the Seamen's Act would apply to a case where all of the parties to the action are foreigners and under a foreign flag, or the constitutionality of the act, it is certain that the statute applies only to cases embraced by its terms, and that such cases must meet the express requirements of the act to set the remedial provisions into operation.

From the uncontradicted evidence it appears that each of libelants left the service of the Strathearn within 48 hours of her arrival; that it was within this time and before the expiration of the statutory "five days" that they made their demands on the master for half part of the wages earned.

By reference to the act it will be noted that seamen are entitled to receive on demand one-half part of their wages then earned at every port where such vessel shall load or discharge cargo, etc., "provided, such a demand shall not be made before the expiration of * * * five days." Therefore the demand of libelants was unseasonably made, and the statute did not apply, and there can be no question of liability under it.

[2] All of the parties to this case are foreigners, and their relations and obligations arise out of a contract entered into in a foreign country and are subject to the laws of such country.

This controversy is a matter closely related to the internal discipline

of the ship and primarily one of consular adjustment. Where all of the parties, as here, are foreigners, the approved practice is to have the consul of such foreign country notified in order that he may make such objection as he may choose to the court taking jurisdiction. In this case the court did not require the consul to be notified in the regular way. Here it was deemed unnecessary, for the consul had unequivocal notice of the demands of the seamen and of the subsequent proceedings taken by libelants. In the absence of such protest in limine, the court exercised its discretion and took jurisdiction of the case. Not until the final hearing did the consul see fit to object to the court taking jurisdiction. This, too, after the jurisdiction had attached and the court had exercised its discretion.

Obviously the purpose of giving notice to the consul of disputes of this character is to facilitate speedy adjustments between the parties, and settle them according to the laws and regulations of the country to which the ship belongs. As citizens of the same country, it is good policy to refer the matters to their consular representative. But this practice has in view the speedy adjustment of the difficulty; and where the consul has remained passive and allowed one of the parties to depart the jurisdiction without adjustment, and the seamen are left behind to seek other employment in a foreign country, as is the present instance, in the opinion of the court furnishes the "special reason" for moving the court to take and retain jurisdiction of the case (The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152), for to remit the parties, under such circumstances, to a foreign tribunal after long delay and untold inconvenience, would work hardship, if not ultimately a defeat of justice.

[3, 4] Such considerations will influence the federal courts in taking jurisdiction, and in such cases administering the law of the country to which the parties belong. The record has been examined carefully, and I am fully convinced that in each case the elements of desertion are clearly made out. Libelants insist upon irregularities in the proceedings necessary to have them legally logged as deserters. There is no merit to this contention. It would be utterly impracticable to read over an entry in a logbook to a deserter and to receive and enter his reply thereto. A "deserter" is one continually and intentionally absent from the ship, constituting a quitting of the service of the vessel. The facts here show an animus non revertendi.

Libelants attempt to justify their absence from the ship on the ground that they came ashore to assert a legal right, and tried to do so within a reasonable time. From the law and the facts of the case it is clear that libelants had no rights which could be successfully asserted at the time. If they assumed they were entitled to the benefits of the Seamen's Act and left the service of the Strathearn on that ground, and it thereafter developed that no such rights had accrued, they interpreted the law at their peril.

Counsel may prepare decrees dismissing the libels.

## UNITED STATES v. NORTH GERMAN LLOYD.

(District Court, S. D. New York. January 13, 1917.)

No. 24.

1. SHIPPING ⟸81(1)—LIABILITY OF VESSEL—INJURY TO SUBMARINE CABLE—NEGLIGENT NAVIGATION.
A steamship which went ashore in the Narrows and dropped her anchor *held* liable for injury to the government cables from Ft. Wadsworth to Ft. Hamilton, which were broken by her anchor, both because of negligence in the grounding and in handling the anchor when she was floated, although the captain was advised of the presence of the cables.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 341, 344, 345, 347.]

2. ADMIRALTY ⟸22—JURISDICTION—SUIT FOR INJURY TO SUBMARINE CABLE.
Admiralty has jurisdiction of a suit for damages against a navigating vessel for injury to a submarine cable lying on the bottom of a channel.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 222–234.]

In Admiralty. Suit by the United States against the North German Lloyd. Decree for libelant.

H. Snowden Marshall, U. S. Atty., and Ben A. Matthews and John Hunter, Jr., Asst. U. S. Attys., all of New York City.
Joseph D. Bedle, of New York City, for respondent.

MANTON, District Judge. [1] On May 27, 1909, the respondent's ship Princess Alice went ashore off Ft. Wadsworth, and it is claimed by the libelant, injured the government's cables extending from Ft. Wadsworth to Ft. Hamilton. The claim is that she negligently went aground, and thereafter, without exercising due care, her anchor came in contact with the cables causing the injury. The contact of cable and anchor is sought to be proven circumstantially by the libelant. Cable signs indicating the presence of submarine cables were on the fort and on the southeast face of Battery Weed. This was a gray building at the water's edge on which is located the Ft. Wadsworth light. Another sign on uprights in letters about nine inches high was located on the bank. The claim is made, however, that because of the condition of the weather, which was foggy, these signs could not be seen. The cables were in good condition just before the grounding of the vessel and had been used. Six hours after the vessel floated, the cables were found to be damaged.

At the time of grounding, the Princess Alice was being piloted by a licensed harbor pilot, the captain in charge, and was moving in the most extensively used water in America. She went aground in the daytime in this widely traveled channel, and the evidence warrants a finding that the grounding of the vessel was due to the captain's failure to give the pilot the correct deviation of the compass for the course that would have taken his ship through the Narrows and safely out to sea. Pilot Akerman says that, had it not been for this error, his ship would never have grounded. It seems to be the captain's duty

to give the pilot the correct deviation of the compass and to check up his course.

It is the government's theory that the steamship, when she first realized the danger of going ashore, dropped her anchor and dragged it inshore, picking up the cables as the anchor dragged over their location, and thereafter the anchor chain was pulled in, causing the cables to be pulled taut, but not damaging the same. At high tide the vessel was floated by using her own power, both engines full speed astern, with the assistance of some eight or ten tugboats. With this force supplied, the ship moved from her position, and the anchor then entangled in the cables, snapped the cables, parting them into various sizes. The cable hut at the Ft. Wadsworth side was to the starboard of the vessel, and her anchor fast to the cables was out on the starboard side, and these cables ran immediately from the quartermaster's dock to the anchor and thence under the vessel as she lay grounded. In this position the strain of the anchor on the cables as the vessel was moved off shore would slide along the cables and pull the cables or slide them along the keel of the vessel.

Early on the morning of the 28th, it was learned that the cables had been torn out during the night. The armor was torn off the insulation, showing that it had been a very heavy strain. The cable was found 200 feet off the end of the quartermaster's pier and was broken off and pulled right out to sea; that is, in the river. The chain holding it and the ring bolt and fastening in the concrete in the cable hut were torn out and jammed in the conduit, smashing the conduit pipes. The splices of the cable were broken open, and the water poured into it and destroyed the cable by soaking the paper. The point of contact is given as 100 feet from the end of the quartermaster's dock.

The testimony, given in considerable detail, indicates a very severe strain and subsequent breaking of the cables. If the anchor of the vessel came in contact with this cable, it, with the subsequent floating of the vessel with the anchor entangled, would be a sufficient reason for the very much damaged condition of the cable.

While no one saw the anchor actually in contact with the cable, the location of the grounding of the vessel, together with the subsequent finding of the cables in the condition as found, and the time of the finding thereof, justifies a finding from the circumstances that the Princess Alice was responsible for the damage to these cables.

That the running aground of the vessel was negligent could hardly be disputed in view of the evidence of Pilot Akerman taken in conjunction with the location of the grounding of the vessel. After the vessel grounded, Capt. Hines pointed out the location of the cables to the captain of the Princess Alice, told him to exercise care so that his anchor might not become entangled with it, and Col. Haan gave notice to one of the tug captains, who was engaged in attempting to float the vessel, of the location of the cables with instructions to tell the captain of their location. This message was delivered. Therefore the captain of the vessel had specific warning as to the location of the cables if the signs on the fort were not sufficient notice to him in view of the foggy condition of the weather. So handling the anchor, after

such notice, as to permit it to come in contact with the cables, as the evidence inferentially justly permits, in my opinion, was negligence.

The evidence further justifies the finding that the ship was without the anchorage limits which extend from the lighthouse shown on the government Exhibit I, in a northerly direction. The course of the Princess Alice as she lay aground was about south-southwest or south by west. The bow of the Princess Alice was about 15 feet from the sea wall, which in turn was about 20 feet from the wall of the fort. The lighthouse was further in, so that the bow of the ship must have been about 50 feet from the line of the anchorage limits. The bow of the ship was the point of the ship nearest the anchorage limits, for the course of the ship and the anchorage line diverge northward.

The Act of February 29, 1888 (25 Stat. L. 41; Comp. St. 1913, § 10090), section 4 thereof, makes it a crime for the master of any vessel to fail in proper observations of the rules and provisions of the International Convention for the protection of submarine cables, and section 8 provides:

"That the penalties provided in this Act for the breaking or injuring of a submarine cable shall not be a bar to a suit for damages on account of such breaking or injury." Comp. St. 1913, § 10094.

[2] These facts require a finding that the Princess Alice was negligently grounded and afterward floated in a negligent manner, resulting in injury to the cables in question, and will warrant a decree for the libelant unless the respondent's claim that admiralty has no jurisdiction be sound.

The case of Postal Telegraph Cable Co. v. P. Sanford Ross (D. C.) 221 Fed. 105, settles this claim adverse to the respondent unless it can be said that this rule was not approved in The Raithmoor, 241 U. S. 166, 36 Sup. Ct. 514, 60 L. Ed. 937. Judge Chatfield in the former case decided that a dredge coming in contact with a submarine telegraph cable crossing a tidewater navigable channel and resting on the bottom, although fastened on shore at each end for connection with land wires, was responsible in admiralty for damages inflicted on such cables due to the negligence of the dredge, holding that, where a cable lies in the bottom of a channel, it is within the admiralty jurisdiction and is maritime.

Counsel for respondent argues, however, that this rule was not approved in the later Raithmoor Case, while the case of Postal Telegraph Cable Co. v. Ross was cited to the Supreme Court. It is not discussed in the opinion, nor is it disapproved. In the Raithmoor Case, a libel was filed in rem against the steamship Raithmoor to recover damages for tort due to the steamship while coming up the Delaware river, coming in contact with a scow or pile driver and a structure then being erected by the United States government to serve as a beacon and with a temporary platform used in connection with the work of construction. The Supreme Court held, reversing the District Court, that jurisdiction in admiralty existed under these facts. The court said:

"We regard the location and purpose of the structure as controlling from the time the structure was begun. It was not being built on shore and await-

ing the assumption of a maritime relation. It was in course of construction in navigable waters, that is, at a place where the jurisdiction of admiralty in cases of tort normally attached—at least in all cases where the wrong was of a maritime character."

As I read this decision, I do not think it essential that the object injured should itself be an aid to navigation before liability attached in admiralty. Its location is controlling, and if, by reason of its location, it has a maritime relation, it is within the admiralty jurisdiction.

Since the injuries had to do with the operations of navigation, and the cable itself was connected with the subject of navigation when occupying some portion of the navigable channel, and was not a structure on land nor affixed thereto as a part thereof, I am of the opinion that admiralty has jurisdiction, and for these reasons will grant a decree in favor of the libelant.

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JOHNSON-BROWN CO. v. DELAWARE, L. & W. R. CO.

(District Court, S. D. Georgia, Albany Division. February 20, 1917.)

1. EQUITY ⊜119—PROCESS—SUBSTITUTED SERVICE—ORDER—NECESSITY.
Substituted service of a bill in equity against a foreign corporation, made on its attorney without any order having been procured therefor, is invalid; the proper procedure being to apply for an order for such service, accompanied by an affidavit showing its necessity.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 296–302.]

2. CARRIERS ⊜177(4)—DAMAGE TO FREIGHT—LIABILITY OF CONNECTING CARRIER—CARMACK AMENDMENT.
Under the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 593 [Comp. St. 1913, § 8592]), making the initial carrier liable to the shipper for damages to the goods while in the hands of any connecting carrier, which superseded as to interstate shipments all remedies given by the states, a shipper cannot sue a subsequent connecting carrier to restrain recovery of freight charges, and enforce a set-off against them for damages to the goods in shipment, where there is no showing as to the carrier on whose lines the damage occurred.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 791–803.]

3. CARRIERS ⊜196—FREIGHT CHARGES—REGULATION—SET-OFF.
A plea of recoupment for damages to the shipment to defeat the railroad company's charges is contrary to the act of Congress requiring the freight to be paid only in cash.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 879–887.]

In Equity. Suit by the Johnson-Brown Company against the Delaware, Lackawanna & Western Railroad Company for injunction and equitable set-off. On motion to dismiss the bill and answer filed by defendant. Bill dismissed.

R. J. Bacon and R. H. Ferrell, both of Albany, Ga., for complainant.

James Tift Mann, of Albany, Ga., for defendants.

SPEER, District Judge. [1] This is a bill filed to restrain an action brought by the Delaware, Lackawanna & Western Railroad Company to recover freight charges on a certain carload of melons. The defendant company is a corporation and citizen of another state. The equity suit filed here was served upon its attorney. No order of court was granted or sought authorizing such substituted service. This seems essential to its validity. In the case of Bartlett et al. v. His Imperial Majesty the Sultan of Turkey and Others (C. C.) 19 Fed. 346, it was held by Circuit Judge Wallace that an order authorizing such service would be granted upon presenting a sufficient affidavit. In Pacific Railroad v. Missouri Pacific Railway Co. et al. (C. C.) 3 Fed. 772, after pointing out that the process of a court does not extend beyond the territorial limits, except in cases to enforce a legal or equitable lien claim against real or personal property within the district where the suit is brought, Mr. Associate Justice Miller, for the court, announces:

"As regards the subpœnas served on solicitors and attorneys for persons before the court in the former suit, the course of procedure in such cases has been well settled by the former practice of this court; and that is that, before such service can be of any validity, an application to the court must be made setting forth the circumstances which render such a service on the attorney or solicitor proper, and the order obtained from the court directing that service be made, and that such service, when made, shall answer as a substitute for actual service on the party so represented by the attorney."

[2] But, if properly served, the bill cannot be maintained. It is based upon a claim that he has a right to set off damages to his melons against the freight charges of the defendant company. Now the action for freight charges was not brought against the initial carrier. Nor is it alleged in the bill that the injury sustained by the fruit occurred on the line of the defendant company. The injury resulted from delay in the shipment, but the bill does not disclose which of the succeeding or connecting carriers on whose line the delay occurred. Before the enactment of the controlling legislation of Congress on this subject, there was—

"such a diversity of legislative * * * holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own state, or for a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another. The congressional action has made an end to this diversity; for the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transaction." Opinion of Mr. Justice Lurton in Adams Express Co. v. Croninger, 226 U. S. 505, 33 Sup. Ct. 151, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257.

The language used by the learned justice was taken from the opinion of Mr. Justice Powell in Southern Pacific Co. v. Crenshaw, 5 Ga. App. 675, 687, 63 S. E. 865. Associate Justice Lurton continues:

"That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that

there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it."

See, also, Texas & Pac. Ry. v. Abilene Cotton Mills, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075.

Justice Lurton continues:

"To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing federal law at the time of his action gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself. One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against a primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable."

Construing this controlling decision, we must reach the conclusion that the plaintiff's suit should have been brought against the initial carrier. That is the effect of what is widely known as the Carmack Amendment. In order to avoid the great confusion which existed on this subject, Congress, by the amendment, has afforded the shipper the most convenient means of redress from any carrier, which, by interrelation, had undertaken to transport his goods in interstate commerce. The simplicity and effectiveness of this remedy would be rendered nugatory if the shipper was at liberty to single out and sue any one or more of the succeeding carriers. The recourse of the initial carrier, if not to blame, is to adjust its loss with the succeeding carriers, which are blamable.

[3] Besides, the attempt in this bill to defeat the railroad company's charges for freight by the plea of recoupment has been held obnoxious to the act of Congress. In Chicago & Northwestern R. R. Co. v. Wm. S. Stein Co. (D. C.) 233 Fed. 716, it was held that in an action by an interstate carrier for freight charges a shipper cannot set off a claim for injuries to the goods; for the freight can be paid only in cash, and such set-offs would open the door to fraud and discrimination. The same doctrine was held and elaborated in the case of Illinois Central R. R. v. W. L. Hoopes & Sons (D. C.) 233 Fed. 135.

For these reasons, or either of them, the bill must be dismissed.

## MANITOU SPRINGS MINERAL WATER CO v. SCHUELER et al.

(Circuit Court of Appeals, Eighth Circuit. February 1, 1917.)

No. 4608.

1. TRADE-MARKS AND TRADE-NAMES ⟸9—PROTECTION.
To entitle a name to equitable protection as a trade-mark, the right to its use must be exclusive, and not one which others may employ with as much truth as those who use it, even though the use by the second producer, in describing faithfully his product, of a name or combination already in use by another may have the effect of causing the public to mistake the origin or ownership of the product, and hence no one can apply geographical names to well-known articles of commerce so as to prevent others in the same territory from truthfully using the same designation.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 13.]

2. TRADE-MARKS AND TRADE-NAMES ⟸3(3)—NATURE OF TRADE-MARK.
A trade-mark must, either by itself or by association. point distinctively to the origin or ownership of the article to which it is applied, and no one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by him.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 6.]

3. TRADE-MARKS AND TRADE-NAMES ⟸66—RIGHT TO TRADE-MARK.
The first appropriator of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator, or manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is in effect a false representation that the productions of the latter are those of the former.

4. TRADE-MARKS AND TRADE-NAMES ⟸9—GEOGRAPHICAL NAMES.
Where a geographical name acquires a secondary significance, indicative not only of the place of manufacture, but of the name of the manufacturer or producer, and the excellence of the thing manufactured or produced, an exclusive right to such name may be asserted as against every one not doing business within the same geographical limits, and even as against him if the name be used fraudulently to mislead buyers.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 13.]

5. TRADE-MARKS AND TRADE-NAMES ⟸7—SUBJECT-MATTER—NATURAL PRODUCT.
One who owns and controls the source of a particular natural product, such as a spring of mineral water, is entitled to be protected in the name given to that product, provided it is one otherwise subject to exclusive appropriation as fully as in the case of any article, or artificial product of manufacture.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 11.]

6. TRADE-MARKS AND TRADE-NAMES ⟸9—GEOGRAPHICAL NAMES—RIGHT TO.
A geographical name which for a long period has referred exclusively to a product made at the place and not to the place itself may be properly used as a trade-mark, and in such case, notwithstanding the manufacturer of the original product removed to another locality, he is entitled to retain the use of the name.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 13.]

7. TRADE-MARKS AND TRADE-NAMES ⟸92—INFRINGEMENT—PLEADING—BILL.
Inartificiality of statement in a bill to enjoin the infringement of a trade-mark will not justify dismissal of the bill in limine if a cause of action is substantially pleaded.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 102, 103.]

8. TRADE-MARKS AND TRADE-NAMES ⟸21—RIGHT TO—PRIORITY.
The exclusive right to the use of a mark or device claimed as a trade-mark is founded on priority of appropriation, although absolute priority, like that required of an inventor in a patent, is not necessary.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 24.]

9. TRADE-MARKS AND TRADE-NAMES ⟸92—RIGHT TO—INFRINGEMENT.
A bill, alleging that complainant's predecessors acquired possession of springs known from time immemorial as the "Manitou Springs," that being the Indian name thereof, that its predecessors and complainant long marketed the waters thereof under the name "Manitou," using such name as a trade-mark in connection with the words "Original Natural Mineral Ginger Champagne Bottled at the Famous Effervescent Springs Lying at the Foot of Pike's Peak, Colo. Manitou, Colo. U. S. A.," and that defendant acquired another spring, discovered in the same locality, but not in the same group, and disposed of its waters under the name "Manitou," sufficiently states a cause of action for equitable relief, particularly in view of the allegations of the registration of the trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 102, 103.]

10. TRADE-MARKS AND TRADE-NAMES ⟸9—REGISTRATION.
Under Trade-Mark Act Feb. 20, 1905, c. 592, § 5, 33 Stat. 725 (Comp. St. 1913, § 9490), providing that nothing shall prevent the registration of any mark used by the applicant or his predecessors which was in actual exclusive use as a trade-mark of the applicant or his predecessors from whom he derived title for 10 years next preceding the act, complainant and its predecessors, having enjoyed an actual and exclusive use of a geographical name as a trade-mark for 10 years next preceding the passage of the act, is entitled on registration to protection, notwithstanding the name be regarded in a sense merely geographical.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 13.]

Appeal from the District Court of the United States for the District of Colorado; John A. Riner, Judge.

Bill by the Manitou Springs Mineral Water Company, a corporation, against J. Schueler and others, copartners doing business under the name and style of Ute Chief Mineral Water Company. From a decree dismissing the bill, complainant appeals. Reversed and remanded, with directions.

Ralph Hartzell, of Denver, Colo., for appellant.

Charles W. Waterman, of Denver, Colo. (Caldwell Martin, of Denver, Colo., on the brief, and John A. Gallaher, of Denver, Colo., of counsel), for appellees.

Before SANBORN, Circuit Judge, and TRIEBER and VAN VALKENBURGH, District Judges.

VAN VALKENBURGH, District Judge. Appellant, complainant below, is a corporation under the laws of Colorado. Appellees, de-

fendants below, are citizens and residents of the state of Colorado, and are copartners, under the firm name and style of the Ute Chief Mineral Water Company, with their principal place of business in the town of Manitou in said state. In its bill plaintiff states that:

It "is the owner and in possession of a large tract of land in the city of Manitou and state of Colorado, and of a certain group of large and valuable springs of mineral water situate upon said lands, which said group of springs are and from time immemorial have been known as 'Manitou Springs,' as will be hereinafter more particularly set forth. That plaintiff and its predecessors in interest have owned and been in possession of said tract of land and said springs for many years. That prior to the settlement and occupation of the region now known as the state of Colorado, the said group of springs had been discovered by the Indian races which then occupied said region, and that the Indians, in recognition of the agreeable, medicinal, and curative properties which the waters of said springs possessed, had given to said group of springs the name of 'Manitou' which is a word used in Indian mythology indicating the name of the Indian 'Great Spirit' or 'Deity.' This name so given to the said group of springs by the Indian races was made known to the first settlers and explorers of the region by the Indians, and the said group of springs retained the said name and was so denominated from that time forth until the present. That in due course the lands in said region were explored and settled upon by citizens of the United States, and the said tract of land embracing said group of springs was acquired by the first predecessors in interest of this plaintiff, and from the time of said first settlement upon said tract of land until the present date, the said group of springs has been called and known as 'Manitou Springs' and has been so known by the successive owners thereof and as well by the public at large. That at all of the times herein mentioned the waters of said springs have been known as 'Manitou Water,' and the said name has been exclusively applied to the waters produced from the said springs and to no other water. That soon after the settlement and occupation of the region now known as Colorado, the waters of said springs had acquired such a favorable renown for their agreeable, curative, and medicinal properties that the owners and proprietors thereof engaged in the business of bottling and vending the same to the public under the name of 'Manitou Water' and the successive owners of the said lands and springs have continued the said business from that time until the present day. That in the course of time and after many years occupied in settlement upon the lands now embraced within the state of Colorado and many years subsequent to the time when the said springs had become well known as the 'Manitou Springs,' and because of favorable climatic conditions in the region surrounding said springs, and because of the desire of many people to enjoy said climatic conditions and the benefits of residence in the neighborhood of the said springs, many people settled upon and took up their residence in such neighborhood, so that in the course of time a town was organized under the laws of Colorado, and to that town, because of its proximity to the said springs, was given the name of 'Manitou,' said name being given to the said town because of its proximity to the said group of springs, which, as is herein set forth, had for many years prior thereto carried the name of and been widely known by the public as 'Manitou Springs.'"

The bill then sets forth:

That plaintiff is now, and for many years past has been, engaged in the business of bottling, manufacturing, and selling the waters from said springs and products allied therewith; that said business has been conducted among the several states of the United States and in commerce with foreign nations; that in the conduct of said business plaintiff and its predecessors in interest have expended large sums of money in building, maintaining, and operating a large plant of buildings and machinery upon said lands, in advertising said waters and allied products, and in establishing and maintaining sales agencies therefor; that by reason of the premises the plaintiff and its predecessors have built up a large and profitable business; that at all times they have

continuously called said waters by the name "Manitou" and have used said name upon all bottles containing said waters and products from said springs; that said name thereby has become widely and favorably known to merchants in and consumers of mineral water and allied products throughout the United States.

"That for many years past plaintiff's predecessors in interest had adopted and used as the trade-mark of the waters from said springs and the allied products, the word 'Manitou,' which trade-mark was in actual and exclusive use as a trade-mark in interstate commerce by plaintiff's predecessors in interest, from whom plaintiff derived title, for more than ten years next preceding February 20, 1905. That plaintiff's predecessors in interest the Manitou Mineral Springs Company, pursuant to the laws of the United States in that behalf, on, to wit, the 19th day of December, 1905, secured from the United States Patent Office, registration of its said trade-mark, consisting of the word 'Manitou' for its exclusive use in the manufacturing and vending of the mineral water and products of its said springs."

That on the 5th day of December, 1913, this plaintiff acquired said properties and business, together with said trade-mark used in connection therewith, and is now the sole owner and proprietor thereof.

"That many years after the discovery of and settlement upon and around the group of springs known as 'Manitou Springs,' and many years subsequent to the time when the waters from the said Manitou Springs had become widely and favorably known in commerce among the several states and to consumers and to the public generally under the name of Manitou, and many years subsequent to the adoption and use of the said name 'Manitou' by plaintiff's predecessors in interest as the trade-mark of the waters from the said Manitou Springs, a certain spring of water was discovered near the town of Manitou, Colo., and to the said spring the discoverers thereof gave the name 'Ute Chief Spring.' That the said last-named spring was and is entirely distinct and apart from the said group of springs now owned by the plaintiff, and known, and herein referred to, as 'Manitou Springs' or any thereof, and that the waters of the said so-called Ute Spring are entirely different in quality and properties from the waters of the said Manitou Springs. That after the discovery of the said Ute Spring, and as plaintiff is informed and believes, about the year 1902, the defendants acquired title to the waters of the said Ute Spring. And thereafter the said defendants, against the protest and warning of plaintiff's predecessors in interest and in violation of the rights of plaintiff's predecessors in interest to the exclusive use of the said trade-mark, and without license or permission from plaintiff's predecessors in that behalf, undertook to and did and do now use the word 'Manitou' upon labels affixed to bottles of mineral water prepared, manufactured, and sold by the said defendants, and did and do now counterfeit and colorably imitate plaintiff's said trade-mark thereon."

Thereafter follow more specific allegations as to the infringement complained of and a prayer for injunctive and other equitable relief.

Adopting the foregoing quoted averments, a second count declares upon a trade-mark registered June 12, 1906, consisting of a device—

"wherein appears the bust representation of an Indian rising above clouds, with the setting sun as a background, and holding in one hand a glass and in the other a pipe, a scene showing a house, a well curb, a rock, trees, people in the foreground and mountain peaks in the background, the word 'Manitou' inclosed in quotation marks, the words 'Original Natural Mineral Ginger Champagne Bottled at the Famous Effervescent Springs lying at the Foot of Pike's Peak, Colo. Manitou, Colo. U. S. A. The only Water on the American Continent Recharged with its Own Gas. Keep Bottle in Cool Place and Lay on its Side.'"

A third count deals with a trade-mark, registered on the same date as that next preceding, for the same device except that the words "Table Water" are substituted for "Ginger Champagne." A fourth

cause of action counts upon a trade-mark registered October 9, 1906, covering the words "Manitou Table Water." A fifth count concerns a trade-mark, registered upon the same date last mentioned, consisting of the words "Manitou Ginger Champagne." A sixth count covers the word "Manitou" alone, registered as a trade-mark January 8, 1907. The defendants are charged with infringement of all these marks. A seventh cause of action is for unfair competition in trade in connection with the infringements aforesaid.

The defendants moved to dismiss this bill, and each count thereof, alleging that the district court was without jurisdiction and the bill without equity. This motion was sustained, and plaintiff brings its appeal to this court. As stated by counsel for appellees:

"The motion to dismiss the amended bill of complaint raised the following propositions: First, that the alleged trade-marks were invalid at common law; secondly, that no facts were alleged which brought the case within the 10-year proviso of the fifth section of the Trade-Mark Act of 1905; thirdly, that no facts were alleged showing any infringement of a trade-mark; and lastly, that no facts were alleged showing unfair trade."

The first of these points involves the contention that the word "Manitou," which forms the basis of the trade-marks in suit, is a geographical name not the subject of a valid trade-mark.

[1-3] The following general propositions of law may be taken as established: To entitle a name to equitable protection as a trade-mark, the right to its use must be exclusive, and not one which others may employ with as much truth as those who use it. And this is so although the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product. Hence no one can apply the name of a district or country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district or dealing in similar articles coming from the district, from truthfully using the same designation. The trade-mark must either by itself or by association point distinctively to the origin or ownership of the article to which it is applied. The reason of this is that unless it does, neither can he who first adopted it be injured by any appropriation or imitation of it by others, nor can the public be deceived. The first appropriator of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator, or manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is, in effect, representing falsely that the productions of the latter are those of the former. The trade-mark must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association. No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. As its office is to point out distinctively the origin or ownership of the articles to which it is affixed, no sign or form of words can be ap-

propriated as a valid trade-mark, which from the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right for the same purpose.

These principles are announced in the following cases decided by the Supreme Court of the United States, from whose opinions the foregoing statements are substantially quoted. Canal Co. v. Clark, 13 Wall. 311, 20 L. Ed. 581; Columbia Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; Elgin Watch Co. v. Illinois Watch Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365. It is upon these cases that appellees rely chiefly to support their position in the point now under discussion. Many other decisions in various jurisdictions are to the same effect, but the complete doctrine will be found comprehensively and elaborately announced in the three cases cited.

In Canal Company v. Clark the word "Lackawanna," as applied to coal, was claimed to be the peculiar property and trade-mark of the complainants. The court found that this word was not devised by the complainants; that they found it a settled and known appellative of the district in which their coal deposits and those of others were situated; that at the time when they began to use it, it was a recognized description of the region and of the earths and minerals in the region. The court further said:

"It may be observed there is no averment that the other coal of the Lackawanna Valley differs at all in character or quality from that mined on the complainants' lands. On the contrary, the bill alleges that it cannot easily be distinguished therefrom by inspection. The bill is therefore an attempt to secure to the complainants the exclusive use of the name 'Lackawanna coal,' as applied, not to any manufacture of theirs, but to that portion of the coal of the Lackawanna Valley which they mine and send to market, differing neither in nature nor quality from all other coal of the same region. * * * The defendant has advertised for sale, and he is selling coal not obtained from the plaintiffs, not mined or brought to market by them, but coal which he purchased from the Pennsylvania Coal Company, or from the Delaware, Lackawanna & Western Railroad Company. He has advertised and sold it as Lackawanna coal. It is in fact coal from the Lackawanna region. It is of the same quality and of the same general appearance as that mined by the complainants. It is taken from the same veins or strata. It is truly described by the term 'Lackawanna coal,' as is the coal of plaintiffs. The description does not point to its origin or ownership, nor indicate in the slightest degree the person, natural or artificial, who mined the coal or brought it to market."

The bill was accordingly dismissed.

In Columbia Mill Co. v. Alcorn the word "Columbia" was adjudged not to be the subject of exclusive appropriation, having been in common use long prior to its adoption by complainant and giving no information by association, prior use, or otherwise, on the subject of origin, production, or ownership.

In Elgin Watch Co. v. Illinois Watch Co., complainant had established a watch factory in the city of Elgin, Ill., and was attempting to appropriate the name of that city to its exclusive use as a technical trade-mark. It appeared that primarily the word simply described the place of manufacture, and in no sense pointed to origin, production or ownership. The decree dismissing the bill was accordingly affirmed.

A situation altogether similar is disclosed in Castner v. Coffman, 178 U. S. 168, 20 Sup. Ct. 842, 44 L. Ed. 1021, in which it was sought to appropriate the name "Pocahontas" as applied to coal. This name was not used until a town was incorporated under that name. The court said:

"In passing, it is proper to notice that the fact that the coal mined in the various collieries in operation at the date of this agreement, as is the case with the mines now being operated, was from the same seam as that mined at the original Pocahontas mines."

It further appeared that there was no evidence of any want of knowledge on the part of complainants of the designation "Pocahontas" as the name of the coal mined in any and all of the collieries in operation in that region, and that the advertisement of the complainants made it clear that they were offering for sale, not the particular product of any one mine, but that the Pocahontas coal which they advertised was derived from numerous collieries within the Pocahontas region.

In John T. Dyer Quarry Co. v. Schuylkill Stone Co. (C. C.) 185 Fed. 557, the principle involved is further illustrated. The stone, quarried, crushed, and sold by complainant at Birdsboro, Berks county, Pa., was of igneous origin, commonly known as trap rock, and obtained from a dike of several miles in extent. The court said:

"Neither Dyer nor his successors owned or leased the entire dike. No reason is perceived why other persons quarrying, crushing, and selling the stone from the same dike should not, in the absence of fraud or unfair competition in trade, be permitted to use, in connection with the business carried on by them, the words peculiarily appropriate to the stone in that dike by whomsoever quarried. Especially is this true in view of the fact that, unlike manufactured articles dependent for their excellence upon care and skill observed in their production, the quality of trap rock, like many other natural products, vegetable and mineral, largely depends upon the locality where found."

[4] It is, however, uniformly recognized that geographical names often acquire a secondary signification, indicative not only of the place of manufacture, but of the name of the manufacturer or producer, and the excellence of the thing manufactured or produced, which enables the manufacturer or owner to assert an exclusive right to such name as against every one not doing business within the same geographical limits; and even as against them, if the name be used fraudulently for the purpose of misleading buyers as to the actual origin of the thing produced or palming off the productions of one person as those of another. French Republic v. Saratoga Vichy Co., 191 U. S. 427, 24 Sup. Ct. 145, 48 L. Ed. 247, and numerous decisions.

It will be noted that the prohibition against exclusive appropriation is confined to a name which is, in the language of the statute, "merely geographical," and "which, from the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose."

[5] It may also be laid down, upon reason and authority, that one who owns and controls the source of a particular natural product, such as a spring of mineral water, is entitled to be protected in the name given to that product, provided it is one otherwise subject to

exclusive appropriation as fully and as completely as in the case of any artificial product of manufacture. Congress Spring Co. v. High Rock Spring Co., 45 N. Y. 295–300, 6 Am. Rep. 82; Appollinaris Co. v. Sherer (C. C.) 27 Fed. 18; Hill v. Lockwood (C. C.) 32 Fed. 389; City of Carlsbad et al. v. Thackeray & Co. (C. C.) 57 Fed. 18; City of Carlsbad et al. v. Kutnow et al., 71 Fed. 167, 18 C. C. A. 24; Northcutt v. Turney, 101 Ky. 314, 41 S. W. 21; Dunbar v. Glenn, 42 Wis. 118, 24 Am. Rep. 395.

[6] This brings us to a very important distinction or exception in the application of the doctrine under discussion. It has been held in Baglin v. Cusenier Co., 221 U. S. 580, 31 Sup. Ct. 669, 55 L. Ed. 863, that while names which are merely geographical cannot be exclusively appropriated as trade-marks, a geographical name which for a long period has referred exclusively to a product made at the place, and not to the place itself, may properly be used as a trade-mark, and in such case that a validly registered trade-mark cannot be used by any one other than the owner, even with words explaining that the article to which it is attached is not manufactured by the owner of the trade-mark. The facts concerning the origin of the trade-mark there under consideration are thus stated:

"The facts, so far as we deem it necessary to state them, are as follows: For several hundred years prior to 1903—save for a comparatively brief period following the French Revolution—the Order of Carthusian Monks occupied the Monastery of the Grande Chartreuse, near Voiron, in the Department of Isere, in France. This was their Mother House. There, by a secret process, they made the liqueur or cordial which, at first sold locally, became, upwards of 50 years ago, the subject of an extensive trade and is known throughout the world as 'Chartreuse.' The Monks originally manufactured the liqueur at the Monastery itself and later at Fourvoirie, close by. It was marketed, here and abroad, in bottles of distinctive shape, to which were attached labels bearing the inscription, 'Liqueur Fabriquée a la Gde. Chartreuse,' with a facsimile of the signature of L. Garnier, a former Procureur of the Order, and its insignia, a globe, cross and seven stars; and these symbols with 'Gde. Chartreuse' underneath were also ground into the glass. In 1876, the then Procureur registered two trade-marks in the Patent Office, and these were re-registered in 1884, under the act of 1881. In the accompanying statement the one was said to consist 'of the word "Chartreuse," accompanied by a facsimile of the signature of L. Garnier,' and the other 'of the word symbol "Chartreuse"'; and the combinations in which these were used were described. In the year 1903, having been refused authorization under the French law of July 1, 1901, known as the Associations Act, the congregation of the Chartreux was held to be dissolved by operation of law, and possession was taken of their properties in France by a 'sequestrating administrator and liquidator' appointed by the French court. Forcibly removed from their former establishment, and taking their secret with them, the Monks set up a factory at Tarragona, in Spain, and there according to their ancient process they have continued the manufacture of the liqueur, importing from France such herbs as were needed for the purpose."

In his opinion Mr. Justice Hughes thus discusses the point now under consideration:

"It is insisted that the judgment is erroneous in determining that 'the word symbol Chartreuse' constituted a valid trade-mark. It is argued that 'Chartreuse' is a regional name; that the characteristic qualities of the liqueur were due to certain local advantages by reason of the herbs found and cultivated within the district described; that even as used in connection with the Monks'

liqueur it was still a description of place; and hence, that at most, so far as this word is concerned, the question could be one only of unfair competition. The validity of this argument cannot be admitted upon the facts which we deem to be established and controlling. It is undoubtedly true that names which are merely geographical cannot be the subject of exclusive appropriation as trade-marks. 'Their nature is such that they cannot point to the origin (personal origin) or ownership of the articles of trade to which they may be applied. They point only at the place of production, not to the producer, and could they be appropriated exclusively, the appropriation would result in mischievous monopolies.' Canal Company v. Clark, 13 Wall. 324 [20 L. Ed. 581]. See, also, Columbia Mill Company v. Alcorn, 150 U. S. 460 [14 Sup. Ct. 151, 37 L. Ed. 1144]; Elgin National Watch Company v. Illinois Watch Company, 179 U. S. 665 [21 Sup. Ct. 270, 45 L. Ed. 365]. This familiar principle, however, is not applicable here. It is not necessary for us to determine the origin of the name of the Order and its chief Monastery. If it be assumed that the Monks took their name from the region in France in which they settled in the Eleventh Century, it still remains true that it became peculiarly their designation. And the word 'Chartreuse' as applied to the liqueur which for generations they made and sold cannot be regarded in a proper sense as a geographical name. It had exclusive reference to the fact that it was the liqueur made by the Carthusian Monks at their Monastery. So far as it embraced the notion of place, the description was not of a district, but of the Monastery of the Order—the abode of the Monks—and the term in its entirety pointed to production by the Monks. * * * It could not fail to be recognized at once that these were the distinctive designations of the liqueur made by the Monks, and not geographical descriptions available to any one who might make cordial in a given section of country."

The distinguishing feature thus pointed out is recognized in the opinion of the Circuit Court of Appeals for the Third Circuit in Apollo Bros. et al. v. Perkins, 207 Fed. 530–533, 125 C. C. A. 192, 195.

"'Nubia,' it is admitted, is a geographical name, and there is nothing in the circumstance of its selection or use by the complainant (such as was found in Baglin v. Cusenier Co., 221 U. S. 580, 31 Sup. Ct. 669, 55 L. Ed. 863) that would permit of its registration under the Trade-Mark Act (33 Stat. 725, U. S. Comp. St. Supp. 1911, p. 1461), section 5 of which denies registration to marks which consist of 'merely a geographical name or term.'"

The deductions to be drawn from the decided cases are that geographical names are excluded only when they are merely such and are not selected, used, and appropriated under such special circumstances as to point distinctively to origin or ownership. Importance attaches to the fact conveyed by its primary meaning, whether the term in its entirety embraces primarily the notion of place or a distinctive designation of origin and ownership. It appears that the latter signification may, under certain conditions, be the primary one, even though the name was geographical and regional at the time of adoption as a trade-mark, and still more would this be true if the geographical or regional sense came into being after such adoption and use, whether technical or otherwise.

It is true that in Glendon Iron Co. v. Uhler, 75 Pa. 467, 15 Am. Rep. 599, the borough of Glendon was established after the adoption of the word "Glendon" as a trade-mark. The exclusive appropriation of that word was denied as a geographical term. This case is cited apparently with approval in Columbia Mill Co. v. Alcorn, supra; but the cases of Canal Company v. Clark, Columbia Mill Co. v. Alcorn, and Elgin National Watch Co. v. Illinois Watch Company, were all

cited and considered in Baglin v. Cusenier Co., and the unanimous conclusion of the Supreme Court in the last-named case was not deemed to be in conflict with the principle announced in the previous decisions of that court.

[7-9] It should be noted that all the leading cases, to which reference has been made, were decided upon a full presentation of essential facts. In the case at bar, we are confined to the allegations of the amended bill, and, without losing sight of the accepted rule of construction against the pleader, nevertheless inartificiality of statement should not justify summary action in limine, if a cause of action is substantially pleaded. The complainant has stated the origin of the trade-mark claimed in terms sufficient to demand consideration, upon fuller showing, of whether or not this case falls within the exception rather than the general rule governing the status of geographical names as technical trade-marks. It has alleged appropriation of this mark with such legal sufficiency as to forbid arbitrary rejection upon the face of the bill. As was said in Columbia Mill Company v. Alcorn, supra:

"The exclusive right to the use of a mark or device claimed as a trade-mark is founded on priority of appropriation, and it must appear that the claimant of it was the first to use or employ it on like articles of production."

But it is held that this does not mean absolute priority like that required of an inventor in a patent under an absolute statute. The doctrine of prior use does not apply with equal force in trade-mark cases, because the exclusive right to the use of a trade-mark rests not on invention, but on such use as makes it point out the origin of the claimant's goods. It must be early enough for that, but absolute priority or invention is not required. Jacoway v. Young, 228 Fed. 630, 143 C. C. A. 152. We believe the state of facts tendered by the bill is sufficient to entitle complainant to exhibit its proofs in support of its claim of technical trade-mark in the word "Manitou" standing alone or in combination.

[10] We have thus far considered only the first proposition raised by the motion to dismiss. In view of the conclusion reached a passing reference will suffice for the others. We deem it unnecessary to decide whether the facts alleged bring the case within the ten-year proviso of the fifth section of the Trade-Mark Act of 1905. It is proper to say, however, that if, upon sound pleading, complainant can show an actual and exclusive use of this word as a trade-mark of itself or its predecessors, from whom it derived title, for ten years next preceding the passage of the act of 1905, it will be entitled to protection accordingly, even though the word "Manitou" be regarded as used in a sense merely geographical. Rossman v. Garnier, 211 Fed. 401, 128 C. C. A. 73; Thaddeus Davids Co. v. Davids Manufacturing Co., 223 U. S. 733, 32 Sup. Ct. 528, 56 L. Ed. 635.

While the allegations respecting infringement and unfair trade might be measurably amplified with a possible gain in definiteness and certainty, nevertheless we by no means consider them fatally defective upon motion to dismiss. Since appropriate action in the trial court, if thought advisable, may remove all substantial ground for criticism

in this respect, we deem further discussion of these features unnecessary at this time. The decree is accordingly reversed, and the cause remanded to the court below, with directions that defendants be permitted to make their answer to the bill, and for such other and further proceedings thereafter as equity may demand and permit. It is so ordered.

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## GREAT LAKES & ST. LAWRENCE TRANSP. CO. et al. v. SCRANTON COAL CO.

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

No. 2434.

1. COURTS ⟸276—FEDERAL COURTS—DISTRICT OF SUIT—WAIVER OF OBJECTION.

Where a bill contains allegations of diversity of citizenship, which give a federal court jurisdiction, but do not entitle complainant to maintain the suit in that district the right to make objection on that ground is a privilege which may be waived, and which is waived by a general appearance, either to plead to the merits or to contest on the merits a preliminary matter, as an application for a preliminary injunction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815.]

2. CARRIERS ⟸78—CONSTRUCTION—IMPLIED OBLIGATIONS.

Complainant, a large shipper of coal on the Great Lakes, entered into a contract with defendant, a shipowner, which provided in substance that during three seasons complainant would employ certain of defendant's steamers to transport its coal westward from Oswego at stated rates of freight. It agreed to load all of such vessels on their west-bound trips, subject to exception in case of strikes, etc., while defendant agreed to carry the said coal on all west-bound trips of the steamers, subject to like exceptions, or in case of loss of a vessel. The parties had conducted business under similar informal contracts for a number of years. *Held* that, in view of the circumstances and relation of the parties, the contract carried with it an implied obligation of defendant to continue its business during the term and to run its boats in a reasonable manner continuously from Oswego westward.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 272–395.]

3. INJUNCTION ⟸59(1)—SPECIFIC PERFORMANCE ⟸5, 68—CONTRACTS ENFORCEABLE—CONTRACTS FOR CONTINUOUS ACTS—REMEDY AT LAW.

On proof by complainant that it could not obtain other vessels of suitable size to carry its coal and deliver the same at its established terminals, and that its business had been so built up that it could be profitably conducted only by water transportation, complainant was entitled to an injunction to restrain defendant from selling the vessels for foreign service, and a specific enforcement of the contract, especially if it was further shown that the sale of the vessels would leave defendant insolvent and unable to respond in damages.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 114, 116; Specific Performance, Cent. Dig. §§ 5–8, 199.]

4. SPECIFIC PERFORMANCE ⟸23—PERSONS AGAINST WHOM PERFORMANCE MAY BE ENFORCED—PURCHASERS.

Complainant was not barred from such relief by the fact that defendant had already sold its vessels to its principal stockholder, who was its vice president and a director, and who had full knowledge of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 52.]

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

5. SPECIFIC PERFORMANCE ⟸16—DEFENSES—HARDSHIP OF ENFORCEMENT.
The contract having been deliberately made in view of the war conditions then prevailing in Europe, was not improvident, and a court of equity will not refuse to enforce it because its enforcement would deprive defendant of large prospective profits from the sale of its vessels.
[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 29, 35, 36.]

6. SPECIFIC PERFORMANCE ⟸6—RIGHT TO RELIEF—MUTUALITY OF REMEDY.
If specific performance be otherwise proper, equity is not deterred from granting its aid because of a so-called lack of mutuality in the remedy; but it suffices that defendant's compulsory performance is conditioned upon complainant's continued readiness to carry out his obligations.
[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 9–11.]

7. SPECIFIC PERFORMANCE ⟸75—CONTRACTS ENFORCEABLE—CONTINUING CONTRACTS.
The need of continuous supervision does not bar, however much it may deter, a court of equity from exercising its jurisdiction to enforce specific performance of a contract when the ends of justice seem to require it.
[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 210.]

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

Suit in equity by the Scranton Coal Company against the Great Lakes & St. Lawrence Transportation Company, George E. M. Pratt, and others. From an order granting a preliminary injunction, defendants appeal. Affirmed.

Henry Russell Platt and Charles E. Kremer, both of Chicago, Ill., for appellants.

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

Before KOHLSAAT, MACK, and EVANS, Circuit Judges.

MACK, Circuit Judge. This is an appeal from an order granting a temporary injunction restraining the sale of nine certain boats or the sending of them from the Great Lakes or the St. Lawrence river beyond Montreal. Plaintiff's rights were based upon a contract between it and the defendant Transportation Company, dated January 17, 1916, the threatened sale of the boats for use in European waters, and the resulting irreparable damage because of plaintiff's contractual obligation to ship coal and the impossibility of obtaining suitable vessels therefor. Plaintiff is alleged to be a citizen of Pennsylvania, and the defendant corporation, a citizen of Virginia; the individual defendants, its directors, citizens of Illinois.

The contract provided in substance that plaintiff employ the nine named steamers—

"for transportation of its coal from the port of Oswego, N. Y., to their full capacity on all west-bound trips, for the season of navigation on the Great Lakes of the years 1916, 1917, 1918, at the rate of freight of seventy cents (70c.) per net ton to Lake Michigan, and sixty cents per net ton to Lake Superior, free in and out, and shall load and unload their respective cargoes from time to time so as to give the said vessels reasonable and ordinary dispatch, substantially the same as heretofore, unless prevented by strikes, disasters or other matters beyond its control hereinafter more fully specified."

Defendant corporation agreed:

"To carry the said coal on all trips west-bound of its said steamers, or any of them, at the said rates of freight for the seasons of navigation aforesaid."

The contract further provided:

"That if at any time the operations or business of the party of the first part at the mines or on the roads by which coal is to be transported to the place of shipment aforesaid, are interrupted by floods, breaks, accidents, combinations, or by turnouts or strikes, or by casualties of any kind, the obligations of the said party of the first part to furnish cargo or cargoes under this contract for the period of such interruption may be suspended for and during the period of such interruption and interruptions from time to time, by notice in writing to the party of the second part, without liability for damages by reason of failure to furnish cargoes and make shipments during such period or periods of suspension; * * * that if at any time the operations or business of the party of the second part or any of its respective steamers, are interrupted by breaks, accidents, combinations, perils of navigation, or by turnouts, strikes, or by casualties of any kind, the obligations of the party of the second part and its respective ships to carry under this agreement shall be suspended during the period or periods of operation of such causes from time to time, by notice in writing to the party of the first part, without liability for damages by reason of failure to carry cargoes during such period or periods of suspension; * * * that in case of actual or constructive total loss of any of the vessels aforesaid, this contract shall be abated and canceled to the extent of the capacity of such vessel or vessels without liability for damages and without claim or compensation whatsoever by the party of the first part on account of the same."

[1] 1. Both the original and the amended bill allege the facts as to citizenship and residence; while the diversity of citizenship essential to federal jurisdiction existed, there was neither such residence in the Northern district of Illinois, nor allegation thereof, as, under section 51 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. 1913, § 1033]), would have permitted the court, against defendant's objection, to exercise its jurisdiction. This right to object, however, is a privilege which defendant may waive. A general appearance is such a waiver. Eldorado Coal and Mining Co. v. Mariotti, 215 Fed. 51, 131 C. C. A. 359, and cases cited.

While it is true that the time given under the rules for pleading enables a defendant carefully to examine the bill and fully to consider whether or not he shall waive this privilege, it does not follow that he may not be called upon for a decision at some earlier period; concededly, he may voluntarily waive the time period and enter a general appearance. And if, as in the instant case, the exigencies of the proceedings require prompt action by the parties and by the court long before the day for pleading, the defendant, in our judgment, is not absolved from forthwith either asserting his personal privilege or waiving it.

Though this may at times result in the loss to a defendant of a statutory privilege, through inadvertence and without real negligence, we deem it but the logical application of the salutary principle underlying the rule requiring, as his first step in the litigation, a special appearance for this specific purpose in order to preserve the right, namely, that a party shall not attempt to win out on the merits and, if unsuccessful or subsequently unwilling to risk a decision in that court, then be able

to avert the consequences, for causes not absolutely fatal to the court's jurisdiction. And it is therefore immaterial that the objection is urged, as in this case, before the court has expressed its views, but after a full hearing on the motion for a preliminary injunction.

New equity rule 29 [198 Fed. xxvi, 115 C. C. A. xxvi] in permitting defenses in point of law arising upon the face of the bill to be made in the answer, and in providing that defenses theretofore presentable by plea in bar or abatement shall be made in the answer, does not, in our judgment, change the law in this respect. It aims at simplifying the pleadings, not at abolishing the requirement of a special appearance at the outset, if the personal privilege is intended to be asserted. It is unnecessary in this case to determine whether or not the rule has changed the former practice (Lehigh Valley Coal C. v. Yensavage, 218 Fed. 547, 134 C. C. A. 275), so as to permit the objection to the jurisdiction to be coupled with an alternative defense on the merits, if it clearly appear that the personal privilege is not thereby intended to be waived. For if this right be granted by rule 29, it was not here exercised; no attempt was made to raise the question of privilege until after the privilege itself had been waived by opposition on the merits to the granting of a temporary injunction.

That the original bill failed to allege in express terms that the amount in controversy exceeded $3,000, for which reason it was amended after the hearing, does not enlarge the defendant's rights. The amendment was purely formal; it is apparent from the other allegations of the original bill that much more than the jurisdictional amount was involved. Moreover, if the objection had been well founded, it would not have gone to the jurisdiction of the court in the true sense of the word.

Furthermore, this objection has no connection whatever with the personal privilege or the waiver thereof. While a defendant who is actually deceived by false jurisdictional or residential allegations in the bill does not lose his right or privilege to object to further proceedings when the true facts appear (Lehigh Valley Coal Co. v. Washko, 231 Fed. 42, 145 C. C. A. 230), one who is not so misled should not and does not regain a waived privilege, merely because the amendment of the bill on other points gives him the right of pleading anew to the merits of the cause.

[2] 2. We come, then, to the interpretation of the contract. There is no express provision that the steamers, or any of them, shall make any trips whatsoever, eastward or westward; there is no express provision that the trips, if and when made, shall extend as far east as Oswego. And therefore defendant contends that the obligation to carry coal westward is conditioned solely upon the Transportation Company's uncontrollable willingness to run the boats on Lake Ontario. If this be the sound construction of the agreement, the bill must be dismissed, for, under such circumstances, the court would not tie defendant's hands.

But we cannot accede to these contentions or adopt this construction. The obligation to carry defendant's coal on all west-bound trips, fairly interpreted in the light of the context and of the relations of

the parties out of which the written agreement grew, carries with it the further implied obligation to run the boats in a reasonable manner continuously during the period of navigation on the Great Lakes east-bound to or beyond Oswego and west-bound calling at this port.

Precedent can throw but little light on the sound interpretation of such contracts, especially as to implying unexpressed obligations: each has its own individuality, its own background and surrounding circumstances. Words are only symbols, and at times, even in the most formal agreement, but elliptical expressions of the mutual understanding; the underlying mutual intent, sought by both parties to be clothed in the language used, must be ascertained; text, context, and extrinsic circumstances, including prior negotiations and relations, may be considered to enable the court to view the matter from the standpoint of the parties at the time of making the contract.

Looking at the agreement in its entirety, we find the circumstances that will suspend the obligation, in whole or in part, of each party, clearly specified, such as strikes, accidents, or the loss of a vessel; it is not the obligation to continue a west-bound voyage from Oswego once begun, but the obligation to continue in the conduct of its business, that is expressly remitted or suspended; clearly this has reference to the entire future of the three-year period of the contract; it would be unnecessary to abate the obligation to carry in the event that a vessel be destroyed, if the duty to carry from Oswego were subject to the owner's arbitrary right to keep the vessel on Lake Erie. Furthermore, such a construction would place this part of the plaintiff's business completely at the mercy of the shipowner, inasmuch as plaintiff's obligation is absolute, except for the specified excuses, to give defendant its cargo on call at the port. A bilateral contract of the nature here in question will not lightly be construed, so as to give one of the parties a virtual option, instead of imposing upon each of them obligations conditioned solely as they may have expressly agreed.

In Rhodes v. Forwood, 1 A. C. 256, the case most relied upon by appellants, the House of Lords refused to imply an obligation of a mine owner to continue as such owner for seven years because he had given plaintiff an exclusive agency in the city of Liverpool for that time. But this result was reached in view of the express concession of the plaintiff that there was no obligation to sell him any coal whatsoever or to refrain from shipping the entire output elsewhere than to Liverpool. Compare, Ogdens, Ltd., v. Nelson, [1904] 2 K. B. 410, affirmed in [1905] A. C. 109. Similar agency cases are common: the mere creation of an exclusive agency in and for one locality for a definite period does not imply an obligation on the part of the principal to continue his nation-wide business for that time. Pellet v. Insurance Co., 104 Fed. 502, 43 C. C. A. 669. The relative importance of the parties' interests may justify the view that they do not intend more than that the agency should be exclusive while the business continues, but not exceeding that specified time. In the instant case, however, practically one-half of defendant's business is involved.

Moreover, the agreement expressly provides that the Coal Company is to employ the vessels and load them "substantially the same as heretofore" and that the Transportation Company is "to carry the said coal on all trips west-bound." The "said coal" refers to the coal loaded as theretofore; that is, in accordance with their former arrangements. While this was their first written agreement, they had had similar dealings under informal contracts for a number of years. The course of action during that time was substantially in accordance with plaintiff's contentions as to the interpretation of the agreement; that is, that while these steamers were tramp vessels, with no definitely fixed trips, they did in fact ply fairly regularly between Oswego and Milwaukee as well as beyond these ports.

Furthermore, the prior negotiations (U. S. v. Bethlehem Steel Co., 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731), and the direct statements of the parties, not to third persons, but to one another, make it clear that they intended by this agreement to tie up the boats in question for three successive seasons. Their very purpose was to prevent the sale; to continue the relations theretofore existing; to make them more permanent. And while, if the language of the agreement clearly fails to express such purpose, it will not be perverted, yet if it be reasonably susceptible of a construction in accordance with their mutually expressed aim, it will be so construed.

[3] 3. But it is strenuously denied that the remedy at law is adequate, or that equity in such a case will give or compel, directly or indirectly, specific performance of the contract. The question, on this appeal from a preliminary injunction, is whether there was an abuse of judicial discretion in granting it. Without detailing the conflicting affidavits, we are of the opinion that the District Court was justified therefrom in concluding that no other boats of a size small enough to pass through the Welland Canal were obtainable; that even if plaintiff could be adequately compensated for any increased freight cost in shipping by rail to Buffalo instead of to Oswego, and thence by water westward, boats of a size to dock at Chicago and Milwaukee, at places reasonably available for plaintiff's established trade, could not be secured for the three-year period; that plaintiff's business had been so built up for delivery by water that the necessity of all-rail shipment would have disrupted it, or have injured it far in excess of the increased freight rate and in a measure difficult, if not impossible, of judicial ascertainment. If on full hearing these conclusions be sustained by the evidence, plaintiff will have demonstrated the inadequacy of a remedy at law.

Moreover the court was justified on the affidavits in concluding that Pratt, the principal stockholder, had paid for the boats in the company's own stock, with but a nominal cash addition; that the transaction would leave the company insolvent, and be a fraud upon plaintiff, as its obligee and creditor; and that under these additional circumstances, the discretionary right of a court of equity to grant specific performance should be exercised, rather than that the plaintiff should be remitted to an action at law against the corporation, necessa-

rily to be followed by further proceedings against such of its stockholders as had taken its property by methods which, however valid between them and the corporation, were invalid as against its creditors.

[6] If specific performance be otherwise proper, equity is no longer deterred from granting its aid because of a so-called lack of mutuality in the remedy. It suffices that defendant's compulsory performance is conditioned upon plaintiff's continued readiness to carry out his obligation. Montgomery Traction Co. v. Montgomery Light & Water Co., 229 Fed. 672, 144 C. C. A. 82; Ames, Lectures on Legal History, p. 376. See, too, Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856.

[7] Nor does the need of continuous supervision bar, however much it may deter, the court from exercising jurisdiction when the ends of justice seem to require it. Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843; Union Pacific R. Co. v. Chicago, R. I. & P. R. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265; Prospect Park & C. I. R. Co. v. C. I. & B. R. Co., 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610; Jones v. Parker, 163 Mass. 564, 40 N. E. 1044, 47 Am. St. Rep. 485; Mayor of Wolverhampton v. Emmons, 1901, 1 K. B. 515.

[4] 4. That Pratt had purchased the boats, and contracted to resell them just before this suit was brought, will not defeat plaintiff. Pratt had been the Transportation Company's vice president and director; at the time of the alleged purchase, he was its principal stockholder; he had full knowledge of the contract, and of plaintiff's claim. He can be fully protected as against the company or any other stockholders for the money paid by him to secure the discharge of the mortgage on the boats or given to the company on account of the purchase price. His knowledge of the entire situation subordinates him as owner to plaintiff's prior equitable right to specific performance.

[5] 5. The contract in question was fairly made, in view of the war conditions then prevailing; plaintiff wanted to assure the continuance of its business in the manner in which it had theretofore been conducted; defendant's then stockholders and directors were willing to tie up their boats, practically to lease these specific and, under the then and now prevailing conditions, unique chattels for more or less certain trips and period; the progress of the war greatly enhanced the value of the boats, so that a sale thereof for use in European waters would be highly profitable to defendants. A court of equity will weigh the relative advantages and disadvantages to each of the parties that would be occasioned by its interposition; there is no absolute right to its aid; it would not enjoin the breach of the contract merely because of the existence of the obligation; it would not prevent defendant from reaping the harvest of war profits merely to maintain the inviolability of contracts; it would not compel performance of a contract improvidently made; it will so mold and condition its aid as to subserve the interests of all parties wherever possible. But a contract fairly and honestly entered into is not improvident merely

because, due to rapid changes in war times, its fulfillment involves the sacrifice of large prospective profits; and that sacrifice will be demanded, if the just rights of the other party cannot otherwise be fully and adequately maintained.

Order affirmed.

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SEMIDEY et al. v. CENTRAL AGUIRRE CO. et al.

(Circuit Court of Appeals, First Circuit. January 4, 1917.)

No. 1207.

1. LANDLORD AND TENANT ⊜285(3)—FORFEITURE OF LEASE—EQUITABLE RELIEF—ASSIGNMENT.

In a suit in equity to forfeit a lease, which permitted subletting the premises, but not assigning them, the determination of whether a transfer was an assignment or a sublease is not of much consequence, since, if it was an assignment, it would not relieve the original lessee of his legal obligations, for breach of which there would be an appropriate remedy.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1194–1196; Dec. Dig. ⊜285(3).]

2. LANDLORD AND TENANT ⊜55(3), 280—FORFEITURE OF LEASE—EQUITABLE RELIEF—GROUNDS.

If the original lessee of land and a water right, or those claiming under it, have diverted the water from the land to its substantial damage, there is a proper case for equitable protection, which might be given either by forfeiture of the lease or by the more common remedy of injunction and accounting for damages.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 143, 145–149, 1180; Dec. Dig. ⊜55(3), 280.]

3. EQUITY ⊜24—RELIEF AWARDED—FORFEITURE.

Equity views forfeiture with disfavor, and will only interfere to work a forfeiture and ascertain damages where the remedies at law are plainly and substantially inadequate.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 69–76; Dec. Dig. ⊜24.]

4. LANDLORD AND TENANT ⊜280—FORFEITURE OF LEASE—EQUITABLE RELIEF—VIOLATION OF PROVISIONS.

Where a lessee of land and a water concession, which could be forfeited by the government if the water was not used in connection with that land, had separated the use of the water from the land, but there were not shown to be any other users of water from the same stream who were complaining to the government, it is not shown that the remedies of the lessors were in law, or by the usual remedies of equity, and so inadequate as to justify a forfeiture of the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1180; Dec. Dig. ⊜280.]

5. APPEAL AND ERROR ⊜1009(1)—REVIEW—FINDINGS OF FACT—SUIT IN EQUITY.

While in an equity proceeding the court of review must examine the case de novo, findings by the trial court, who saw the witnesses, and was in close touch with the locality and physical conditions, should not be disturbed, except in case of clear and unmistakable error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970, 3978; Dec. Dig. ⊜1009(1).]

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6. LANDLORD AND TENANT ⟸111—FORFEITURE OF LEASE—EQUITABLE RELIEF—INJURY.

While a concession of water rights for use on certain lands provided that it should be inseparable from the lands, but it appeared that for several years before the leasing of the land the water had not been used thereon, because of the destruction of the canal, permission given by the lessee in good faith to another to use the water on other lands for a term in consideration of his repairing the canal, and with a provision that all rights thereto should revert to the original land at the end of the term, though a technical violation of the lease, resulted in no substantial injury to the lessor, but rather benefited his land, and therefore does not entitle the lessor in equity to a forfeiture of the lease, since equity will not interfere to protect a mere technical or strictly legal right involving no substantial injury.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 336; Dec. Dig. ⟸111.]

7. LANDLORD AND TENANT ⟸111—FORFEITURE OF LEASE—STATUTE.

Under Civ. Code Porto Rico, § 1459, providing that, if the lessor or lessee should not comply with the obligations imposed by the preceding sections, they may request the rescission of the contract and damages, and section 1472, providing that the lessor may judicially dispossess the lessee for the infraction of any of the terms stipulated in the contract, breaches of the lease by the lessee do not ipso facto give the right of rescission, regardless of extenuating or moderating circumstances.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 336; Dec. Dig. ⟸111.]

8. LANDLORD AND TENANT ⟸285(3)—FORFEITURE OF LEASE—SUIT—ISSUES.

In a suit to forfeit a lease for violation of the restrictions concerning the use of water rights, the lessor cannot raise the question that the lessee is violating Joint Resolution May 1, 1900 (31 Stat. 715), because its holdings are excessive.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1194–1196; Dec. Dig. ⟸285(3).]

9. WATERS AND WATER COURSES ⟸156(7)—CONCESSION TO USE WATER—RESTRICTION TO LAND.

Under a water right concession, which declared the water to be inseparable from the land for which it was granted, that it could not be utilized for other purposes, nor the one alienated without the other, the lessee of part of the land, and those claiming under it, cannot legally use the water, except on the land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 182; Dec. Dig. ⟸156(7).]

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

Suit by Francisco Semidey and others against the Central Aguirre Company and others. Decree for defendants, and plaintiffs appeal. Decree vacated in part, and otherwise affirmed.

Perry Allen, of New York City (Henry G. Molina, of San Juan, Porto Rico, on the brief), for appellants.

Charles Hartzell, of San Juan, Porto Rico, and Malcolm Donald, of Boston, Mass. (Stafford Johnson, of Boston, Mass., on the brief), for appellees.

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

ALDRICH, District Judge. The questions raised in this case grow out of a controversy in respect to a lease of a sugar plantation at Guayama, Porto Rico, known as Hacienda Teresa, "together with whatsoever is covered by and appertains to said lands, and is annexed to and remaining thereon, with their entrances and exits, uses, rights and servitudes," and among the rights and servitudes covered by this clause were certain water rights running with the land by virtue of an irrigation concession granted by the local Spanish authorities in 1861, and confirmed by the government of Spain in 1868.

The lease was by the Semidey family to the Central Aguirre Company, and was dated July 30, 1901, and the concessionary right which attached to the land was that of the right to take the waters of the rivers Lapa and Majada for irrigation purposes.

The water right concession was to the owners of six haciendas, two of which owners withdrew, and it is claimed that the concessionary rights thereupon centered in the remaining four concessionaries as owners of haciendas or plantations, known, respectively, as Teresa, Aguirre, Carmen, and Amedeo; but there is nothing for us to decide in respect to the question whether the entire grant to the six concessionaries, upon the withdrawal of two, inured to the remaining four.

There was a provision in the concession that "the waters granted are inseparable from the haciendas for which they are granted; they cannot be utilized for other purposes, nor the ones alienated without the others"; and in the approval of the government of Spain, through its minister of the colonies, it was provided that failure to observe the provisions of the concession should cause the concession to lapse.

[1] It is claimed that the Aguirre Company transcended its rights under the lease from the Semidey family of July 30, 1901, and exposed the concession to forfeiture by making an assignment, renunciation, and transfer of the lease to Mr. Jeremiah Smith, for himself, his successors, or representatives, who in turn assigned or sublet to Frazer, Rogers & Noyes, expressly reserving to the Central Aguirre Company the use of the concessionary canal and its waters, thereby separating the concessionary waters from the Teresa land and hacienda, to which the rights were inseparably and inviolably annexed, thereby again exposing the concession to imminent danger of forfeiture.

There was no provision in the lease expressly authorizing an assignment as such, and, although there was a provision authorizing a lease, it was provided that:

"In case the Central Aguirre Company should lease the hacienda to another person, it is understood that the clauses and terms of this contract shall always remain in full force and effect with the Central Aguirre directly responsible to the lessor."

Looking at the purpose of the Central Aguirre Company in its conveyance to Smith, we think the idea of the Aguirre Company was not to renounce in the sense of surrendering any rights under their lease in respect to the waters of the rivers, but to transfer them to Smith and his successors; and, that being the purpose, the difference between an assignment and a subletting would not be of much consequence, in an equitable sense, except in so far as it might bear upon

the question of danger of forfeiture. An assignment of this character would simply transfer such right as the original lessee, had, and it is not easy to perceive that, by such an act, the lessee could relieve itself from the legal obligations which rested upon it under the terms of the lease, and, if the obligations in respect to repairs, settlements, and other things were not fulfilled, that an appropriate remedy would not be at hand.

It is further contended (and in this contention perhaps lies the substantial and turning point of the case) that the Central Aguirre Company, to whom the use of the waters was expressly reserved, proceeded, in connivance with one Manuel Gonzales, and with the consent of Smith, to divert the waters and apply them to the use of certain lands belonging to Gonzales, not covered by the concession; that Gonzales closed the intake of the subcanal leading to the Hacienda Teresa, constructed a subcanal of his own and tapped the joint or main canal of the concession at a point immediately above the intake of the subcanal leading to the Teresa estate, and took and used a large portion of the water of the Lapa and Majada rivers for the purpose of irrigating lands of his own not covered by the concession; and that this condition continued from 1907 to the time of filing the bill in the early part of 1912.

This proceeding is in equity, and was instituted in the District Court of the United States for the District of Porto Rico, and the relief sought is that the lease of July 30, 1901, together with subsequent renewals, be canceled as of July 31, 1911; that the renewal of the lease, dated March 25, 1911, be canceled; that the Central Aguirre Company, Smith, and others be directed to vacate the Hacienda Teresa; and for an injunction and an accounting.

The question here is not so much a question whether the assignment was a technical breach of the lease, or whether there are unfulfilled obligations in respect to the repair of ditches, canals, and fences, and unfulfilled obligations in respect to squatters and other things, as it is a question whether the plaintiffs have made out a case for equitable relief.

[2] It goes almost without saying that if either the original lessee, or those acting under the lease, either by virtue of an assignment or a sublease, or otherwise, have tapped the canal and diverted waters which were going, and should go, to the Teresa hacienda, and that ownership is suffering substantial damage, it would be a proper case for equitable interference and protection, and that protection might come through a possible decree of forfeiture, or through the instrumentality of the more common and less offensive remedy by injunction and an accounting as to damages.

[3] In equity the element of drastic force involved in the idea of forfeiture is not looked upon with favor. Indeed, it is viewed with disfavor, and it is only in extreme cases, and where remedies at law are plainly and substantially inadequate, that equity will interfere to work a forfeiture and ascertain damages. Jones v. New York Guaranty & I. Co., 101 U. S. 622, 25 L. Ed. 1030; Henderson v. Carbondale Coal & Coke Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. Ed. 332;

Brewster v. Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213; Lindeke v. Associates Realty Co., 146 Fed. 630, 77 C. C. A. 56; U. S. v. Oregon & C. R. Co. (C. C.) 186 Fed. 861; St. Louis Union Trust Co. v. Galloway Coal Co. (C. C.) 193 Fed. 106, affirmed on appeal in 201 Fed. 1022, 119 C. C. A. 294; Liddle v. Cook, 209 Fed. 182, 126 C. C. A. 130.

[4] There is nothing in the record which presents any public phase in respect to the waters in question. The primary idea upon which a government reserves to itself the right to declare a forfeiture of its grants in respect to public waters is, that the duty rests with all governments to protect members of the public when their rights and interests are involved in the use of public waters. The concession in question was to six owners located upon or near the waters in question. The waters, in a sense, may be public waters; but, be that as it may, there are no owners above, or below, or between the six concessionaries, who are complaining that their rights have been invaded, and for that reason that the concession should be forfeited. This is merely a controversy between holders under a single grant, who are in dispute as to their relative rights. The remedies for ascertaining and establishing their rights must be adequate, either in the usual course of law, or of equity, and usual remedies are to be favored above exceptional and oppressive remedies through forfeiture.

We see no ground, under the circumstances of this case, for saying that the assignment or the sublease should be canceled upon the ground that there is imminent danger that the concession will be declared forfeited by the government, or upon the ground that the concessionary rights are otherwise in danger.

The assignments of error are 32 in number, but we do not deem it necessary to consider them seriatim, because there are certain general principles of equity which must be accepted as controlling, and as against the general claim of the plaintiff for forfeiture and cancellation as equitable relief.

There are 15 findings which are special in the sense that they are findings upon distinct phases of the case.

Although a substantial part of the proofs, and perhaps all of the proofs before Judge Hamilton, are in the record, there is not upon the evidence very much conflict in respect to the substantial features of the case. Some of the findings of the court below involve law and fact, but those which relate to the grounds which may become the basis of equitable relief are purely findings in respect to questions of fact. As for instance, No. 11, which is, in effect, that the complainants are not being injured by Gonzales' restoration of the Lapa canal, at his own expense, and the use of the waters of the Lapa river by him under the reservations in the sublease. And the same is true of finding 13, which is to the effect that in 1910, after some adjustment of water and canal conditions, that the Teresa estate was receiving all of the irrigation water from said concession to which it was entitled.

[5] While in an equity proceeding the court of review may and must examine the case de novo, findings of fact by the court, who saw

the witnesses and was in close touch with the locality and the physical conditions involved, will not be disturbed, except in case of clear and unmistakable error. Villanueva v. Villanueva, 239 U. S. 293, 36 Sup. Ct. 109, 60 L. Ed. 293; Washington Securities Co. v. United States, 234 U. S. 76, 78, 34 Sup. Ct. 725, 58 L. Ed. 1220; Stuart v. Hayden, 169 U. S. 1, 14, 18 Sup. Ct. 274, 42 L. Ed. 639; Trujillo & Mercado v. Succession of Rodriguez, 233 Fed. 208, 147 C. C. A. 214.

[6] The concession in question was in 1868. It gave the grantees or concessionaries certain rights in respect to the waters of the Lapa and Majada rivers for purposes of irrigation, and there were certain provisions as to canals, intakes, conduits, repairs, and various other things. Soon after the grant, canals were constructed, and other things were done with a view of utilizing the water rights granted by the government of Spain. The canals and other structures were so far destroyed by a hurricane in 1878 as to render them practically useless, and after some things had been done by the Central Aguirre syndicate by way of reconstruction, they were again in 1899 practically demolished, and after an expenditure of considerable sums of money upon the Majada canal, and after investigations in respect to the expense of restoring the Lapa canal, it was decided not to undertake the work of its reconstruction.

It would seem that the owners of the Teresa interest did nothing in the direction of repairing the canal, either by themselves or in connection with the other owners; that they were sleeping upon their concessionary rights for 20 years or more; and that the waters, so far as the Lapa river and the Teresa hacienda were concerned, were in practical nonuse and going to waste, at the time of the lease to the Central Aguirre Company.

The idea of the Central Aguirre Company under its lease was to utilize the waters; but having ascertained the expense of reconstruction of the Lapa canal and other things connected with it, and that the expense was such that they did not care to assume it, they entered into a contract with Manuel Gonzales for grinding cane, and an arrangement was made with him to repair the Lapa canal under a scheme which contemplated his use of the waters of the Lapa river, upon condition that the rights should revert to the Central Aguirre Company at the termination of the agreement with Gonzales. This arrangement between the Central Aguirre Company and Gonzales, and what was done under it, unquestionably involved an unwarranted diversion of the waters; but there is nothing in the situation which indicates bad faith. It is reasonable enough to assume that the Central Aguirre Company acted under the supposed, but mistaken, idea of a right under the lease to utilize waters which were in practical nonuse and doing no one any good.

While the diversion cannot be justified in a strict legal sense, it is urged that the owners of the Teresa interest have taken rents under the lease, or some part of them, and that that operates as a waiver of any point that might otherwise be taken against the violation of the terms of the lease and the unwarrantable diversion of the waters. But we do not go much into the question of waiver, because under the cir-

cumstances, it is difficult to see that the complainants have suffered any substantial injury, if any injury at all, by reason of the diversion of the waters and the technical invasion of their rights. Indeed, it seems more probable than otherwise that the Teresa estate has been benefited by the restoration of the canal and other structures. It is not necessary to inquire whether the Teresa hacienda is getting under present conditions, or was getting under the conditions existing at the time these proceedings were instituted, as much water from the Lapa river as it was entitled to under the original concession, because it is quite sufficient to say that that estate is receiving as much water as it was receiving before the restoration of the canals and the other works by Gonzales at a large expense, and under a restoration which must ultimately inure to the benefit of the Teresa estate.

It is not our understanding that equity must interfere, or should interfere, at the instance of a party suffering no substantial injury, to regulate technical or strictly legal rights. Where disputes arise between owners of community water rights under a grant, there must not only be the grievance of legal invasion, but a grievance of irreparable, or at least of substantial injury, in order to justify the interposition of equity, to the end that questions as to forfeitures and leases should be regulated.

[7] The point is taken that, under sections 1459 and 1472 of the Civil Code of Porto Rico, the breaches of the lease, and of the conditions of the original concession, put the concession in jeopardy of forfeiture and operate to give the lessors under the doctrine of rescission the right to demand possession of the premises.

We do not understand that all departures from the terms of concessions or of leases necessarily operate that way ipso facto. There might be extenuating and moderating circumstances, and it is doubtless for such reasons that under both sections judicial investigation and judicial dispossession are contemplated.

[8] A further point is taken that the defendants stand here in violation of the joint resolution of Congress, approved May 1, 1900 (31 Stat. 715), modifying what is known as the Foraker Act (Act April 12, 1900, c. 191, 31 Stat. 77), because their holdings of land interests are excessive. We do not go into the question of the holdings of the corporation, or consider any questions of restriction of holdings, because it is clearly not the right of a party to an equity proceeding invoked for the purpose of regulating relative water rights under a joint grant, to raise a question of that kind in the collateral way in which it is sought to be raised by the complainants here.

Viewing this case as one involving commingling water rights, where the interests, from the very nature of things, are dependent and interdependent and relative, rights affected by development and by nondevelopment, by user and by nonuser, and as a case in which the complainants are suffering no permanent or substantial injury, we see no reasonable grounds for canceling the leases upon the ground that their provisions have been violated, nor do we think that any of the questions involved in this case should be influenced by any contention that the concession is in jeopardy of forfeiture.

[9] Section 8 of the concession of 1861 is quite imperative in its terms, in that it declares that:

"The waters granted are inseparable from the haciendas for which they are granted; they cannot be utilized for other purposes, nor the ones alienated without the others."

We cannot see that Gonzales, or any others claiming under the lease of the Teresa hacienda, could get any greater right of diversion than that which the Teresa had under the original concession.

Gonzales, by tapping the main canal below the junction of the Lapa and Majada rivers, and taking the waters of the joint canal by means of a subcanal of his own, is using the water upon his own lands and land not covered by the irrigation concession. This is something that seems not to be in dispute, and, that being so, we think that part of the final decree which declares that the "waters which are being taken by Gonzales from the Lapa concession are being legally used" should be vacated, and this notwithstanding it is further declared that the use thereof is in trust for the owner of the Teresa estate.

We find no grounds for interfering with the District Court's disposition of the cause in respect to cancellation and forfeiture, nor with its order in respect to rents now in the possession of the District Court for the district of Ponce; but we think that part of the decree which declares Gonzales' use to be legal should be vacated, to the end that the complainants' prayer for an injunction in the pending cause may be available to them, if, under present or subsequent conditions, the situation should be such that the use should be terminated or regulated by injunction, and as to what should be done through such an instrumentality we express no opinion.

As both parties in a measure prevail under this appeal, we think no costs should be taxed by either party in this court.

The decree of the District Court, declaring Gonzales' use of the Lapa water to be a legal use, is vacated. In all other respects it is affirmed. No costs in this court.

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ESTEP et al. v. KENTLAND COAL & COKE CO.

(Circuit Court of Appeals, Sixth Circuit. February 6, 1917.)

No. 2874.

1. APPEAL AND ERROR ⟸1009(1)—REVIEW—FINDINGS.

Findings of fact by the trial judge in an equity case will not be disturbed on appeal, unless the evidence preponderates against them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970, 3978.]

2. WITNESSES ⟸159(8)—COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS.

Under Civ. Code Prac. Ky. § 606—2, forbidding a person to testify for himself concerning any verbal statement of or transaction with a deceased person, grantees, suing to reform a deed which reserved timber rights to the grantor, are incompetent to testify as to time of the inser-

tion of the reservation; the grantor being dead and having transferred the timber rights before his death.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 675.]

3. DEEDS ⟸194(1)—VALIDITY—PRESUMPTIONS.

While there is a presumption that a deed is delivered at its date, intention alone will not constitute delivery, and some act showing a parting by the grantor with control over the deed is necessary; therefore delivery cannot be found where the grantor retained possession and control of the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574, 575, 581–583, 634.]

4. COURTS ⟸375—APPLICABILITY OF STATE LAW—LIMITATION OF ACTIONS.

State statutes of limitations are not binding on the federal courts in equity suits, and the question whether relief is barred depends only on whether complainant has been guilty of laches; the federal courts frequently finding complainant guilty of laches for delay for less than the period of limitations.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 983.]

5. REFORMATION OF INSTRUMENTS ⟸32—LACHES.

Plaintiffs, when minors of 16 and 17 years, received a conveyance of land from their father; the deed being recorded nearly a year after its date. By interlineations in the deed a reservation to the grantor of the mineral rights in the land was inserted. In the year that the deed was recorded, plaintiffs learned of the sale of minerals, and they consented to a conveyance thereof 3 years thereafter. The mineral rights were subsequently transferred to an innocent purchaser, and some 10 years after the eldest of plaintiffs reached his majority they sued to reform the conveyance on the theory that the reservation was inserted by their father after delivery. *Held* that, in view of plaintiff's acquiescence in the conveyance and probable participation in the proceeds, they are barred by laches from attacking the deed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 119–121.]

6. ESTOPPEL ⟸90(2)—EQUITABLE ESTOPPEL—WHAT CONSTITUTES.

In such case plaintiffs are estopped from questioning the deed.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 244.]

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Suit by Joseph H. Estep and another against the Kentland Coal & Coke Company and others. From a decree denying relief, complainants appeal. Affirmed.

C. M. Whitt, of Williamson, W. Va., for appellants.

J. F. Hager, of Ashland, Ky., for appellees.

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

KNAPPEN, Circuit Judge. Appeal from a decree denying relief in a suit in equity to reform a deed, etc. The case is this:

On June 23, 1898, William F. Estep and wife, the parents of plaintiffs, executed a deed to them of certain lands in Pike county, Ky., then belonging to the father. When executed, the deed contained no reservation of minerals. The deed was voluntary and without valuable consideration. The plaintiffs were at the time respectively 17 and

nearly 16 years of age; both were living with their parents, and so continued until the plaintiffs were respectively married. The deed was recorded June 5, 1899, nearly a year after its date. The record of the deed shows a reservation to the grantors of the mineral rights in the land, and the deed contains an interlineation to that effect in the father's handwriting. On March 21, 1899, and thus between the date and the recording of the deed, Estep and wife contracted with one Hellier for the sale of the mineral rights in the land at a price of 75 cents per acre. There is nothing to indicate that this was not at the time an adequate price for the minerals. In the following May, and thus still before the deed was recorded, a survey was made for ascertaining the acreage, and presumably the boundaries, of the tract containing the minerals; and on February 23, 1902, Estep and wife made deed to Hellier of the minerals, which were fully paid for at or before the time the deed was made. The father died May 22, 1903 (at which time one of the sons was 22 years old and the other nearly 21), leaving to his other children the surface rights in his remaining lands, from which he had meanwhile sold the minerals. Hellier died about three years later. On March 4, 1910, under decree of the probate court in the settlement of his estate, the minerals in question were sold to the defendant Alma Coal Company, who, in the following December, sold and conveyed them to the defendant Kentland Coal & Coke Company, at a price of $30 per acre, which was fully paid.

This suit was begun July 6, 1912, for the cancellation of the exception of the minerals contained in the deed, and an adjudication that plaintiffs were the owners of such minerals. The testimony upon the trial was taken in open court. The trial judge filed an opinion, in which he expressed himself as not satisfied that the deed was delivered to plaintiffs before the date on which it was lodged for record, and announcing the conclusions that plaintiffs knew of the sale of the minerals to Hellier and consented to the insertion of the exception in the deed, that plaintiffs carried the chains in the making of the survey in 1899, and were present when the transaction was closed and the money paid, and that the defendant Kentland Company was a purchaser for value without notice of any defect in the title. The conclusion was reached that plaintiffs are barred from relief by laches and estoppel.

[1] In these circumstances, the conclusions of the trial judge are accepted by us as correct, unless the evidence is found to preponderate decidedly against those conclusions. City of Cleveland v. Chisholm (C. C. A. 6) 90 Fed. 431, 434, 33 C. C. A. 157; Monongahela Co. v. Schinnerer (C. C. A. 6) 196 Fed. 375, 379, 117 C. C. A. 193; Pugh v. Snodgrass (C. C. A. 6) 209 Fed. 325, 326, 126 C. C. A. 251. There is no such preponderance; on the other hand, the evidence preponderates in favor of the conclusions of the trial judge.

[2] Of course the change in the deed, if made after its delivery, would not deprive plaintiffs of their title to the minerals. The evidence, however, makes it very uncertain, to say the least, that the delivery was made before the date on which the deed was recorded. Plaintiffs were both minors, the deed was without valuable considera-

tion, plaintiffs were not present at its execution, and while there was testimony by one of the plaintiffs of a delivery soon after execution, the testimony was held incompetent by the trial judge (and we think rightly) under section 606—2 of the Civil Code of Kentucky, which (with certain exceptions not important here) forbids a person to testify for himself concerning "any verbal statement of, or any transaction with, or any act done or omitted to be done by * * * one who is * * * dead when the testimony is offered to be given." Dunbar v. Meadows, 165 Ky. 275, 278, 176 S. W. 1167.

[3] The deed was kept in the father's deed box until by the father's direction one of the plaintiffs transmitted it for record. While there is a presumption more or less strong that the deed was delivered at its date (Ford v. Gregory, 10 B. Mon. 175, 180), intention alone will not constitute delivery; some act evidencing a parting by the grantor with control over the deed being necessary thereto. Dunbar v. Meadows, supra, 165 Ky. 277 et seq., 176 S. W. 1167; Justice v. Peters, 168 Ky. 583, 586, 182 S. W. 611.

While the trial judge states that "for the sake of the argument" he disposed of the case on the basis that the exception was inserted in the deed and in its record after the deed was recorded, the judge was apparently of a contrary opinion; and we think it the natural inference from the testimony that the interlineation was made between the date of the deed and its recording. There was testimony, apparently credible, that Hellier had heard, after the contract of February, 1899, for the sale of the minerals, but before payment was made, that the land had been deeded to plaintiffs on account of the father's trouble with a creditor, and that Hellier declined to carry out the contract unless the minerals were excepted in the deed, that the father agreed that th exception should be made, and that plaintiffs agreed thereto. The mother was living with one of the plaintiffs when the trial was had, but was not produced as a witness, nor was her absence explained. As well said by the trial judge:

"It is not likely that, with this title bond outstanding, he [the father] would have put to record a deed showing the title thereto in his children."

We have no trouble in agreeing with this conclusion. And not only is the conclusion that plaintiffs knew of and consented to the insertion in the deed of the exception of the minerals supported by direct testimony, but there was also apparently credible testimony from the same witness that plaintiffs were present when the deed was made, that it was read in their presence, and that they agreed that "if ever anything occurred afterwards they was to join in the deed when they became 21," and that there was talk that the father would pay to the boys some part of the consideration for the minerals.

That the Kentland Company is a purchaser in good faith is clear; the only suggestion to the contrary deserving mention is that the record itself, if consulted, would, because of the spelling and language of the exception, be seen not to have been made by the scrivener of the deed generally. But this suggestion does not overthrow the otherwise convincing nature of the evidence of good faith purchase. The ques-

tion then is: Are the facts and circumstances such as to justify a conclusion that plaintiffs are barred by laches and estoppel?

The pertinent situation may be thus summarized: Plaintiffs knew of and assented to the sale of the minerals in 1899 and to their conveyance in 1902; no complaint was ever made until 1912, when this suit was begun, at which time one of the plaintiffs was 31, the other nearly 30 years of age. Meanwhile Hellier had paid for the minerals, presumably with plaintiffs' knowledge; the father had died, as had Hellier; the value of the minerals had been greatly enhanced; and they had been sold to an innocent purchaser for value at a large price.

[4] In the view we take of the case it is unnecessary to decide whether, as alleged by defendants, plaintiffs' action is barred by section 2515 of the Kentucky Statutes, which imposes a limitation of five years upon "an action for relief on the ground of fraud or mistake," subject to the proviso in section 2519 that the cause of action shall not accrue until the discovery of the fraud or mistake, not to exceed in all 10 years from the time the fraud was perpetrated. See Combs v. Ison, 168 Ky. 728, 731, 182 S. W. 953.

In Pond Creek Coal Co. v. Hatfield (this day decided) 239 Fed. 622, —— C. C. A. ——, we state the rule to be well settled that state statutes of limitation are not binding upon the courts of the United States, and that in suits in equity in the federal courts relief is barred by lapse of time, only as the same amounts to laches or works an estoppel, and that while there has been "for the sake of uniformity a disposition to accept the statutory regulations of the states prescribing the time within which suits may be brought," ripening into a rule which will be enforced whenever by observing it the court "is not required to abrogate its own principles," yet that the courts have frequently enforced the doctrine of laches where the lapse of time has been shorter than that prescribed by state laws, but where the peculiar circumstances gave rise to an equity which the court was bound to protect. The latter proposition is abundantly sustained by the following decisions: Richards v. Mackall, 124 U. S. 183, 188, 8 Sup. Ct. 437, 31 L. Ed. 396; Alsop v. Riker, 155 U. S. 449, 460, 15 Sup. Ct. 162, 39 L. Ed. 218; Penn Mutual Life Ins. Co. v. Austin, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626; Ky. Coal, etc., Co. v. Ky. Union Co. (C. C. A. 6) 187 Fed. 945, 948, 110 C. C. A. 93; Patterson v. Hewitt, 195 U. S. 309, 319, 25 Sup. Ct. 35, 37 (49 L. Ed. 214). As said in the latter case:

> "Indeed, in some cases the diligence required is measured by months rather than by years. * * * And in others a delay of two, three, or four years has been held fatal."

[5, 6] We think the instant case falls clearly within the rule of the cases cited. Plaintiffs' cause of action is utterly without equity. We think it barred by both laches and estoppel. Bull v. Sevier, 88 Ky. 515, 11 S. W. 506; Ayre & Lord Tie Co. v. Baker, 138 Ky. 494, 128 S. W. 346. Plaintiffs' minority at the time the change in the deed was made and the minerals sold is not enough to avoid the bar; for although they were not called upon, during their minority, to repudiate the transaction or to institute suit (assuming that the change was made

after delivery), the circumstances were such as to require them, in case they had a grievance, to act with reasonable diligence upon coming of age. This they did not do. Instead they waited nearly nine years after the younger had attained his majority, to the manifest injury of innocently acquired rights, and until several years after the deaths of the two persons having the best knowledge of the transactions, and this to the embarrassment of their opponents in litigation—acting at the last only, as is fairly presumable from the record, when prompted by the great advance in coal values.

The decree of the District Court is affirmed, with costs.

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POND CREEK COAL CO. v. HATFIELD et al.

(Circuit Court of Appeals, Sixth Circuit. February 6. 1917.)

No. 2841.

1. APPEAL AND ERROR ⟸1078(1)—REVIEW—WAIVER OF ERRORS.
Contentions not discussed, either in appellant's brief or orally, must be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256.]

2. EQUITY ⟸87(1)—STATUTES OF LIMITATION—APPLICATION.
The Kentucky statutes of limitation apply to equitable as well as to legal actions.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242, 244, 395; Limitation of Actions, Cent. Dig. § 170.]

3. LIMITATION OF ACTIONS ⟸19(1)—STATUTES—APPLICABILITY—LANDS—MINERAL INTERESTS—"REAL ESTATE."
Under Ky. St. § 458, defining "real estate" as including all rights and interests in lands other than chattel interests, and in view of the practice in other actions, section 2505, prescribing a 15-year limitation upon actions for the recovery of real property, applies to an action to recover mineral interests in lands.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 73, 80, 84, 85.

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

4. ADVERSE POSSESSION ⟸42, 54—DURATION AND CONTINUITY OF POSSESSION.
Ky. St. § 2505, prescribing a 15-year limitation upon actions for the recovery of real property, does not begin to run until adverse possession, and the bar is not complete unless the adverse possession is continuous for the full statutory period.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 207–212, 271.]

5. MINES AND MINERALS ⟸49—ADVERSE POSSESSION—NATURE OF POSSESSION.
Although defendant, who purchased the surface rights upon land, at that time or soon thereafter formed the intention of holding the mineral interests, his claim thereto, unless open and notorious, was not adverse.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 135.]

6. MINES AND MINERALS ⟸49—ADVERSE POSSESSION—ESSENTIALS.
Where the owner of the surface conveyed it, reserving the mineral rights, which he did not own, the mere use and possession of the surface was not enough to constitute adverse possession of the mineral rights.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 135.]

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

7. MINES AND MINERALS ⊂⊃49—ADVERSE POSSESSION—ESSENTIALS.
Where the owner of the surface rights in land, who was entitled to mine coal for domestic purposes, cut timber and mined coal, such acts constitute no adverse possession; it being presumed that the mining was in the exercise of his rights.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 135.]

8. MINES AND MINERALS ⊂⊃49—ADVERSE POSSESSION—ESSENTIALS—PAYMENT OF TAXES.
That the owner of the surface rights in land paid taxes on the lands containing the minerals does not constitute adverse possession of the mineral rights.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 135.]

9. COURTS ⊂⊃375—RULES OF DECISION—AUTHORITY OF STATE LAWS—STATUTES OF LIMITATION.
State statutes of limitation are not binding on the federal courts, and in suits in equity in the federal courts relief is not barred by lapse of time, except as it amounts to laches or works an estoppel; hence an equitable suit in the federal District Court for the Eastern District of Kentucky will not be barred by Ky. St. § 2514, prescribing a 15-year limitation, though such period had elapsed, unless the delay amounts to laches or works an estoppel.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 983.]

10. EQUITY ⊂⊃72(1)—DEFENSES—"LACHES."
The question of "laches" does not depend, as does a statute of limitation, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did; and, the defense being an equitable one, the lapse of time must be so great and the relations of the defendant to the rights such that it would be inequitable to permit plaintiff to assert his rights.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 207, 210–213.
For other definitions, see Words and Phrases, First and Second Series, Laches.]

11. COURTS ⊂⊃375—FEDERAL COURTS—RULES OF DECISION—STATE STATUTES.
For the sake of uniformity, the federal courts will accept state statutes of limitation whenever by so doing they are not required to abrogate their own principles.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 983.]

12. EQUITY ⊂⊃75—DEFENSES—LACHES.
Plaintiff's predecessor in title purchased the mineral rights in a parcel of land, defendant acting as agent upon commission. He did not discover that the original grantors had only a bond for, and not actual title to, a part of the rights conveyed. Thereafter defendant purchased from the grantors of plaintiff's predecessor the surface rights in such lands, and received a conveyance direct from the title holder, who had given a bond for title to the grantors of plaintiff's predecessor. The deed to defendant made no reservation of the mineral rights, and was executed and recorded more than 21 years before plaintiff filed a bill praying that defendant be declared to hold in trust for it the mineral rights. *Held* that, notwithstanding defendant's conveyance of the surface rights in such land, reserving the mineral rights, plaintiff and his predecessors could not be deemed guilty of laches in failing to earlier institute the action; there being no adverse possession, and it appearing that the defect in their title was not discovered by defendant himself when acting as agent, and that the right of action was discovered only a short time before suit, the

conveyance to plaintiff a few months before its commencement being the only actual transfer of title.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 227, 228, 230, 233, 234, 239, 240.]

13. EQUITY ⊜324—ACTIONS—LACHES—PLEADING.
In cases of great delay in seeking relief, courts of equity on their own motion require plaintiff to allege and show affirmatively facts excusing the delay; the practice being justified on the theory of discouraging stale claims.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 635–640.]

14. EQUITY ⊜271—ACTIONS—AMENDMENTS—DEFENSES—LACHES.
In a suit to compel defendant to hold as trustee for plaintiff mineral rights in land, plaintiff, having failed to establish its excuse for a 20-year delay in instituting suit, applied for leave to file an amendment to the bill, setting up that there was no actual change of the ownership of the mineral rights on the part of plaintiff or its predecessors in title until the conveyance 6 months before suit begun, and thus there was no occasion for the examination of title, or of the public records, for any claim on defendant's part, that neither plaintiff nor its predecessors in title had ever heard rumors of the claim until within three years before suit was begun, and that plaintiff when it made the purchase had no knowledge thereof. *Held* that, it appearing that plaintiff was in equity entitled to the mineral rights, the amendment, which was denied on the ground that it did not excuse the delay, was proper, and should have been permitted.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 558–560.]

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Bill by the Pond Creek Coal Company against Anderson Hatfield and others. From decree dismissing the bill, complainant appeals. Reversed and remanded, with directions.

T. H. Harman, of Pikeville, Ky., for appellant.

P. K. Malin, of Ashland, Ky., for appellees.

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

KNAPPEN, Circuit Judge. Appellant filed its bill in equity, asking that appellees be declared to hold in trust for it the mineral rights in a tract of about 230 acres in Pike county, Ky., that plaintiff's title thereto be quieted, and for conveyance accordingly. The pertinent facts needing present statement are, in substance, these:

July 24, 1889, Arthur Bright, as trustee for others, purchased from the Maynard Brothers, and paid for, the mineral rights in a tract of 1,164 acres in Pike county, Ky. In this purchase Anderson Hatfield acted as agent for Bright, trustee, upon commission. He also took (as deputy clerk of the circuit court) the acknowledgment of the grantors, and, in connection with an attorney employed for the purpose, "ran over the title at the courthouse," finding no defects therein. This deed was at once recorded. It turns out that one Smith had sold to Williamson 230 acres of the 1,164-acre tract, making no conveyance, but giving title bond therefor. Williamson had sold the 230-acre tract

to the Maynards, but, not having received conveyance from Smith, did not convey to the Maynards, but made agreement to do so.

About six months after the conveyance from the Maynards to Bright, trustee, of the mineral rights in the 1,164-acre tract, viz. February 10, 1890, Hatfield purchased from the Maynards the surface interest in the entire 1,164-acre tract. In the course of this purchase the situation as to the legal title to the 230-acre parcel was for the first time discovered by Hatfield. Neither Bright, trustee, nor any one representing him had discovered it. The Maynards accordingly conveyed to Hatfield the entire 1,164 acres, and arranged that Smith should deed direct to Hatfield the 230-acre parcel; a portion of the purchase price being held back until Smith's conveyance should be made. Four days later Smith, by deed reciting Williamson's direction so to do, conveyed the 230 acres to Hatfield, who then paid to the Maynards the portion of the purchase price which had been held back, and the deeds from the Maynards and Smith were at once recorded. Neither deed contained an exception of the mineral rights. The Maynards understood they were selling to Hatfield only the surface rights, Hatfield paid for such rights only, and had in mind that the mineral rights had been, as previously said, purchased through him for Bright, trustee. By deeds made in 1902 and 1903 Hatfield conveyed the 230 acres to his children, reserving the mineral rights. The surface rights were, by mesne conveyances, sold to Vinson, who makes no claim to the mineral rights.

About two months before this suit was begun (which was December 12, 1911) Hatfield conveyed in form to his sons the mineral rights in the 230-acre tract; the deed not having been recorded until after this suit was commenced. Defendant Anderson Hatfield still claims the mineral rights, notwithstanding the deed to his sons, and it was conceded upon the hearing in this court that no one had obtained from Anderson Hatfield any rights superior to his. Bright, trustee, in 1893, conveyed the mineral rights in the entire 1,164 acres to Nash, trustee, who in 1902 conveyed to the Blackberry Coal Company. The latter on June 13, 1911, conveyed to Beale, trustee, who on November 17, 1911 (less than one month before this suit was begun), conveyed to plaintiff.

It appeared upon the hearing below that as to 55 or 60 acres of the 230-acre tract the Maynards had title superior to that derived from Smith, and thus that the mineral rights therein passed to Bright, trustee, under the deed of the Maynards. The District Court accordingly gave plaintiff relief as to the 55 or 60 acres. The court was of opinion, however, that as to the remainder of the 230-acre tract the suit was essentially for the specific performance of Smith's contract to convey and that, as nearly 22 years had elapsed between Smith's conveyance to Hatfield and the commencement of this suit, an action in the state courts of Kentucky would be barred by section 2514 of the Kentucky Statutes, which provides, for an action upon a "recognizance, bond, or written contract," a limitation of 15 years after the cause of action accrues; and that, if not governed by section 2514, the case would fall within section 2522, which provides a limitation of 10 years for actions

not specially provided for; and that the case fell within what was understood to be the rule that under ordinary circumstances relief will not be granted as against laches for a longer period than limited by state statutes, subject to exception in cases where by reason of fraud or concealment of the cause of action it has not been discovered, or where it would not have been discovered by reasonable diligence; and the court, being of opinion that Hatfield had not fraudulently concealed the right of action, that there was no showing of reasonable diligence on the part of plaintiff and its grantors in discovering the right of action, and that reasonable diligence would have disclosed it, dismissed the bill, except as to the 55 or 60 acres mentioned.

[1] Plaintiff's petition for rehearing and for leave to file a proposed amendment to the bill, by way of excusing the charge of laches, was denied. Defendant has not appealed. While plaintiff's appeal covers a claim that another part of the 230-acre tract should have been awarded plaintiff, on the theory that Hatfield was estopped to deny the Maynard's title thereto, this claim is not discussed either in brief or orally, and must be treated as abandoned. The only question now reviewable, therefore, is whether the District Court rightly held that plaintiff's laches had been such as to bar recovery as to the remainder of the 230-acre parcel.

As the case is presented here, it is not made entirely clear that plaintiff had lost the right to relief in the state courts of Kentucky. By section 2505 of the Kentucky Statutes actions "for the recovery of real property" are barred if not brought within 15 years after the right accrues. The District Court was of opinion that this action is not one for the recovery of real property. We are cited to no decisions to that effect. But as the question has not been discussed here, we content ourselves with these observations, for such bearing as they may have upon the ultimate question of laches:

[2, 3] The fact that the suit is in equity, rather than at law, cuts no figure; the Kentucky statutes of limitation apply to equitable as well as to legal actions. Clay's Adm'r v. Clay, 7 Bush, 95; Ferguson v. Railroad, 108 Ky. 662, 57 S. W. 460. The term "real estate" includes all rights and interests in lands other than chattel interests (Ky. Statutes, § 458; Anderson's Trustee v. Sterritt, 79 Ky. 499, 503), and necessarily embraces mineral rights. The section in question is not in terms confined to actions of ejectment. It is held applicable to an action for admeasurement of dower (Anderson v. Sterritt, supra; Bankston v. Mining Co., 95 Ky. 455, 25 S. W. 1105; McDanell v. Landrum, 87 Ky. 404, 9 S. W. 223, 12 Am. St. Rep. 500), which action by statute (Civil Code Ky. § 499), as well as at common law (Waters v. Gooch, 6 J. J. Marsh. 587, 22 Am. Dec. 108), may be in equity. In the Kentucky dower proceeding, as well as in the action here, the remedy is by conveyance. The section has also been held applicable to a suit for the protection of an easement of burial (Hook v. Joyce, 94 Ky. 450, 22 S. W. 651, 21 L. R. A. 96), as well as an easement of light and air (Ray v. Sweeney, 14 Bush, 1, 7, 29 Am. Rep. 388), to an action to supply a lost deed (Brandenburg v. McGuire, 105 Ky. 10, 13, 44 S. W.

96), and (impliedly) to the foreclosure of a vendor's lien upon real estate (Hitt v. Pickett's Adm'r, 91 Ky. 644, 11 S. W. 9).

[4] Hatfield took the legal title to the mineral rights with full knowledge that the equitable right thereto was in Bright, trustee, and so took such legal title subject to that equitable right in Bright and his successors in title, including plaintiff here. If section 2505 is applicable, action thereunder in the Kentucky courts would not be barred, for the statute does not begin to run until adverse possession (Ray v. Sweeney, 14 Bush, 1, 29 Am. Rep. 388); and the bar is not complete unless the adverse possession is continuous for the full statutory period (Wickliffe v. Ensor, 9 B. Mon. 253).

[5-8] No such adverse possession was established, and the District Judge so held. Although we have no doubt that Hatfield, at the time of his purchase, or soon thereafter, formed the intention to hold the mineral interests, his claim thereto, unless open and notorious, was not adverse, within the meaning of the law of adverse possession; and the evidence of such open and notorious claim during the statutory period is not satisfactory. The mere use and possession of the surface of the land was not enough to constitute adverse possession of the mineral rights, after Hatfield's conveyance of the surface with reservation of such rights. Farnsworth v. Barret, 146 Ky. 556, 561, 142 S. W. 1049. In fact, Anderson Hatfield never lived on the 230-acre parcel, and never improved it. Such residence and improvement as were had seem to have begun not earlier than 1902, which was only about 9 years before suit was begun. The mining of coal by Hatfield was not an assertion of adverse right to the minerals, for the coal was presumably mined for domestic purposes only, and the right to such mining was by the Maynards' deed to Bright, trustee, expressly reserved to the grantors and their successors.

It is equally clear that the cutting of the timber, which belonged to the owner of the surface, was not an assertion of adverse right against the owner of the minerals; and the payment of taxes upon the lands containing the minerals did not constitute adverse possession of the minerals.

But, treating this as an action to obtain specific performance of Smith's covenant to convey (and section 2514 applies to such an action —Cocanougher v. Green, 93 Ky. 519, 522, 20 S. W. 542), it does not necessarily follow that it would be barred in the Kentucky courts by the lapse of 15 years after the making and recording of Smith's deed to Hatfield. Smith did not refuse to convey, but had in fact conveyed to Hatfield in supposed conformity with his agreement. As against Hatfield, on the theory that he was obligated to carry out Smith's contract, the statute would not begin to run until plaintiff or its predecessors in title knew, or should have known, of the conveyance, and that Hatfield claimed the minerals under it. The questions of knowledge and diligence will be considered in connection with the defense of laches, to which we now come.

[9, 10] As recognized by the District Judge, the rule is well settled that state statutes of limitation are not binding upon the courts of the United States, and that in suits in equity in the federal courts relief

is not barred by lapse of time except as it amounts to laches or works estoppel. As said in Townsend v. Vanderwerker, 160 U. S. 171, 186, 16 Sup. Ct. 258, 262 [40 L. Ed. 383]:

"The question of laches does not depend, as does the statute of limitation, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did."

Moreover, mere delay is not enough to preclude relief in equity, in the absence of such conditions as would, presumably, at least, make the assertion of right after such delay inequitable. In Halstead v. Grinnan, 152 U. S. 412, 417, 14 Sup. Ct. 641, 643 (38 L. Ed. 495), it is said:

"It [laches] is an equitable defense, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them."

As said in Galliher v. Cadwell, 145 U. S. 368, 372, 12 Sup. Ct. 873, 874 (36 L. Ed. 738), the cases in which the defense of laches has been considered—

"proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in conditions or relations during this period of delay it would be an injustice to the latter to permit him to now assert them."

As said in Penn Mutual Life Ins. Co. v. Austin, 168 U. S. 685, 698, 18 Sup. Ct. 223, 228 (42 L. Ed. 626):

"The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words, where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect."

As said in O'Brien v. Wheelock, 184 U. S. 450, 493, 22 Sup. Ct. 354, 371 (46 L. Ed. 636):

"Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of situation during neglectful repose, rendering it inequitable to afford relief."

And as expressed in Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, 509, 33 Sup. Ct. 554, 562 (57 L. Ed. 931):

"But the doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations. For what might be inexcusable delay in one case would not be inconsistent with diligence in another and unless the nonaction of the complainant operated to damage the defendant, or to induce it to change its position, there is no necessary estoppel arising from the mere lapse of time. Townsend v. Vanderwerker, 160 U. S. 171, 186 [16 Sup. Ct. 258, 40 L. Ed. 383]."

In Schwartz v. Loftus (C. C. A. 8) 216 Fed. 320, 325, 132 C. C. A. 464, 469, the rule is thus stated:

"While the lapse of time is an element which courts consider in refusing or granting the defense of laches, time alone ordinarily is not sufficient to constitute the defense, but in addition thereto the situation of the parties must have so changed as to render the prosecution of the suit inequitable."

[11, 12] In this case defendants have been in no way injured by the delay in bringing suit, and the case is utterly barren of equity in their favor, unless, perchance, in the fact that Hatfield has from the time of his purchase from the Maynards paid the taxes on the land containing the minerals, presumably without separation of surface and mineral rights. But this payment furnishes, at the best, but slight equity in Hatfield's favor, in view of the fact that he had all the time the right to mine coal for domestic purposes, and did so, and as it does not affirmatively appear that the taxes were increased on account of the mineral rights. There are no intervening rights of third persons calling for protection, and there has been no change of situation or relations making relief to plaintiff inequitable. The instant case differs radically from Estep v. Kentland Company, 239 Fed. 617, — C. C. A. — (this day decided by us), in which case, in view of express elements of knowledge and estoppel, we held that plaintiffs had lost their right to complain.

There has, however, been "for the sake of conformity a disposition to accept the statutory regulations of the states prescribing the time within which suits may be brought. And this practice has ripened into a rule which will be enforced whenever by observing it the court is not required to abrogate its own principles, in which case it will protect its own jurisdiction." Ky. Coal, etc., Co. v. Ky. Union Co. (C. C. A. 6) 187 Fed. 945, 948, 110 C. C. A. 93; Godden v. Kimmell, 99 U. S. 201, 210, 25 L. Ed. 431; United States Fidelity, etc., Co. v. Union Bank, etc., Co. (C. C. A. 6) 228 Fed. 448, 452, 143 C. C. A. 30. Indeed, courts have frequently "enforced the doctrine of laches in favor of defendants where the lapse of time has been shorter than that prescribed by state laws, but where the peculiar circumstances gave rise to an equity which the court was bound to protect." Ky. Coal Co. v. Ky. Union Co., supra; Richards v. Mackall, 124 U. S. 183, 188, 8 Sup. Ct. 437, 31 L. Ed. 396; Alsop v. Riker, 155 U. S. 449, 460, 15 Sup. Ct. 162, 39 L. Ed. 218; Penn Mutual Life Ins. Co. v. Austin, supra; Patterson v. Hewitt, 195 U. S. 309, 319, 25 Sup. Ct. 35, 49 L. Ed. 214. And, on the other hand, where by fraud or concealment of the cause of action it has not been discovered, or would not by reasonable diligence have been discovered, a longer period for bringing suit than prescribed by the statutory limitations has been permitted. Ky. Coal, etc., Co. v. Ky. Union Co., supra, and cases there cited.

If plaintiffs' cause of action was not discovered, or by reasonable diligence should not have been discovered, until shortly before the commencement of suit, it was clearly entitled to relief. There is no showing that plaintiff actually knew of Hatfield's claim to the minerals. The principal contention is that plaintiff and its predecessors should

have known of defendants' claim through the constructive notice afforded by the records. But Bright, trustee, did not know that Smith held the title, and Hatfield cannot with good grace assert that Bright and his successors lacked diligence in failing to discover that fact, since both Hatfield and the attorney representing Bright, although searching the records to determine the title, failed to discover it. The record of the deeds from the Maynards and Smith to Hatfield was not, standing alone, compelling evidence of Hatfield's claim to the mineral rights, in view of the fact that it seems to have been not uncommon, in a conveyance of the surface (after deed of the mineral rights had been given), to make deed of the land which contained the minerals without excepting the latter; and there is more or less force (although not conclusive) in the suggestion that the reservation of the mineral rights in the deeds from Hatfield to his children is not necessarily inconsistent with a recognition on Hatfield's part that he did not own them. However, such reservation was less than 10 years before suit was begun.

[13] In case of great delay in seeking relief the courts have shown a tendency, of their own motion, to require the plaintiff to allege and show affirmatively facts excusing the delay. Badger v. Badger, 2 Wall. 87, 95, 17 L. Ed. 836; Godden v. Kimmell, supra; Richards v. Mackall, supra; Foster v. Mansfield, etc., Ry. Co., 146 U. S. 88, 99, 13 Sup. Ct. 28, 36 L. Ed. 899; Ky. Coal, etc., Co. v. Ky. Union Co., supra. This the trial judge held plaintiff had not done. The practice referred to is thought to be justified in the interest of peace by way of discouraging the assertion of stale claims, and perhaps on the theory that great delay would prima facie have a tendency to make the assertion of claim inequitable.

[14] Plaintiff's original bill did state a sufficient excuse for delay, for it alleged that Hatfield had made no claim to the mineral rights in question "until within the last few months, and until this plaintiff and its immediate vendor had purchased the same at a greatly enhanced price, when it was that defendant unlawfully and fraudulently conceived the idea of claiming * * * minerals for himself. * * *" Defendants' showing, however, was to the contrary of this allegation; and in view of the decisions cited we cannot say that the action taken was not right as the record then stood. But plaintiff immediately asked leave to amend by showing, what it claimed to be the fact, that there was no actual change of ownership of the mineral rights on the part of plaintiff and its predecessors in title until the conveyance from the Blackberry Coal Company to Beale, trustee, which was on June 12, 1911 (6 months before suit begun), and thus no occasion for examination of the title or of the public records for any claim on Hatfield's part; that in fact neither plaintiff nor its predecessors in title had any knowledge of Hatfield's claim until shortly before the bill was filed; that no one connected with plaintiff or its predecessors had heard even rumors of such claim until within 3 years before suit was begun; and that plaintiff had no knowledge of Hatfield's claim of ownership at the time it purchased (less than 1 month before suit), nor until a few days before suit was begun.

We think this amendment should have been allowed. It was in the interest of justice; the proposed showing, if made out, furnished a complete justification for the delay, and entitled plaintiff to the relief sought; to deny it would be to abrogate the principles on which the defense of laches is based. The refusal to allow the amendment was not made in asserted exercise of a discretion so to do, but because it was thought the proposed showing would not bridge the chasm. In this we think the learned District Judge was in error.

The decree must therefore be reversed, and the cause remanded, with directions to permit the filing of the proposed amendment, to give opportunity for the presentation of testimony in support of, and by way of defense to, the allegations contained in the proposed amendments, and generally upon the subject of plaintiff's excuse or lack of excuse for delay in bringing suit—a practice sanctioned by Noble v. Seery, 223 U. S. 65, 32 Sup. Ct. 194, 56 L. Ed. 353, as well as by the decisions of this court in Snead v. Scheble, 175 Fed. 570, 574, 99 C. C. A. 578, and Butterfield v. Miller, 195 Fed. 200, 210, 115 C. C. A. 152.

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## EAMES v. H. B. CLAFLIN CO. et al.

(Circuit Court of Appeals, Second Circuit. January 26, 1917.)

No. 46.

1. CUSTOMS AND USAGES ⟸1—EFFECT—"CUSTOM"—"USAGE."

While "usage" and "custom" are often used synonymously, strictly speaking, "usage" is invoked to give meaning to a contract on the assumption that the parties contracted in reference thereto, if they knew of the usage, while "custom" is a length of usage which has become law, and which the parties are presumed to know.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 1.

For other definitions, see Words and Phrases, First and Second Series, Custom; Usage.]

2. CUSTOMS AND USAGES ⟸3—EFFECT—GENERAL KNOWLEDGE.

To give usage the force of law, there must be acquiescence and notoriety from which it may be inferred that it was known to the public, though it may be only to a small portion of the public engaged in the particular business affected by the custom.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 2, 6.]

3. CUSTOMS AND USAGES ⟸12(2)—PERSONS AFFECTED—OTHER BUSINESS.

Under some circumstances, the customs of business different from that of the person sought to be charged cannot be recognized against them without showing actual knowledge; but if one employs another to work after the method of transacting the other's business, he may be presumed to have intended the business to be performed according to the customs regulating it.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 24.]

4. BROKERS ⟸77—LIEN—"FACTOR"—"GOODS."

A note broker, who according to the custom of the business gave the purchaser of notes an option to return after investigation of credit, and who became personally liable to the purchaser for the return of the purchase price, though such liability was not a custom of the business and

was not known to his principal, is not entitled to a factor's lien on all notes of his principal in his possession for the amount paid by him on return of certain notes after the insolvency of the principal, since, while he is within the old definition of a "factor" as one to whom goods are consigned to sell by a merchant at a distance from the place of sale, if notes are considered goods, the expression "goods" in the old law was limited to chattels, and did not include choses in action, and the lien, which is no longer of value to the merchant, but only to the factor in cases of insolvency of the merchant, will not be extended beyond its original limits.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 98.

For other definitions, see Words and Phrases, First and Second Series, Factor; Goods.]

5. FACTORS ⟸47(2)—LIEN—"EXPENSES AND ADVANCEMENTS."

If a note broker is considered a factor, amounts paid by him after his principal's insolvency, on return of notes sold by him for his principal with option to return, for which he had assumed personal liability, though that was not the custom of the business, and was not known to his principal, are not "expenses and advancements on the notes," for which alone a factor is given a general lien on all his principal's goods.

[Ed. Note.—For other cases, see Factors, Cent. Dig. § 66.]

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

Creditor's bill by John C. Eames against the H. B. Claflin Company. From an order of the District Court, requiring Hathaway, Smith, Folds & Co. to surrender notes of the defendant in their possession, and on which they claimed a lien, the lien claimants appeal. Affirmed.

See, also, 231 Fed. 693, 145 C. C. A. 579; 220 Fed. 190.

Appeal by Hathaway, Smith, Folds & Co. (hereinafter called Hathaway) from a final order entitled in the equity suit above named. The suit aforesaid is a creditor's bill to conserve, collect and distribute to those entitled the property of H. B. Claflin Company (hereinafter called Claflin), in which was made an order of June 24, 1914, appointing receivers of the Claflin Company, and vesting them with the right of possessing all the assets of that corporation.

The receivers filed a petition in the suit, against Hathaway, alleging that firm to have in possession a large amount of property, viz. the promissory notes of divers persons and corporations, belonging to Claflin, and praying that an order might pass directing Hathaway to surrender the same. Appellants appeared, and answered the petition, admitting possession and title, but claiming a lien upon said notes, etc. The District Court denied the lien, and entered the order against Hathaway, from which this appeal is taken.

For many years prior to failure in June, 1914, Claflin had been established in New York City, doing one of the largest businesses in wholesale dry goods, etc., in the country, and enjoying excellent credit. Hathaway was and long had been a firm of note brokers, doing business (especially) in New York and Chicago. In June, 1908, some of appellants personally saw the president of Claflin and undertook to sell promissory paper belonging to that company in Chicago and the regions thereabout. No special agreements other than as to rate of remuneration were made between Claflin and Hathaway then or thereafter. Appellants were employed as note brokers at a certain commission; nothing more was said or written. Between 1908 and 1914 Hathaway sold several million dollars worth of paper belonging to Claflin, collecting from whomsoever bought, and invariably remitting the proceeds of sale on the same or the following day to Claflin in New York.

On June 11, 1914, appellants in Chicago sold to the Corn Exchange Bank of that city notes made by divers persons to the order of Claflin, by that company indorsed in blank, and belonging to Claflin at the moment of sale—all to the face value of $127,174.49. For these notes the bank paid over to

Hathaway face, less discount, or $124,746.43. which amount, less commissions and exchange, Hathaway on the same day sent to New York as usual. With the notes there was delivered to the bank by appellants a statement of the transaction in the following form:

"[Letterhead of Hathaway, Smith, Folds & Co.]
"Corn Exchange National Bank, Chicago, Ill.
"Hathaway, Smith, Folds & Co., Commercial Paper,
"137 South La Salle Street,
"Chicago 6/11/14.

"[Here follows a full description of the notes sold.] Indorsed by the H. B. Claflin Co. The above notes may be returned by delivery at our office during banking hours on or before 50 M 6/22/14
"50 M 7/ 1/14

"This option is given for credit investigation only.
"Hathaway, Smith, Folds & Co.,
"W. Edwards."

(Edwards was Hathaway's cashier; "50 M" means $50,000 face value notes. The figures following show that at the date of Claflin's failure one option had expired, but there still existed an option on $50,000 open to July 1, 1914.)

On June 11th the Corn Exchange Bank knew Hathaway as broker for Claflin, selling that company's property, to wit, notes; knew that it bought Claflin's property; and Hathaway knew of the bank's knowledge. The Claflin failure, and appointment of receivers, was known in Chicago, and to both the bank and appellants, on June 24th; the day following the bank tendered to Hathaway nine of the notes received on June 11th, and for which it had paid $49,517.68. This sum (less commission) Hathaway had already sent to Claflin Co. as above stated, but the nine notes were taken back, and appellants paid out of their own funds $49,517.68 to the bank.

Thus, on June 25th, appellants had the nine notes that day received, and also many others, admittedly belonging to Claflin and unsold at date of failure. The receivers' petition demanded all these notes, except the nine; Hathaway's answer sets up a lien on all the notes, including the nine, for the amount repaid the bank on June 25th. The pleaded basis for this lien is a custom to sell commercial paper "on option," which means that the purchaser has the right to return what he bought, or some of it, at any time within the option limit, to the broker, and get back "from the broker," the purchase price. On a sale with option it is alleged that the broker need not remit to his principal until expiry of option, but he frequently does so "where he has other paper of his principal in his hands for protection." The answer asserts that this custom was well known to Claflin, and that under it Hathaway's remittance on June 11th, of the proceeds of the nine notes, "was an overpayment, and in the nature of an advance"—giving rise to the lien relied on.

The evidence shows no mention of this custom in any dealings between appellants and Claflin. No special arrangements were made on June 11th between the bank and Hathaway; the latter did not assume personal liability to the bank otherwise than by delivery of the statement (Exhibit 4), which (plus inferences from subsequent conduct) is the only evidence of contract as between appellants and the bank.

Alfred B. Cruikshank, of New York City, for appellants Hathaway and others.

Henry Root Stern, of New York City, for appellees receivers of Claflin Co.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Appellants herein urge that four propositions be resolved in their favor: (1) That the custom or usage of selling commercial paper with option

of return be recognized and accepted; (2) that Hathaway & Co. be held to have promised repayment to the Corn Exchange Bank from their own funds, if the option was exercised and paper returned; (3) that such a payment as Hathaway made to the bank is as matter of law an advance on account of the principal; and (4) that to the extent of such payment they are entitled to a general lien upon all Claflin's property in their possession. As no explicit contract, oral or written, stated any of these points as between Claflin and Hathaway, their legal relations depend wholly on establishment of the custom pleaded.

[1] Usage is ordinarily regarded as the evidence of custom, though the words are often used synonymously. But "strictly speaking, custom is that length of usage which has become law.' It is a usage which has acquired the force of law, and ignorance of the law will not excuse. A general custom is the common law itself, or a part of it." Walls v. Bailey, 49 N. Y. 471, 10 Am. Rep. 407. Usage is invoked to give meaning to a contract, on the assumption that the parties contracted in reference thereto; yet, since there can be no intent without knowledge (actual or imputed) of what was intended, not only must proof be given showing that the usage relied upon exists, but the relation of the parties concerned must be shown to be such that knowledge of the usage in question may be inferred, and further that intent to be bound thereby may also be established by reasonable inference.

[2] As was said in Adams v. Otterback, 15 How. 545, 14 L. Ed. 805, to give usage "the force of law * * * requires an acquiescence and a notoriety, from which an inference may be drawn that it is known to the public," and, if to the public, then by fair presumption to that member of the public who must be held to have contracted in the light thereof. Yet a custom may be good and lawful without more than a small fraction of the world knowing anything of it; indeed, most customs or usages affect only a particular business, yet are nevertheless binding if certainty, continuity, reason, legality, and acquiescence are duly established.

[3] Under some circumstances the customs of those engaged in a business wholly different from that of the persons sought to be affected cannot be recognized as against said persons without showing actual knowledge thereof, for assent can be implied only from knowledge of the custom which it is claimed authorizes it. Great Western, etc., Co. v. White, 118 Fed. 410, 56 C. C. A. 388, and cases cited. But if one employs another to work in and after the method of transacting that other's business, then (though ignorant of such method) he may be presumed to have intended the business thus requested, to be performed according to usage. Walls v. Bailey, supra; Gleason v. Morrison, 20 Misc. Rep. 320, 45 N. Y. Supp. 684.

In this instance Hathaway was employed as a note broker to sell Claflin paper, and such brokerage is a well-known and independent occupation, quite capable of developing, sustaining, and enforcing its own customary business methods. A majority of this court consider the evidence submitted as fairly establishing (within the rules above laid down) that during the whole time of Hathaway's business con-

nection with Claflin there was a custom or usage of selling commercial paper with an option of return. That majority of the court further deem it proven as matter of fact that on June 11, 1914, Hathaway intended to become, and did become, personally responsible to the Corn Exchange Bank for the repayment to that bank of the price of any paper returned under the recited option. Both these findings are of fact, and render unnecessary consideration of decisions wherein it was sought to hold note brokers in invitum to similar liability. Union Trust Co. v. Whiton, 97 N. Y. 172; Commercial Bank v. Waters, 45 App. Div. 441, 60 N. Y. Supp. 981, affirmed 167 N. Y. 583, 60 N. E. 1109; Monticello Bank v. Bostwick, 71 Fed. 641. But we do not find sufficient evidence of any custom (or part of a custom) whereby brokers, on selling paper with option, superadd to the undoubted liability of their principals (in respect of a return) their own promise to repay in the first instance. From this finding of fact, it follows that no custom required or justified the act of Hathaway in assuming personal responsibility to the Corn Exchange Bank.

[4] As for such action, there were certainly no explicit contractual arrangements, to which Claflin was a party; appellants insist that a note broker is but one species of factor; and therefore entitled to that general lien, or lien in respect of the general balance of account, allowed to all factors as the result of an ancient custom which unquestionably has long since hardened into a part of the law. As put in Nagle v. McFeeters, 97 N. Y. 202, once establish the status of factor and "the law implies or infers the lien from the relation [of] the parties." Walker v. Burch, 6 T. R. 258. And this contention is thought to gain support from establishment of the option custom, to which lien would certainly be a convenient, and is said to be a necessary, adjunct.

It is not denied that the rather modern occupation of note or bill broking seems to respond to old definitions of the word "factor." He is (if notes are goods) "a person to whom goods are consigned for sale by a merchant * * * at a distance from the place of sale." Baring v. Corrie, 2 B. & A. 143. He is a mercantile agent (if notes are merchandise) to whom in the ordinary course of business is intrusted the possession of goods; and it is the fact of possession, which has always especially distinguished a factor from a broker. See In re Rabenau, 118 Fed. 471; Howland v. Woodruff, 60 N. Y. 80; United State v. Villalonga, 23 Wall. 42, 23 L. Ed. 64; Ommen v. Talcott, 188 Fed. 403, 112 C. C. A. 239; Jenks, English Civil Law, § 536. This resemblance is superficial and misleading, and the argument rests upon a hasty identification with the "goods, wares and merchandise" of historic law (always chattels) of what are evidences of indebtedness, actual or inchoate, and mere choses in action.

It is to be observed that a special lien upon the notes received back by Hathaway from the bank does not advance the matter. It may be assumed that any agent has a lien on movable property in his possession and belonging to his principal in respect of expenses incurred in relation to that particular property. Hammonds v. Barclay, 2 East, 227; Houghton v. Matthews, 3 Bos. & P. 494; Muller v. Pondir, 55

N. Y. 340, 14 Am. Rep. 259. But since the property here in question is negotiable paper, it is indifferent whether Hathaway now owns, or has a lien upon, the nine notes returned; those notes may be enforced against all parties liable thereupon; the brokers have all the rights of legal owners, whatever their technical appellation.

The claim is that virtute officii, or by legal implication from their employment, note brokers have that general lien upon all their principal's property on hand for a general balance of account, which is the essential and peculiar characteristic of a factor. Upon authority there is nothing shown, or known to us, holding that a note broker is a factor; and it is both old and recent law that where a lien is claimed on a general account "it is to be taken strictly" (Houghton v. Matthews, supra), and where such lien is asserted under circumstances not previously recognized as conferring the same "we should be anxious to tread cautiously and on sure grounds before we extend beyond the limits of decided cases" (Matter of Heinsheimer, 214 N. Y. 368, 108 N. E. 636, Ann. Cas. 1916E, 384, and cases cited). The business of such brokers has not "a character known to the law with certain prescribed duties, but the employment is one which depends entirely on the course of dealing." Foster v. Pierson, 4 L. J. Exch. N. S. 125. The privilege now contended for has been demanded in Grant v. Taylor, 35 N. Y. Super. Ct. 351; but the court said:

"If there be a usage giving to persons engaged in * * * selling bills or notes, a lien for a general balance against their customer, such usage should be proved. It will not be presumed to exist in the absence of an express agreement."

And in this case there was no express agreement, and no established usage is proven.

It is urged upon us that Bank v. Levy, 1 McMullen (Law) 431, and Hodgson v. Payson, 3 Har. & J. (Md.) 339, contain expressions which recognize a factor's lien under circumstances said to be analogous to the present. In both cases a lien was granted, but in each the person asserting the same had at the request of his principal indorsed paper belonging to the principal, and (from somewhat imperfect reports) we are of opinion that the lien accorded was based, not upon the character of employment, but upon the fact of indorsement by request. See as to general lien, and the hostility of the law thereto, Mechem on Agency (2d Ed.) vol. 2, p. 1276; Jones on Liens (3d Ed.) § 422; Kent's Commentaries, vol. 2, pp. 634-636.

Considering the reason and history of the matter, a lien was not granted for the primary purpose of benefiting the agent who came to be known as a factor, but of assisting the principal, who, being at a distance, was obliged to confide the sale of his goods to some one upon the ground. The owner did not part with title, but he could not exercise immediate supervision of sales, and he ordinarily preferred to let the goods stand responsible for expenses and advances rather than to deposit with his factor agent cash in advance. The practice was thought to promote confidence in and liberality on the part of factors (Story on Agency [9th Ed.] § 378), and what most merchants

preferred came to be obligatory upon all; such is the common origin of much of what we loosely call the common law.

It was for the advantage, not of the principal alone, but of commerce generally, that the factor's lien should be recognized, as it long has been. But every improvement in communications, each advance in business ease, has rendered less necessary and desirable the creation of liens which nowadays are commonly useful to the agent alone, and then upon the insolvency of his principal, and are obviously detrimental to that class, always the largest and most to be regarded, who can and do deal with the principal only in the relation of debtor and creditor.

It is never more necessary to go behind titles, to get at substance, than when a new claim of right is made under an ancient name. It rather befogs the matter to dwell upon the similarities or differences between bill brokers and commission merchants—between dealers in commercial paper and mercantile factors. The name is nothing; what appellants want is not to be dubbed factors, but to have the right to a general lien annexed to one part of their business. Therefore the vital inquiry is whether that business, as the evidence shows it, was so conducted, in accordance with the rules of agency (of which factorage is but a subdivision), as to impose a lien under judgments of authority, or merit one by analogy thereto.

[5] That no lien is imposed by authority we have stated; but further it may well be doubted whether Hathaway's act, if performed by an undoubted factor, and in respect of chattels, would have been within the scope of such factor's authority as inferred from his employment. It is not true as matter of law that the lien urged upon us arose from paying over the proceeds of option sale to Claflin, which is the manner of pleading it; that lien arose, if at all, the moment Hathaway assumed liability on the option, and one test of the lien's worth is to ask whether such unrequested assumption was either an expense of sale, or an advance upon what the broker had for sale. "Expenses and advances" are words (in this connection certainly) of such simple meaning as to require no exposition, and it is obvious that Hathaway's contribution of his own financial worth to the option privilege, was neither an expense of sale, nor an advance upon the property committed to his care. What was neither expense nor advance has never been admitted as a matter for which any factor (virtute officii) could demand indemnity from his principal. If indemnity cannot be demanded, lien certainly fails.

The circumstances under which agents generally may demand reimbursement from principals were summarized in Frixione v. Tagliaferro, 10 Moo. P. C. 196; it must be shown that the agent's loss arose from the fact of agency, that the act productive of loss was within the scope of the agency, and was not attributable to the agent's default or laches. The scope of even a factor's authority has its limits (Commercial, etc., Bank v. Heilbronner, 108 N. Y. 439, 15 N. E. 701); those limits are the accomplishment of the principal's wishes, by means explicitly or impliedly agreed upon beforehand. Nothing explicit being pretended, the implication here demanded is of an act commer-

cially undesirable, and without analogy in the relation of a factor to his merchandise.

As appellants' asserted lien is in our opinion unsupported by authority, possesses merely a specious resemblance to a factor's lien, would be of doubtful validity if claimed for one employed by the name of "factor," and if allowed here would tend to confer on note brokers as a class privileges injurious to the business community as a whole, the order under review is affirmed, with costs.

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ALASKA JUNEAU GOLD MINING CO. v. EBNER GOLD MINING CO. et al.*

(Circuit Court of Appeals, Ninth Circuit. February 5, 1917.)

No. 2795.

1. WATERS AND WATER COURSES ⟸33—DIVERSION—INJUNCTION—EVIDENCE.
In a suit to restrain a mining company from interfering with the water right claimed by plaintiff, evidence *held* to show that the individual who posted in his own name the notice of diversion under which the company claimed was acting for it, and in pursuance of a plan for developing its property.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23–26.]

2. WATERS AND WATER COURSES ⟸16—DIVERSION—NOTICE—PLACE OF USE.
A notice of diversion of water, posted at a point where the company for which it was posted was then diverting water for a small mill, which stated that the flume for the new diversion might be carried across the creek, was sufficient to show an intention not to use the water at the site of the old mill.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 8.]

3. WATERS AND WATER COURSES ⟸16—DIVERSION—NOTICE—POINT OF DIVERSION.
Plaintiff cannot object that defendant's notice of diversion of water, posted at a point above plaintiff's dam, failed to show that the water was to be taken out above the dam, where he admitted that it was the universal custom to post the notice at the point of intended diversion.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 8.]

4. CORPORATIONS ⟸180—ACTS OF STOCKHOLDERS—MAJORITY STOCKHOLDER.
The owner of nearly all the stock in a corporation sustains a fiduciary relation to it, and acts done with relation to its property at his instance are done on behalf of the corporation or for its benefit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 665–673.]

5. WATERS AND WATER COURSES ⟸23—DIVERSION—NOTICE—PLACE OF USE.
Where a mining company, at the time of posting a notice of intention to divert water for use at another point on its group of claims, was in possession of land claimed by it as a mill site adjoining its mining claims, which subsequently was adjudged to be public land because of the existence of mineral thereon, and was relocated by the company as a lode claim, the water diverted in accordance with the notice can be used at the mill erected on that claim.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 15, 18.]

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

*Rehearing denied May 14, 1917.

6. WATERS AND WATER COURSES ⊂=33—DIVERSION—NOTICE—PERSONS ENTITLED TO BENEFIT.

The fact that an individual, who posted a notice of intention to divert water for use on defendant's group of claims, conveyed his rights to another, who was a stockholder and bondholder of a corporation, which owned most of the stock in defendant corporation, and who advanced money to defendant, which was hindered from getting money for development because of litigation between it and plaintiff, is not inconsistent with the finding that the notice was posted on behalf of defendant corporation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23–26.]

7. APPEAL AND ERROR ⊂=1011(1)—REVIEW—FINDINGS OF FACT.

A finding of the District Court, that miner's rules relating to the diversion of water were not in force when the rights of the parties originated, made upon conflicting evidence, cannot be disregarded by the Circuit Court of Appeals, even if contrary to the weight of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3988.]

8. WATERS AND WATER COURSES ⊂=16—DIVERSION—NOTICE—TRESPASS.

A mining company, which posted notice of an intention to divert water from a stream on land patented to another company without permission of the latter, was a trespasser, and could base no right to the use of water on the posting of such notice.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 8.]

9. WATERS AND WATER COURSES ⊂=17—DIVERSION—DILIGENCE—TEMPORARY SUSPENSION OF WORK.

Evidence of a temporary suspension of the work of diverting water for a mill after the posting of the notice, as a result of hostile acts by a rival claimant, does not show want of due diligence in the prosecution of the work.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 9.]

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

Suit for injunction by the Alaska Juneau Gold Mining Company against the Ebner Gold Mining Company and others. Decree for defendants, and plaintiff appeals. Remanded, with instructions to correct the decree in accordance with findings of fact, and in other respects affirmed.

The appellant brought a suit against the appellees to enjoin them from interfering with the appellant's asserted right to the use of a portion of the waters of Gold creek, near Juneau, Alaska. The trial resulted in a decree dismissing the complaint, and adjudging that the appellee the Ebner Gold Mining Company was entitled to the first and paramount use of the waters of Gold creek, to the extent of 10,000 miners' inches. As the last-named company is the real party in interest in the litigation, it will in this opinion be designated the appellee. The court below, upon the testimony, found in substance the following facts:

(2) That the appellee was for a long time prior to the commencement of the suit the owner of a number of contiguous quartz mining claims and mill sites in Silver Bow basin, near Juneau. That the claims contained a low-grade milling ore, bearing gold of great value. That at the upper end of the group the lode claims are high up on the mountain side, and that the mill sites are in the valley below. That there flows over and across the group Gold creek, a mountain stream carrying at certain seasons a large

volume of water, and at other seasons much less by reason of cold weather. That for 15 or 20 years prior to the suit the appellee had been mining and milling the ores taken from the upper end of the group by means of a 10-stamp quartz mill, and later by a 15-stamp quartz mill, located near the upper end of the group. That for the purpose of power in such milling of the ore the appellee had diverted and appropriated and used from Gold creek all the water that was necessary—the water being diverted near the upper end of the group of claims, and after use being returned to the creek.

(3) That some time in the year 1908 the appellee and Ebner, its general manager, concluded to mine and mill the appellee's ores on a more extensive scale, and for that purpose to drive a large working tunnel, commencing the same at the lower end of the group, upon what is known as Cape Horn No. 2 lode claim, and driving the same through said group of claims to the upper end thereof, and to erect and equip a stamp mill of 150 or 200 stamps at or near the lower end of said tunnel, and to build and construct a flume and pipe line to take water from Gold creek, at or near the point where the water had been theretofore diverted by the appellee, to a point near the lower end of said tunnel, at which point the stamp mill and other buildings were to be erected. That during the year 1909 one H. T. Tripp, an experienced mining engineer, was employed by persons interested in the appellee's group of mining claims to examine and explore the mining property, and report on the advisability of mining the same on a larger scale, as had been decided by Ebner and the appellee. That Tripp made such examination and reported favorably on the proposition, about the last of June or 1st of July, 1910.

(4) That as early as October, 1880, the miners in and near the vicinity of Juneau and Silver Bow basin diverted and appropriated water from streams, to be used for mining and other beneficial purposes, and ever since that date it has been the universal practice and custom to post a notice in writing in a conspicuous place at the intended point of diversion of the stream, and its waters expected to be diverted, and that the posting of such notice has always been considered the first step toward the appropriation and application of the water to mining or other beneficial use, and as giving warning and notice to others of the appropriators' intention. That the posting of such notice does serve the purpose so stated. That Tripp knew of that custom, and on June 29, 1910, he attached to a board and posted in a conspicuous place on the appellee's dam, which had been used by it for diverting water in its mining operations, a written notice claiming 10,000 miner's inches of water out of the said Gold creek, the notice being as follows: "Notice is hereby given to all whom it may concern that I, the undersigned, claim 10,000 miner's inches of water flowing in this creek, or any part of 10,000 miner's inches that may be flowing at any season of the year, to be conveyed by ditch, flume, or pipe along the bank of Gold creek, with pipe or flume or both to any place on the property known as the Ebner mine, or to carry across or farther than the limits of the said mine property. This location is made on the ground this day and date, and is posted at the place known as the Ebner dam, about 1¾ miles up from Juneau, Alaska, on Gold creek. Dated this 20th day of June, 1910." That said notice could be plainly seen from a public highway which runs up Gold creek near the dam on which the notice was posted. That while Tripp signed his own name to the notice, he was acting on behalf of and for the appellee's group of mines, and the parties interested therein, and the said water was intended to be conducted from the point of intake to the appellee's mill site at the lower end of the appellee's property, and to be used in the new mill which was to be built for mining purposes. That the posting of Tripp's notice was the first step taken by any one toward future diversion and appropriation of the waters of Gold creek, and was prior to any step taken by the appellant, or any intention made manifest by the appellant, of taking water from Gold creek. That not until after the appellee had followed up the posting of the notice by actual physical work at the point where the notice was posted, and after actual diversion of the water at that point, did the appellant do anything to give notice to the appellee of any claim that the appellant intended to make to the water of Gold creek, or to appropriate any portion thereof.

(5) That Tripp, long before the commencement of the suit, transferred to the appellee whatever right or title he acquired by posting the notice. That work was commenced under that notice, and has proceeded with due diligence. That soon after the filing of the notice work was commenced on the tunnel, and at the time of the commencement of the suit the tunnel had been driven 2,600 feet. That a right of way was surveyed out for a high line flume, commencing at the point where the Tripp location notice was posted, and running to a point near the lower end of the tunnel and the mill site, and a flume 3¾ feet by 4 feet, and about 4,000 feet long, with a carrying capacity of 3,200 miner's inches of water had been completed at the time of the commencement of the suit. That on September 14, 1910, water was diverted from Gold creek at the point where the Tripp notice was posted, and was running through a large open cut made for the purpose of laying the new flume, and this diversion was prior to any diversion made by the appellant. And the court found, in general, that the work of driving the tunnel, of laying the flume, and of constructing the mill were all diligently and actively continued.

(6) That, at the time when the appellant claims that the appellee was wrongfully depriving the appellant of the use of the water, the appellee was using the same, and it was necessary at all times for the appellee to have the same in the progress of its work.

(7) That the tunnel is being driven through the group of mining claims known as the Ebner mine, and for the benefit of which the water was located by Tripp. That all work in connection with the development and opening of the ore bodies in said mining claims since the location of the water by Tripp has been done with diligence, and that $351,000 have been expended therein, and that all this was done for the purpose of opening up the Ebner group of mining claims as a mine, so that the bodies of ore therein could be mined and milled.

(8) That the miner's rules and regulations which the appellant set out in its reply were never followed by the miners, and were never put in force, or, if they ever were followed, or put in force, thy fell into disuse and became obsolete before the rights of either of the parties to this suit were claimed to be initiated. That they are inconsistent with the general laws of the United States, and could not be enforced after the extension of organized government to Alaska in the year 1884. That the work of diversion, appropriation, and application of the water by the appellee was prosecuted to completion with reasonable diligence from the time of the inception of the right.

The court found as a conclusion of law that, as against the appellant, the appellee is the owner of, and entitled to the first use of, 10,000 miner's inches of water to be taken from Gold creek, at or in the vicinity of the place where the Tripp notice was posted, and that the rights of the appellant are subordinate thereto.

J. A. Hellenthal, of Juneau, Alaska, and Curtis H. Lindley, of San Francisco, Cal., for appellant.

John R. Winn, of Juneau, Alaska, and Alfred Sutro, of San Francisco, Cal. (Winn & Burton, of Juneau, Alaska, and Pillsbury, Madison & Sutro and A. D. Plaw, all of San Francisco, Cal., of counsel), for appellee Ebner Gold Mining Co.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellant, adverting to the fact that Tripp was employed by one Underwood and by the California-Nevada Copper Company, and not by the appellee, contends that the evidence shows that Underwood employed Tripp to investigate the property, so that, if Underwood should afterwards acquire rights thereunder, he might, if he saw fit, adopt the plans; that, whatever Tripp's intentions were, they were entirely

personal and speculative, and never were adopted by the appellee, or by any one by any overt act until after August 1, 1910, the date when the appellant began its operations; that on leaving the employment of Underwood Tripp never advised the parties who succeeded Underwood of what he had done, but he retained in his possession the only copy of the notice he had posted, and that Tripp never had any intention of taking the water out on the north side of the creek, but that his intention was to preserve the old flume and utilize it in the later operations.

The evidence is that, at the time when Tripp posted the notice, he was, and for some time had been, in the employment of Underwood, who at that time was, by purchase from Ebner, the owner of nearly all of the capital stock of the appellee. On October 19, 1909, Underwood wrote to Tripp, telling him to find the best mill site for the Ebner property "as things now stand," and, referring to the 200-stamp mill which was to be built the next year, when the spot for the mill should be settled, and telling him that, when that spot was settled, he could plan his tunnel, etc. Tripp testified that he had dealings with the directors of the Copper Company, with which Underwood was connected, and which company succeeded to all of Underwood's interests, and the evidence shows that Tripp, on his arrival on the ground, asked Ebner for the keys to the boarding house and the property, told him he was ready to commence operations, and it shows that Tripp put up an assay office and started the boarding house, and that he was in full control and possession of all the property of the appellee, so long as he remained on the premises. On September 25, 1909, he wrote to Ebner, referring to the fact that in company with Ebner he had selected a location "which we have jointly agreed upon as being the proper location for a tunnel to the Ebner mines." Tripp's plan at that time contemplated that a 200-stamp mill should be built on the Cape Horn No. 2 lode claim, that a tunnel should be commenced at that point and carried to the upper end of the group of claims, and that water should be carried from the old dam to the new mill site, following the south bank of the creek for a distance, then to cross to the north bank thereof, and thence to the new mill site. In July, 1910, Tripp turned over his work to Bent, his successor.

[2] There can be no question that Tripp, in posting the notice, was acting for and on behalf of the appellee's group of mines, and in pursuance of a definite plan, and we think the court below properly held that the notice was sufficient to indicate an intention to appropriate the water for the purposes thereafter claimed by the appellee. The notice specified that the flume might be carried on the southerly side, "or to cross the creek with pipe or flume, or both, to any place on the property known as the Ebner mine." There was sufficient in this to show that it was not the intention to use the water at the site of the old stamp mill. If such had been the intention, there was no occasion to post a notice. The water was already being conducted to, and in use at, that mill.

[3] To the contention that the notice did not indicate an intention to take the water out at any point above the appellant's dam, it is a

sufficient answer to point to the admission, in the appellant's reply, that "it has been and is the universal and general rule, practice, and custom for those desiring to appropriate water to post a notice in writing in a conspicuous place at the point of intended diversion."

[4] Acts done by Tripp at the instance of Underwood, or at the instance of the Copper Company, must be deemed to be done for the benefit of the appellee's group of mines, and to inure to the advantage thereof. Underwood, and later the Copper Company, by virtue of owning all, or nearly all, of the stock of the appellee, represented the appellee in these transactions, and sustained a fiduciary relation to it. In Wheeler v. Abilene Nat. Bank Bldg. Co., 159 Fed. 391, 393, 89 C. C. A. 477, 479 (16 L. R. A. [N. S.] 892, 14 Ann. Cas. 917), it was said:

"The holder of the majority of the stock of a corporation has the power, by the election of biddable directors and by the vote of his stock, to do everything that the corporation can do. His power to control and direct the action of the corporation places him in its shoes, and constitutes him the actual, if not the technical, trustee for the holders of the minority of the stock. He draws to himself and uses all the powers of the corporation."

See, also, Jones v. Missouri-Edison Electric Co., 144 Fed. 765, 75 C. C. A. 631; Union Pacific R. Co. v. Frank, 226 Fed. 906, 920, 141 C. C. A. 510.

[5] But it is argued that there was nothing in Tripp's notice to show that the water was intended to be used at any point outside of the Ebner group of mines, and it is said that that group ended on the south with the Lotta claim, and that between the Lotta claim and the new mill site intervened a tract of land now known as Parish lode No. 2, but which at the time of the posting of the notice was public land of the United States. But the evidence shows that the ground covered by the Parish lode No. 2, although in subsequent litigation between the parties to this cause it was held to be public land, was at the time of the Tripp notice in the actual possession of the appellee, which had theretofore taken steps to locate the same. At that time, and for more than a year prior thereto, the appellee's mining property consisted of the Golden Fleece, Crown Point, Keystone, Taku, Lotta, Parish No. 1, the Cape Horn, and the Eureka mill site south of the Cape Horn, which subsequently, on account of quartz discovery therein, was located as the Cape Horn No. 2 lode claim. Although Ebner held the title to Cape Horn and Cape Horn No. 2, he held it in trust for the appellee, or the owners of its capital stock. This is shown by his letter to Tripp of September 25, 1909, in which he suggests that the assessment work for those claims be performed by work in starting the tunnel.

[6] The appellant points to the fact that on April 4, 1912, Tripp sold his water rights under his location notice to Hoops, who on March 10, 1913, sold the same to Jennings, and that it was not until May 21, 1914, that Jennings conveyed to the appellee. But this evidence, we think, is not inconsistent with the other testimony showing Tripp's relation to the appellee through Underwood and the Copper Company. Hoops was not a stranger to the appellee. He was a stockholder and

bondholder of the Copper Company, and he had advanced money for the Ebner mines to keep the work going on; the appellee being at that time hindered by litigation with the appellant, and on that account unable to raise all the necessary money.

[7] The finding of the court below that the rules and regulations which were pleaded in the appellant's reply were not in force at the time when the rights of either of the parties to the present suit were initiated was made upon conflicting evidence, and we would not be at liberty to disregard it, if we were of the opinion that it was contrary to the weight of the evidence. A consideration of the evidence, however, convinces us that the finding is well sustained.

[8] We discover no ground to disturb the finding of the trial court that not until after the appellee had followed up the posting of the Tripp notice by actual physical work at the point where the notice was posted, and after actual diversion of water at that point, did the appellant do anything that would give notice to the appellee that the appellant intended to make any claim to the water of the creek, or to appropriate the same. The appellant having brought the suit, and having therein attacked the right of the appellee, the burden was upon it to show that it had acquired a prior right to divert water from the creek at the point where it had constructed the Alaska Juneau dam. The appellant had initiated its claim by posting a notice on August 1, 1910, in which claim was made to 20,000 miner's inches of the water of Gold creek, to be used for milling, mining, and other purposes, "said water to be diverted from said creek at a point indicated by this notice posted on a tree, and about one mile from the mouth of the said Gold creek. Said water is to be diverted by ditch, pipe, and flume." The evidence is without dispute that the notice was posted on the Lotta claim, a claim which had been patented to the appellee. The evidence further shows that it was not posted there by reason of any mistake as to the boundaries of the Lotta claim, but that it was deliberately and intentionally placed there under a claim of right and title to the land, by virtue of a mining claim located on July 20, 1910, designated the Oregon lode mining claim, which overlapped the Lotta claim.

The appellant's projected ditch or flume was to extend over a portion of the Lotta claim, and over the Parish No. 2 claim, lying south thereof. In an action of ejectment, brought by the appellee against the appellant, it was finally adjudged that the appellant's attempted location of the Oregon claim was void, and that the appellee was the owner of the whole of the Lotta claim. Ebner Gold Mining Co. v. Alaska-Juneau Gold Mining Co., 210 Fed. 599, 127 C. C. A. 235. On October 3, 1910, and before that action was commenced, the appellant began to build a dam on the Lotta claim at the point where its notice was posted. The dam site was subsequently abandoned, and the appellant built its dam at the line between the Lotta claim and the Parish No. 2. The acts so done upon the appellee's property were acts of trespass, never assented to by the appellee, but actively opposed by it, and they could not become the basis of a right to appropriate the water of Gold creek. "The right of appropriation extends only

to waters upon the public domain of the United States, or upon the public lands of a state, for one cannot acquire a water right on land held in private ownership by another without acquiring an easement in such land." 40 Cyc. 704; Prentice v. McKay, 38 Mont. 114, 98 Pac. 1081; Smith v. Denniff, 24 Mont. 20, 60 Pac. 398, 81 Am. St. Rep. 408; Marshall v. Niagara Springs Orchard Co., 22 Idaho, 144, 125 Pac. 208; Tobey v. Bridgewood, 22 Idaho, 566, 127 Pac. 178.

[9] Nor do we find ground for disturbing the finding of the court below that the appellee's project was prosecuted with due diligence from and after the date of the posting of the Tripp notice. It is true that there is evidence of a temporary suspension of activity, but the testimony leaves no doubt that this was the direct result of a series of hostile acts on the part of the appellant.

The point is made that the decree is erroneous, in that it awards the appellee the first use of 10,000 inches of water, whereas the court found as a fact that the capacity of the appellee's flume is but 3,200 inches. The attention of the court below was not directed to this error by a motion to correct the same, or by the assignments of error.

The cause will be remanded to the court below, with instructions so to correct the decree as to accord with the finding of fact as above indicated. In other respects the decree is affirmed, and the appellee is awarded costs on the appeal.

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## CORDINGLY v. KENNEDY.

(Circuit Court of Appeals, Eighth Circuit. January 25, 1917.)

No. 4535.

1. EXECUTORS AND ADMINISTRATORS ⟸524(3)—ACTIONS BY—FILING OF ORDER APPOINTING FOREIGN REPRESENTATIVE.

Under Rev. St. Colo. 1908, § 7152, providing that, where any executor, etc., shall have been appointed in any other state or territory, he shall, upon filing his original appointment, or a copy thereof, duly authenticated as required to make the same receivable in any court of record in the state, be entitled to prosecute and defend any action or proceeding relating to the estate, substantial compliance is sufficient, and the failure of a foreign executor to incorporate in his complaint a copy of the exemplification of his official bond and letters testamentary does not render the complaint subject to demurrer, where he had filed a copy of his appointment duly authenticated as required by law, for, though there be a failure to comply with the strict terms of the statute, the defect can be cured by filing the order of appointment or copy at any time before hearing.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2335–2343.]

2. APPEAL AND ERROR ⟸204(4)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

An objection to the introduction of an exemplified copy of the letters testamentary of the foreign executor, who was suing as plaintiff, cannot be considered on appeal, where not called to the attention of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1264–1271, 1278; Trial, Cent. Dig. § 172.]

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

3. APPEAL AND ERROR ⟸920(1)—FOREIGN EXECUTORS—BOND—SUFFICIENCY—PRESUMPTIONS.

Rev. St. Colo. 1908, § 7153, declares that the court in which any action may be brought by any foreign executor, etc., shall not grant authority to maintain suits in the state unless he shall file a properly authenticated copy of his letters of executorship, etc., and a properly authenticated copy of his bond, with security in double the amount of the value of the property and estate sought to be recovered, unless it shall appear to the court that removal of such estate will not conflict with the interest of the ward or estate represented, or the terms of limitations attending the right by which the ward or wards or the estate own the same, or the rights of creditors. A foreign executor, suing on a note for $5,000 upon which a little more than one year's interest at 6 per cent. had accrued, gave bond in the sum of $10,000. *Held* that, as the statute is not mandatory, and therefore not jurisdictional, but lodges discretion in the trial court, the defendant cannot, on appeal, attack a judgment in favor of the executor, on the ground that the bond was insufficient, the record being silent as to the matter; there being a presumption of regularity and validity attending the judicial acts of courts of record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3714, 3716, 3720.]

4. APPEAL AND ERROR ⟸274(3)—PRESENTATION OF GROUND OF REVIEW IN COURT BELOW—EXCEPTIONS—NECESSITY.

In an action by an executor on a note held by his testatrix, testimony received, subject to objection that the witness was incompetent, was rejected by the trial court, and judgment rendered for the executor. The defendant then and there excepted to the judgment, and prayed for 15 days within which to file a motion for new trial. *Held* that, there being no other exception to the exclusion of the testimony deemed incompetent, an assignment of error complaining of its exclusion may be rejected, on the ground that the question was not preserved for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1605.]

5. WITNESSES ⟸140(14)—INCOMPETENCY—"INTERESTED PARTY."

Sess. Laws Colo. 1911, p. 676, declares that no party to any civil action or person, directly interested in the event thereof, shall be allowed to testify therein of his own motion or in his own behalf, when any adverse party sues or defends as the trustee or conservator of an idiot, lunatic, or as the executor or administrator, etc., of any deceased person, unless called as a witness by such adverse party. In an action on a note held by plaintiff's testatrix, defendant contended that the note was a purely formal instrument, which he had executed so that the testatrix could exhibit it to other relatives and thus conceal her gift of a sum of money in the amount of the note to her grandson, that it was not intended the note should be enforced, that it was understood the grandson should also sign it, and that after defendant had signed it he delivered it to the grandson, who failed to sign it, but without authority delivered it to the testatrix. Defendant offered the grandson as a witness to such understanding. *Held*, that the grandson was an interested party, for according to his testimony defendant was only a surety or an accommodation maker, and defendant, if defeated, might have recourse against the grandson, and hence he was incompetent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 613.

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

6. WITNESSES ⟸178(3)—COMPETENCY—CROSS-EXAMINATION.

Where, in an action by an executor, the defendant tendered an interested witness, cross-examination by the executor to such an extent as to disclose the witness' interest, and consequent incompetency, is not a waiver of objection to his competency.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 722.]

7. COURTS ⊂=406(1)—CIRCUIT COURT OF APPEALS—REVIEW—MATTERS REVIEWABLE.

The denial of a motion for new trial cannot be reviewed on writ of error to the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1103.]

8. EXECUTORS AND ADMINISTRATORS ⊂=524(2)—ACTIONS—DEFENSES.

Rev. St. Colo. 1908, § 7152, providing that no judgment in favor of any foreign executor, etc., shall be rendered until such executor shall first have given 10 days' notice of publication of the pendency of the action, is for the benefit of those having adversary interests, particularly local creditors, and a defendant duly served with process, who contested on the merits, cannot attack the judgment against him and in favor of a foreign executor, because the notice was not given; the omission being a mere irregularity.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2334.]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by Henry Spicer Kennedy, executor of the last will and testament of Harriet U. Kennedy, against Alfred Cordingly. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles F. Carnine, of Denver, Colo. (Ponsford & Carnine, of Denver, Colo., on the brief), for plaintiff in error.

Edwin H. Park, of Denver, Colo. (Thomas H. Gibson, of Denver, Colo., on the brief), for defendant in error.

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

VAN VALKENBURGH, District Judge. Defendant in error sues in the capacity of executor of the last will and testament of Harriet U. Kennedy, deceased, who died in Los Angeles county, Cal., in May, 1913, to recover judgment against plaintiff in error for the sum of $5,000, with interest thereon at 6 per cent. per annum from February 20, 1913, upon a promissory note dated January 20, 1911, signed by plaintiff in error and payable to the order of the testatrix of defendant in error. To the complaint plaintiff in error filed a demurrer and answer. The demurrer challenged the legal capacity of defendant in error to institute or prosecute the cause of action set forth, for the reason that he is suing in an official capacity as executor under an alleged appointment by the superior court of Los Angeles county, Cal., and as such has failed to comply with the terms and requirements of sections 7152 and 7153 of the Revised Statutes of Colorado of 1908, in that it was not shown by the complaint that as such executor he had filed in the trial court his original appointment, or a copy thereof duly authenticated, as required to make the same receivable in courts of record in the state of Colorado, and, further, in that said complaint failed to show that said defendant in error had filed in said cause a properly authenticated copy of his bond as such executor, with security in double the amount of the value of the property and estate sought to be recovered; that by reason of the premises the complaint did not

state facts sufficient to constitute a cause of action. This demurrer was by the court overruled.

By the answer plaintiff in error put in issue all the allegations of the complaint, except that pleading the jurisdictional amount in controversy, and for further defense alleged in substance:

"That on or about January 16, 1911, Harriet U. Kennedy, testatrix of defendant in error, delivered to plaintiff in error $5,000, with instructions that the latter should use said sum to the best of his judgment in a business enterprise engaged in by one Charles T. Kennedy, who is a grandson of defendant in error's testatrix, and who is a son-in-law of plaintiff in error, and that this money was intended as a gift from the said Harriet U. Kennedy to her grandson; that Harriet U. Kennedy's property was derived from the estate of her deceased husband, and that at the time she made this gift she was in fear of controversy or litigation with her two sons, who were the other heirs of said estate, and that by reason of this apprehension she requested the said Charles T. Kennedy to make a formal promissory note to represent the amount of the $5,000 gift, so that she could exhibit the pretended note and thus account for said sum of $5,000 in the event such contemplated controversy should arise; that this note represented no indebtedness whatsoever, and that plaintiff in error signed it upon the express understanding that he should not be called upon to pay it; that it was further understood that the said Charles T. Kennedy should also sign the note, and that, after plaintiff in error had signed it, he delivered it to Charles T. Kennedy, who failed to sign the note, and without authority delivered it to defendant in error's testatrix, and that plaintiff in error did not know until April, 1914, that Charles T. Kennedy had not signed said pretended note; that plaintiff in error expended said sum of $5,000 solely for the benefit of said Charles T. Kennedy, and that the former derived no personal gain or profit therefrom, and received no consideration for signing said note; that defendant in error's testatrix stated that when the estate of her deceased husband was settled, and she would no longer be called upon to account for said $5,000, she would cancel said note; and that, although her husband's estate was settled prior to her death, she failed to cancel and return said pretended note."

To this answer defendant in error filed a demurrer, which was likewise overruled.

At the trial, to the court sitting as a jury, defendant in error offered in evidence Exhibit A, the promissory note in question; Exhibit B, letters testamentary issued to him by the superior court of Los Angeles county, Cal.; and Exhibit C, the bond of Henry S. Kennedy as executor. Exhibits A and B were admitted without objection, and that interposed to Exhibit C was overruled, and an exception duly saved. It was further agreed that the record might show, without proof, that Harriet U. Kennedy was dead, and died prior to the bringing of this suit. Thereupon defendant in error rested his case.

Plaintiff in error then offered the above-named Charles T. Kennedy as a witness in his behalf. Defendant in error objected to the competency of the witness to testify, on the ground that the case was being prosecuted by the executor of the last will and testament of the payee in the note; that under the allegations of the answer the witness was an interested person, within the meaning of the Colorado statute, and was therefore disqualified. The court reserved its ruling, and the testimony was received subject to the objection. Plaintiff in error was next sworn on his own behalf, but upon objection his testimony was excluded. Of this ruling complaint is not urged in this court. Plaintiff in error offered no further testimony, and the court there-

upon, after argument, ruled that the witness Charles T. Kennedy was an incompetent witness, sustained a motion to strike out his testimony already received, and rendered judgment on the note for principal and interest in the sum of $5,646.66, and for costs, "to which order and judgment, to be entered as aforesaid, and to the entering of said judgment, the defendant, by his counsel, then and there duly excepted."

The following errors are specified: (1) The court erred in overruling the demurrer to the complaint. (2) The court erred in admitting in evidence Exhibit B, purporting to be an exemplified copy of letters testamentary issued to defendant in error, upon the ground that it does not follow the approved form of such letters testamentary as recognized by the Code of Civil Procedure of California. (3) The court erred in admitting in evidence Exhibit C, purporting to be a copy of the bond of defendant in error as executor of the estate of Harriet U. Kennedy, deceased. (4) The court erred in ruling that Charles Kennedy was not a competent witness to testify in said cause, and in striking out the testimony given by him. (5) The court erred in overruling the motion of plaintiff in error for a new trial. (6) The court erred in rendering judgment in said cause, for the reason that the defendant in error did not, for at least 10 days prior to the rendition of said judgment, or for any other period of time, or at all, give notice of the pendency of said action by publication in the county where said cause was pending, or in any other county within the said district of Colorado.

[1] 1. Section 7152, Revised Statutes of Colorado 1908, provides:

"When any executor, administrator, guardian or conservator shall have been appointed such in any other state or territory of the estate of any person not a resident of this state at the time of his death, or at the time of such appointment, in the case of minors and lunatics, such foreign executor, administrator, guardian or conservator, upon filing his original appointment or a copy thereof, duly authenticated, as required to make the same receivable in any court of record in this state, may prosecute and defend any action or proceeding relating thereto, as may be prosecuted and defended by any such official duly appointed by any county court of this state; but no judgment in favor of any such executor, administrator, guardian or conservator, shall be rendered until such executor, administrator, guardian or conservator shall first have given notice of the pendency of such action by publication for at least ten days in some newspaper of general circulation, published in the county where such suit is pending."

Error is assigned to the action of the trial court in overruling the demurrer, because defendant in error did not incorporate in his complaint a copy of the exemplification of his official bond and letters testamentary. Copies of the documents themselves were set out therein. At the hearing on demurrer it was conceded that defendant in error had filed a copy of his appointment, duly authenticated, as required by law. In this court the same concesssion is made in the brief of counsel. Was the omission so to state in the complaint fatal on demurrer? We do not think so. Substantial, if not literal, compliance with the statute is shown, and that is sufficient. Even though there had been failure to comply with the strict terms of the statute, the defect could have been cured by filing at any time before hearing. But in this case compliance is admitted. Dodge v. Town of North Hudson

(C. C.) 188 Fed. 489–493; Hodges et al. v. Kimball et al., 34 C. C. A. 103, 91 Fed. 845.

[2] 2. The second specification of error cannot be considered here, because no objection was made at any time to the introduction of Exhibit B, which is an exemplified copy of the letters testamentary; the attention of the trial court was not called to this alleged error, and nothing was preserved for review in this court.

[3] 3. The objection to the bond of the executor, defendant in error, is founded upon section 7153, Rev. Stat. Colo. 1908, which provides:

"The court in which any action may be brought by any foreign executor, administrator, guardian or conservator shall not grant the authority given in this act to maintain suits in this state, unless he shall file with the court a properly authenticated copy of his letters of executorship, administratorship, guardianship or conservatorship, as the case may be, and a properly authenticated copy of his bond, with security in double the amount of the value of the property and estate sought to be recovered in such action, which letters and bond shall have been executed and filed according to the laws of the state where such executor, administrator, guardian or conservator is appointed, unless it shall appear to the court that a removal of such estate will not conflict with the interest of the ward or estate represented or the terms of limitations attending the right by which the ward or wards or the estate own the same, or the rights of creditors. If there be a resident executor, administrator, guardian or conservator in any such case, such resident official shall have ten days' notice of the application or intention of such nonresident executor, administrator, guardian or conservator to bring such action, and in all such cases, the resident executor, administrator, guardian or conservator shall have the right to bring such action if he shall elect so to do within such time."

The contention is that the bond fails to comply with the statute, because not "in double the amount of the value of the property and estate sought to be recovered in such action." The property sought to be recovered was money, evidenced by a promissory note for $5,000, with interest at the rate of 6 per cent. per annum from February 20, 1913. At the time the suit was filed a little more than one year's interest had accrued, which plaintiff in error insists was readily ascertainable by mathematical computation. The bond given was in the sum of $10,000. The amount of the judgment was $5,646.66.

It may well be doubted whether the law contemplates consideration of other than the principal sum sought to be recovered, and whether the security given was not a substantial compliance with both the letter and the spirit of the statute in this regard. However, the objection is not tenable for another obvious reason. The statutory provision is not mandatory, and therefore not jurisdictional, but expressly lodges discretion in the trial court. It directs a bond with security in double the amount, etc., "unless it shall appear to the court that a removal of such estate will not conflict with the interest of the ward or estate represented or the terms of limitations attending the right by which the ward or wards or the estate own the same, or the rights of creditors." The record is silent upon this matter, but the presumption of regularity and validity attending the judicial acts of courts of record compels the conclusion that the court, in the exercise of its sound discretion, deemed the bond sufficient to protect all rights involved, as it undoubtedly was.

[4] 4. The action of the court in ruling that Charles Kennedy was not a competent witness, and in striking out the testimony given by him, was based upon the following statutory provision:

"That no party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein, of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of an idiot, lunatic or distracted person, or as the executor or administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee; unless when called as a witness by such adverse party so suing or defending," etc. Session Laws of Colorado 1911, c. 229.

The testimony of this witness was received subject to objection and to a ruling that the same should be stricken out if decided to be incompetent. The subsequent action of court and counsel is thus stated in the record:

"The Court: I think the authorities are with the plaintiff. Under the statute Kennedy was not a competent witness as the statute is construed by the appellate courts of Colorado, and therefore it would be necessary to sustain the objection based on the ground of the motion to strike out his testimony. Judgment on the note for principal and interest $5,646.66 and costs. (To which ordering of judgment to be entered as aforesaid, and to the entering of said judgment, the defendant, by his counsel, then and there duly excepted, and prayed for 15 days within which to file a motion for new trial, which was granted.)"

It is and must be conceded that without the testimony of this witness no defense upon the merits was disclosed. The exception of plaintiff in error was taken generally to the action of the court in ordering and entering judgment—which is amply supported by the record—and not to its action in sustaining the motion to strike. This assignment might safely and soundly be rejected for the reason that, by his failure to except, plaintiff in error has not preserved this question for review. But, upon the entire record presented, we think the trial court committed no error in this ruling.

[5] Plaintiff in error makes two contentions concerning the competency of the witness Kennedy: (a) That he was not a "person directly interested" in the event of the suit. (b) That defendant in error, by cross-examining this witness, waived any right which he may have had to object to his testimony.

The interest of Kennedy in the result of this litigation is made to appear by a consideration of the rights created or extinguished by its issue. If plaintiff in error were defeated, as he was, then, upon Kennedy's own testimony, as sought to be introduced, Cordingly could recover over against Kennedy, for whom he was surety, or accommodation maker. If, however, Cordingly should prevail, then Kennedy would stand relieved from any claim, because he had assumed no liability to Cordingly unless the latter could be compelled to satisfy Kennedy's debt. It was therefore of vital and direct interest and importance to him that Cordingly should win this case, thereby removing any foundation for a cause of action by Cordingly against him. The Colorado statute in question was taken directly from that of Illinois. Brown v. First National Bank, 49 Colo. 393, 113 Pac. 483. The construction in

the latter state conforms to the view reached here. Bressler v. Baum, 42 Ill. App. 190; First Nat. Bank v. Bressler, 38 Ill. App. 499. In the latter case it was said:

"Where the liability of the maker over for certain payments of interest he had made upon the note in suit depended upon the event of the action, which was by an administrator, such maker is not a competent witness in his own favor and against the administrator, although he is not a party to the suit."

But as we view it, the rule announced in Colorado is not otherwise. Cree v. Becker, 49 Colo. 268, 112 Pac. 783; Larson v. Ross, 10 Colo. App. 267, 50 Pac. 730; Williams v. Carr, 4 Colo. App. 363–367, 36 Pac. 644, 645. In Williams v. Carr, one Ulman was adjudged incompetent as to a witness, under circumstances similar in legal aspect to those in the case at bar. The court said:

"If the debt was collected of Williams, Ulman would be liable to him. If, as attempted in the deposition of Ulman, the fact was established that the mining bonds were delivered by Ulman to the plaintiff, and by him received in full satisfaction and discharge of the note, this would relieve, not only Williams, but himself, from all liability or indebtedness; viewed in any light, his legal position is such as to disqualify him under the statute. * * * Although the statute may, in this instance, and in some others, work a hardship, and prevent parties from establishing honest defenses, it is a salutary one, and necessary for the protection of estates, widows and minor heirs, who, without some rule of evidence of this kind, would find themselves at the mercy of any unprincipled debtor, and while the rule need not be unnecessarily extended, it should not be so restricted as to fail in its intention."

This case is cited with approval, and the rule thus announced is confirmed, in Cree v. Becker, supra. If the cases of Smith v. Smith, 22 Colo. 480, 46 Pac. 128, 34 L. R. A. 49, 55 Am. St. Rep. 142, and Allen v. Shires, 47 Colo. 433, 107 Pac. 1070, may be construed as tending to sustain the contention of plaintiff in error, they are not in harmony with at least one later decision of the same court. Where the law of a state has not been definitely settled by sufficiently consistent decisions of its courts of last resort, it is the duty of the federal courts to give effect to their own independent judgment. Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228. We therefore adopt that construction which better satisfies the language and spirit of the statute and meets the abuses which it seeks to correct.

[6] But counsel insist that defendant in error is not in a position to question the competency of this witness, because whatever right he may have had in this regard was lost by cross-examination. Allen v. Shires, 47 Colo. 433–436, 107 Pac. 1070, is cited. That case, upon examination, does not support this contention. There plaintiff, in making out his case in chief, called to the witness stand the defendant to be examined, as if under cross-examination, which is permitted by section 7284, Rev. Stat. Colo. 1908. By this section, the party called for such examination shall not be concluded thereby, but may rebut it by counter testimony. The cross-examination to which plaintiff subjected defendant covered a very wide range, bore on all the material issues raised by the pleadings, and even passed beyond them. This is a very different situation from that presented in the instant case, where the witness was not called by the adverse party, but was cross-exam-

ined only to such extent as would fully disclose that he was a party directly interested in the result of the controversy; which was made clearly to appear.

[7] 5. The fifth specification may be dismissed, with a restatement of the established rule in this jurisdiction that the action of a trial court, in overruling a motion for new trial, cannot be reviewed in this court.

[8] 6. The provision of section 7152 supra, that no such judgment shall be rendered until the executor shall first have given 10 days' published notice of the pendency of the action, is not jurisdictional. It is for the benefit of those who hold adversary interests, more particularly local creditors, and can be invoked only by those whose rights might be affected by the omission. Mohr v. Manierre, 101 U. S. 417, 25 L. Ed. 1052. Plaintiff in error was served with process, appeared personally, and presented his defense. In such case no damage could accrue to him from any failure to give this formal notice; but, in any event, his failure to suggest this specific matter to the trial court is fatal to the position now assumed. The exception to the ordering and entering of judgment was baldly general. If it had been specific, the court might, and doubtless would, have delayed entering the judgment until the notice had been published. It was not required to divine all possible formal irregularities from a merely general exception to the entering of judgment. Webb et al. v. National Bank of Republic, 77 C. C. A. 143, 146 Fed. 717, 718; Ogden City v. Weaver, 47 C. C. A. 485, 108 Fed. 564; Wear v. Imperial Window Glass Co., 139 C. C. A. 622, 224 Fed. 60–63.

Finding no substantial error in the record, the judgment of the court below is accordingly affirmed.

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SHELTON et al. v. GAS SECURITIES CO.

(Circuit Court of Appeals, Eighth Circuit. January 27, 1917.)

No. 4733.

1. WATERS AND WATER COURSES ⊂⊃230(6)—IRRIGATION DISTRICTS—ACTION ON BONDS—PRIMA FACIE CASE.

In an action to recover the interest on irrigation district bonds payable to bearer, plaintiff makes a prima facie case of bona fide ownership of the bonds by proof of their possession.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 319.]

2. APPEAL AND ERROR ⊂⊃1008(2)—REVIEW—FINDINGS OF FACT.

A finding by the court in a case tried by consent without a jury, justified by the evidence received, cannot be re-examined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3957, 3964.]

3. WATERS AND WATER COURSES ⊂⊃230(1)—IRRIGATION DISTRICTS—BONDS—ESTOPPEL TO DENY LIABILITY.

Where irrigation district bonds, issued by officers authorized to bind the district, recited that all acts and things required to be done, and con-

ditions and things required to exist, pursuant to the issuance of the bond, to render it lawful, had happened and been done and performed, and did exist, in regular and due time, form, and manner as required by law, a purchaser of the bonds before maturity is not required to examine the record of the proceedings to determine whether the bonds were regularly issued; but the district is estopped to question the regularity of such proceedings, since anything which would tend to depress the market value of the bonds would defeat the purpose of the Legislature in authorizing such recital.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 319.]

4. WATERS AND WATER COURSES ⊜230(1)—IRRIGATION DISTRICTS—BONDS—ESTOPPEL—AUTHORITY OF OFFICERS.

An irrigation district is not estopped to question the proceedings by which its bonds were issued by recitals in the bond that such proceedings were regular, unless the officers executing the bonds had lawful authority to make the recitals and to make them conclusive.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 319.]

5. WATERS AND WATER COURSES ⊜230(2)—IRRIGATION DISTRICTS—BONDS—ESTOPPEL—AUTHORITY OF OFFICERS.

The Colorado irrigation district statute (Laws 1905, p. 246), requiring the secretary of the board of directors to enter in the records and with the county clerk a statement of the result of the bond election, and providing that the bonds issued shall be negotiable in form, executed in the name of the district, and signed by the president and secretary, and the seal of the district be affixed thereto, and shall state that they are issued by the authority of the act, authorizes the president and secretary to make recitals in the bonds as to the regularity of the proceedings for their issuance, which shall be binding on the district.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 319.]

6. WATERS AND WATER COURSES ⊜230(5)—IRRIGATION DISTRICTS—BONDS—NATURE OF OBLIGATION.

Negotiable bonds issued by an irrigation district are subject to the same rules as other negotiable paper.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 319.]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by the Gas Securities Company against the Niles Irrigation District to recover the interest on district bonds, in which J. M. Shelton and others intervened. Judgment for plaintiff, and interveners bring error. Affirmed.

I. B. Melville, of Denver, Colo. (Max D. Melville, of Denver, Colo., on the brief), for plaintiffs in error.

Platt Rogers, of Denver, Colo. (James Grafton Rogers and Edmund Rogers, both of Denver, Colo., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and TRIEBER and VAN VALKENBURGH, District Judges.

VAN VALKENBURGH, District Judge. Defendant in error, Gas Securities Company, is a New York corporation. The Nile irrigation district is a public corporation created, organized, and existing under

the laws of Colorado by virtue of an act entitled "An act in relation to irrigation districts," approved May 3, 1905, and acts amendatory thereof and supplemental thereto, with express power to issue, sell, and deliver bonds and written obligations for the purpose of constructing, or purchasing, or acquiring necessary sites, reservoirs, water rights, canals, ditches, and works, and acquiring the necessary property and rights therefor. Plaintiffs in error allege that they are freeholders of irrigable lands within said Nile irrigation district, that as such owners they are taxpayers, and that their lands are liable for all assessments and levies for irrigation district purposes, including principal and interest on bonds issued by authority of the act aforesaid.

August 3, 1914, defendant in error filed its complaint against said Nile irrigation district, as defendant, alleging the ownership of 1,338 of certain bonds of said district, of the denomination of $500 each. A copy of the bond, set out in the complaint, contains the following recitals:

"This bond is one of series No. 1, and a part of the total issue of bonds of said district aggregating seven hundred thousand dollars ($700,000) authorized to be issued by the votes of the legal electors of said district at an election duly called and held therein on the 15th day of August, A. D. 1908, at which election a majority of the legal electors of said district voted 'Bonds Yes,' and the result of said election was so declared and entered of record; that this bond is issued by virtue of the votes cast at said special election pursuant to, and upon the authority of and by full compliance with the provisions of an act of the General Assembly of the state of Colorado, entitled 'An act in relation to irrigation districts,' approved May 3, 1905, and all acts amendatory thereof."

"And it is hereby recited and certified that all acts and things required to be done, and conditions and things required to exist, pursuant to the issuance of this bond, to render the same lawful and valid, have happened and been properly done and performed and did exist in regular and due time, form, and manner as required by law, and said bonds are declared to be the bonds of said district and a legal indebtedness thereof, which indebtedness is a lien upon all the real property in said district, and to be paid by revenue derived from the annual assessment and taxation upon all real property included within said district, levied and collected under the laws of the state of Colorado."

The bonds were executed in the name of the district, signed by the president and secretary, with the seal of the district affixed thereto, all as prescribed by statute. Defendant in error prayed judgment upon certain overdue and unpaid interest coupons in the sum of $60,210, with interest from their maturity. The defendant district filed answer, admitting the indebtedness; and because the board of directors of the district refused to set up certain alleged existing defenses to the coupons sued on, plaintiffs in error sought and were granted permission to intervene in the cause below, and to file their amended answer and verified statement. By their pleadings interveners admit the jurisdictional facts, and also that the defendant district authorized, made, and executed the bonds and coupons thereto attached, as alleged in the complaint, for the purposes therein stated. Five separate defenses to plaintiff's right to recover are, by plaintiffs in error, thus summarized:

"First, that the bonds and coupons involved had not been disposed of by the district board in the manner provided by the irrigation district act; second, that the board attempted to deliver $652,000 of the bonds for a proposed system of irrigation works, no portion of which was in existence at the time

of entering into the contract of purchase, the act requiring that to so exchange bonds the system must be constructed or partially constructed; third, that time was of the essence of the construction contract entered into, and it was therein provided that the system should be completed within 20 months, but, notwithstanding that no construction was done thereunder during said 20 months, the board, long after the expiration of said period, attempted to revive said contract without referring the same to the district electors; fourth, that after the qualified electors had authorized and ratified the original contract, the board entered into a so-called modified contract for the construction of a wholly different and much inferior system of irrigation works, and delivered the most of the bonds and coupons herein involved thereunder, without referring either said original or modified contracts back to the electors for rescission, ratification, or rejection, as provided by said act; and, fifth, that a portion of the bonds involved herein were sold to the contractor for cash with the known purpose in view of defraying therefrom the operating expenses of said district, contrary to the express terms of said act."

It was further alleged that, in addition to the notice furnished by the public records of the irrigation district, the imperfections claimed were actually known, or at least knowledge thereof was imputable to the present owner, defendant in error. In the trial to the court, sitting as a jury, defendant in error made its prima facie case by the production of the negotiable instruments sued on; their genuineness being admitted. To avoid the expense and time incident to sustaining by proofs such of the defenses pleaded as would, if proven, be of no avail to interveners if the court should find that plaintiff was a purchaser in good faith, for value, without notice, actual or constructive, the order of proof was ruled to begin with the question of bona fide purchase. Interveners were permitted to make a full showing with respect to actual notice of alleged irregularities; but the court ruled that, in view of the recitals in the bonds, defendant in error was not required at its peril, before purchasing the bonds and coupons in controversy, to examine the public records of the irrigation district under which they were issued, and, thus, by anticipation, excluded all such evidence tendered or suggested in support of the defense of constructive notice. Nothing was offered by defendant in error, except the formal proofs aforesaid, and, at the close of the testimony, the court found the issues, including that of bona fide purchase, in favor of defendant in error, and rendered judgment accordingly. The irrigation district declined to join in the writ of error, and interveners appear as sole plaintiffs in error in this court.

[1, 2] Since, with the exception noted, plaintiffs in error introduced all the evidence they desired upon the matter of bona fide purchase, and defendant in error offered nothing in this behalf, questions of order and burden of proof are unimportant in this review. Possession of the bonds and coupons in question made, under the pleadings, a prima facie case for the plaintiff. Bernards Township v. Morrison, 133 U. S. 523, 527, 10 Sup. Ct. 333, 33 L. Ed. 726; Presidio County v. Noel-Young Bond Co., 212 U. S. 58, 70, 29 Sup. Ct. 237, 53 L. Ed. 402. Upon the entire evidence, the court below found that the bonds and coupons involved were purchased by plaintiff "without notice or knowledge of any matters tending to show that said bonds and coupons had been issued and delivered by said district in violation of the terms of the statute of Colorado or tending to show that the same were

null and void." This finding is justified by the evidence received and considered by the court. This case having been tried by consent without a jury, if we limit ourselves to matters thus received and considered, we must accept the findings made, and cannot re-examine the court's determination of the issues. Lawson v. United States Mining Co., 207 U. S. 1, 12, 28 Sup. Ct. 15, 52 L. Ed. 65; Campbell v. United States, 224 U. S. 99, 105, 32 Sup. Ct. 398, 56 L. Ed. 684.

[3] The only substantial question presented is whether the trial court erred in excluding from consideration the records of the irrigation district relating to this transaction, in holding that the purchaser, before buying the bonds in suit, was not required to examine such records, and that, as against defendant in error, the defendant and interveners were estopped by the recitals in said bonds from setting up any of the claimed irregularities in the issuance and delivery thereof. The answer to this question will determine the merits of this controversy.

The effect of recitals in bonds of this character in relieving purchasers of all inquiry, notice, and knowledge of the record, action, or omission of the municipal board or other officers of the municipality issuing the same, was elaborately considered by this court in Town of Aurora v. Gates, 125 C. C. A. 329, 332, 336, 337, 208 Fed. 101, 104, 108, 109 (L. R. A. 1915A, 910). It was there held that:

"A municipality or a quasi municipality may not, by the recitals or certificates in its bonds, estop itself from denying that it is without power to issue them, when the laws are such that there can be no state of facts or of circumstances under which it would have authority to emit them. But, if the laws are such that there might under any state of facts or of circumstances be lawful power in the municipality or quasi municipality to issue its bonds, it may, by recitals therein, estop itself from denying that those facts or circumstances exist and that it has lawful power to send them forth, unless the Constitution or act under which the bonds are issued prescribes some public record as the test. * * * The recitals in municipal bonds by the officers or the representative body invested with power to perform a precedent condition and with authority to determine when that condition has been performed, that all the requirements of law necessary to authorize the issue of the bonds have been complied with, precludes inquiry, as against an innocent purchaser for value, whether or not the precedent condition had been performed before the bonds were issued. * * * Where, by legislative enactment, authority has been given to the officers of a municipality to issue its bonds on some precedent condition, and where the fact may be gathered from the enactment that those officers were invested with power to decide whether or not that condition had been complied with, their recital in the bonds issued by them that it was fulfilled is duly authorized, and it estops the municipality or quasi municipality from proving its falsity to defeat the bonds in the hands of an innocent purchaser. * * * A municipality, a quasi municipality, or a corporation and its officers, who by the apparent legality of their obligations or by recitals of their validity have induced innocent purchasers to invest in them are estopped from denying their legality on the ground that in some of the preliminary proceedings which led to their execution, or in their execution itself, they failed to comply with some law or rule of action relative to the mere time or manner of their procedure, with which they might have lawfully complied, but which they carelessly disregarded."

In this case the general power and authority of the district and its officers to issue bonds for the purposes declared, not only appear from the provisions of the act under which the irrigation district was organized, but are admitted in the answer. It is further admitted that

the defendant district did authorize, make, and execute the negotiable bonds, with coupons thereto attached, in the manner and form as alleged in the complaint, for the purposes enumerated in the statute. The alleged defects complained of were irregularities merely in the performance of the conditions preliminary to the exercise by the district of the authority conferred by statute, and in the delivery of the bonds subsequent to their issue. Such irregularities, including a partial failure of consideration, whether inadvertent and negligent merely, or amounting to fraud as between the district and its officers, will not affect the title of subsequent bona fide purchasers for value before maturity or the liability of the irrigation district. Cromwell v. County of Sac, 96 U. S. 51, 57, 24 L. Ed. 681; Bernards Township v. Morrison, 133 U. S. 523, 527, 10 Sup. Ct. 333, 33 L. Ed. 726.

[4] It is true that where the validity of the bonds depends upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. Gunnison County Commissioners v. Rollins, 173 U. S. 255, 267, 19 Sup. Ct. 390, 43 L. Ed. 689. The power and duty of municipal officers issuing bonds to ascertain, determine, and declare the facts authorizing their issuance need not be expressly conferred and devolved by statute, but may result from implication. Miller v. Perris Irrigation District (C. C.) 99 Fed. 143; Town of Coloma v. Eaves, 92 U. S. 484, 23 L. Ed. 579; Oregon v. Jennings, 119 U. S. 74, 92, 7 Sup. Ct. 124, 30 L. Ed. 323; Bernards Township v. Morrison, 133 U. S. 523, 528, 10 Sup. Ct. 333, 33 L. Ed. 726.

[5] By the Colorado statute the secretary of the board of directors must, as soon as the result of any election held under the provisions of this act is declared, enter in the records of such board, and with the county clerk of the county in which the office of said district is located, a statement of such result showing the same with great particularity. The bonds "shall be negotiable in form, executed in the name of the district and signed by the president and secretary, and the seal of the district shall be affixed thereto. * * * Said bonds shall express on their face that they are issued by the authority of this act, stating its title and date of approval. The secretary shall keep a record of the bonds sold, their number, date of sale, the price received, and the name of the purchaser." Clearly the president and secretary, as the executive officers of the district, had special personal knowledge of such transactions. They were the officers contemplated and designated by the statute to issue bonds and make the necessary recitals therein. Miller v. Perris Irrigation District et al. (C. C.) 99 Fed. 143; Town of Coloma v. Eaves, 92 U. S. 484, 489, 23 L. Ed. 579; Oregon v. Jennings, 119 U. S. 74–92, 7 Sup. Ct. 124, 30 L. Ed. 323; Bernards Township v. Morrison, 133 U. S. 523, 528, 10 Sup. Ct. 333, 33 L. Ed. 726; Presidio Co. v. Noel-Young Bond Co., 212 U. S. 69, 29 Sup. Ct. 237, 53 L. Ed. 402. The recitals in these bonds were exceptionally full and complete and are conclusive in favor of the bona fide holder.

Town of Aurora v. Gates, 125 C. C. A. 329, 208 Fed. 101, L. R. A. 1915A, 910; Evansville v. Dennett, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760; Quinlan v. Green County, 205 U. S. 410, 419, 27 Sup. Ct. 505, 51 L. Ed. 860; Green County v. Quinlan, 211 U. S. 582, 29 Sup. Ct. 170, 53 L. Ed. 343; Presidio Co. v. Noel-Young Bond Co., 212 U. S. 68, 29 Sup. Ct. 237, 53 L. Ed. 402.

[6] Obligations of this nature are subject to the same rules as other negotiable paper. Cromwell v. County of Sac, 96 U. S. 51, 24 L. Ed. 681.

"These bonds were intended for sale; and it was rationally to be expected that they would be put upon distant markets. * * * Everything that tended to depress the market value was adverse to the object the Legislature had in view. It could not have been overlooked that their market value would be disastrously affected if the distant purchasers were under obligation to inquire before their purchase, or whenever they demanded payment of principal or interest, whether certain contingencies of fact had happened before the bonds were issued—contingencies the happening of which it would be almost impossible for them in many cases to ascertain with certainty. Imposing such an obligation upon the purchasers would tend to defeat the primary purpose the Legislature had in view. * * * Such an interpretation ought not to be given to the statute, if it can reasonably be avoided; and we think it may be avoided." Town of Coloma v. Eaves, 92 U. S. 484, 487, 488 (23 L. Ed. 579).

The foregoing language of the Supreme Court has wide application and discloses the reasoning upon which this rule of estoppel is based. As was said in Bernards Township v. Morrison, 133 U. S. 523, 529, 10 Sup. Ct. 333, 335 (33 L. Ed. 726):

"Whatever may be the hardships of this particular case, to sustain the defenses pressed would go far towards destroying the market value of municipal securities."

It follows that the judgment of the lower court was right and must be affirmed.

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## CITY OF HUTCHINSON v. KANSAS BITULITHIC CO. et al.

(Circuit Court of Appeals, Eighth Circuit. January 22, 1917.)

No. 4622.

1. MUNICIPAL CORPORATIONS ⟸347(1)—PAVING CONTRACTS—LIABILITY OF SURETY—INVALIDITY OF PRINCIPAL OBLIGATION.
   A surety on the bond given by a paving contractor to secure the performance of the contract cannot, if the contract was invalid because in excess of the mayor's authority, be held liable for the contractor's failure to conform to the specifications.
   [Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 876.]

2. MUNICIPAL CORPORATIONS ⟸368—PAVING CONTRACT—BREACH OF GUARANTY.
   Where a paving contract as signed by the mayor required the contractor to construct the paving so that it would endure without need of repairs for one year after its completion and acceptance, and provided that

the city engineer should be the sole arbitrator to determine whether the paving conformed to the guaranty, and that when the engineer should determine that any defects existed therein he should give the contractor notice, and if the contractor failed to make good such defect the guaranty should be held to have been broken, while the specifications simply required the contractor to keep the paving in good repair for one year, and to make repairs promptly when required by the city council by written order of the mayor, the city cannot recover for breach of the guaranty, where it was admitted that the city engineer had given no notice of the defects during the year, on the theory that the mayor had no authority to include that provision in the contract, since, even if that contention be sound, the rights of the parties must then be determined by the specifications, which do not contain the guaranty.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 901.]

3. MUNICIPAL CORPORATIONS ⟸339(2)—PAVING CONTRACT—AUTHORITY OF MAYOR—SPECIFICATIONS.

Under a provision of the specifications that if any part thereof should appear obscure the interpretation of the city engineer should be final, the mayor had authority to include such a condition as part of the guaranty, it being for the benefit of the city, since it did not deprive the council of their power, if they discovered defects, of ordering the engineer to give notice thereof, and in the event of his refusal of removing him and appointing another, who would give the notice.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 870.]

4. MUNICIPAL CORPORATIONS ⟸368—PAVING CONTRACT—REPAIRS—DUTY OF CONTRACTOR.

The contract, fairly interpreted, required that the contractor so construct the paving that it would be accepted by the city authorities, and, in proof that the paving was what it purported to be, the contractor was bound to maintain it in repair if any defects appeared during the first year.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 901.]

5. MUNICIPAL CORPORATIONS ⟸375—PAVING CONTRACTS—ACTIONS—FRAUD.

In an action at law by a city to recover for breach of a guaranty of paving, where the contractor relied on the failure of the city engineer to give notice of the necessity of repairs as required by the contract, the city could set up in reply that the engineer was corruptly hired by the contractor not to give such notice, since, when used purely for purposes of defense, not of affirmative relief, fraud not only may be, but must be, availed of in an action at law.

6. PLEADING ⟸269—AMENDMENT AT TRIAL—REFUSAL.

In an action at law by a city to recover for breach of guaranty of paving, where the contractor relied on the failure of the city engineer to give notice of defects as required by the contract, it was not error to refuse to permit the city in the midst of the trial to amend its reply, so as to allege that the contractor corruptly hired the city engineer not to give notice, which was a fact which must have been known to the city at all times, especially where the engineer's testimony, already given, and the offer to amend, showed that the purported amendment was merely a paper defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 811–815.]

7. PLEADING ⟸17—AMENDMENT—REPLY—CONCLUSION—FRAUD.

Where the defense to an action for breach of a paving contract was the failure of the engineer to give notice of defects, an offer by the city to amend its reply to allege that the engineer had had no previous ex-

perience with paving of that character, that as soon as a portion of it was laid, and before its completion, he had been fraudulently employed by the contractors to prepare testimonials praising the pavement, which were circulated by the contractor, that thereby he corruptly and fraudulently became the employé and champion of the contractor, and by reason thereof, and of his incompetency, he fraudulently neglected and refused to give the required notice, the charge of fraud and corruption was merely an argumentative conclusion of the pleader from the fact that the city engineer commended the paving, and it was not error to refuse to permit the amendment to be filed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 38, 41, 195, 350.]

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

Action by the City of Hutchinson against the Kansas Bitulithic Company and another. Judgment for defendants, and plaintiff brings error. Affirmed.

F. L. Martin and Howard S. Lewis, both of Hutchinson, Kan. (Van M. Martin, William G. Fairchild, and Walter F. Jones, all of Hutchinson, Kan., on the brief), for plaintiff in error.

A. C. Malloy, of Hutchinson, Kan., and J. M. Head, of Kansas City, Kan. (C. M. Williams, of Hutchinson, Kan., on the brief), for defendants in error.

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

AMIDON, District Judge. July 3, 1905, the city of Hutchinson, Kan., entered into a contract with the Kansas Bitulithic Company for the paving of five blocks of its Main street. The United States Fidelity & Guaranty Company became surety upon a bond for the faithful performance of this contract. The work was completed and accepted by the city in January, 1906. The present action was brought against the Paving Company and the Surety Company in February, 1910, to recover $26,000 damages for a breach of the bond through failure to perform the contract. The court directed a verdict for defendants, and the city brings error.

There are only two questions in the case of sufficient importance to require discussion.

The contract signed by the paving company, and in the name of the city by its mayor and clerk, contained the following provision:

"The contractor, the Kansas Bitulithic Company, agrees to construct the said pavement with such material and in such a manner that the same shall endure without the need of repairs for a period of one (1) year from and after the completion and acceptance thereof.

"It is expressly agreed that the city engineer shall be the sole and final arbitrator to determine at any and all times within said period of one year whether or not said pavement conforms to the aforesaid guarantee, and that when said engineer shall determine that any faults, defects, or imperfections exist in said pavement during the period aforesaid, and he shall give the contractor, the Kansas Bitulithic Company, or its agents notice thereof in writing, if the said contractor shall fail to make good such fault, defect, or imperfection within ten (10) days after the receipt of such notice aforesaid, then this guarantee shall be held to have been broken and said contractor shall be

liable to pay to the city of Hutchinson the cost of making good such fault, defect, or imperfection. Said contractor agrees to keep and maintain in the city of Hutchinson an office and agent upon whom notice of the aforesaid may be served."

It was conceded on the trial that nothing was done by the city engineer during the year following the acceptance of the paving to fix liability on the Paving Company under this provision. The trial court ruled that a determination by the engineer that the paving was defective, with notice to the company, was a condition precedent to liability, and for this reason directed a verdict for defendants. The city challenges that ruling upon two grounds: (1) It says that the quoted provision of the contract is void, and was inserted without the knowledge or consent of the city council, and that it is such a departure from the plans and specifications for the paving that the mayor under his power to sign a contract on behalf of the city was not authorized to embody this provision in it. (2) That the Paving Company corruptly induced the city engineer not to comply with the terms of the quoted provision. We will examine these objections in their order.

[1] The bond by its express terms was given to secure the performance of a contract between the city and the Paving Company "dated on the 3d day of July, A. D. 1905." The only contract between these parties bearing that date is the one which embodies the quoted provision. If that contract is not secured by the bond, then there is no principal contract to support a liability against the Surety Company, for it is elementary that a surety cannot be held beyond the contract between the principals.

[2] It is urged, however, by counsel for the city, that we ought to go back to the written specifications, the bid of the Paving Company, and its acceptance by the city. These, it is insisted, constitute the real contract. But if we do that the city is in no better position. The city contends that the Paving Company was bound by the contract "to construct the said pavement with such material and in such a manner that the same shall endure without the need of repairs for a period of one year from and after the completion and acceptance thereof." It is the contention of the Paving Company that its contract, when all its terms are considered, bound it to construct the paving under the supervision of the city engineer, in accordance with the specifications, and if any defects appeared in it during the first year after its acceptance, that the Paving Company would, upon notice, repair all such defects without expense to the city. That was the controverted question between the parties. Now, the provision which we have quoted above is the only language anywhere found in the dealings between the parties which gives any support to the contention of the city that the paving was to be so constructed as not to need repairs during the first year. If that provision is stricken out of the contract there is nothing to support the city's contention. On the contrary, if we go back to the specifications, the language there only requires the Paving Company to keep the paving in repairs during the first year. The language of the specifications is as follows:

"The contractor or contractors, in consideration of the price herein stipulated to be paid and received for the construction of said pavement, is hereby bound and does hereby agree to maintain and keep said pavement in good repair at his own expense for and during a period of one (1) year from the date of the final acceptance of the work, so that at the end of said period said pavement shall be in good serviceable condition, and free from any defects or settlements that will impair its usefulness or durability as a roadway; it being understood that said maintenance and repairs shall be performed faithfully and promptly at all times, when required by said city council by written order from the mayor."

So the city must fail upon either of the alternatives presented. If the contract embraces the provisions which we first quoted, the city has failed to comply with its terms. If that provision be stricken out, and we go back to the specifications, the Paving Company is only required to keep the paving in repairs, and there is no language whatever to support the contention that it was bound to construct a pavement of such material and workmanship that it would not need repairs during the first year.

[3] Again, the contention of the city that the provision contained in the signed contract which we have quoted is void is wholly untenable. That provision is consistent with the specifications. They throughout require the work to be done under the supervision of the city engineer and the improvement committee of the council. The twenty-fifth article of the specifications is as follows:

"It is expressly agreed and understood that if any part of the specification should appear obscure the interpretation of the engineer shall be accepted as final."

It is plain, therefore, that when the provision was inserted in the contract to the effect that the engineer's judgment should be binding as to whether the pavement disclosed defects during the first year, this was a provision which is frequently found in such contracts, and is in harmony with the specifications which had been prepared for the work in Hutchinson. The provision is also clearly for the benefit of the city. It did not deprive the mayor and the city council of power to observe the pavement during the first year after its acceptance, and discover for themselves whether defects had appeared in it. If any such defects were discovered by them, they could require the city engineer to give the notice specified in the contract; and if he refused or failed to do so, it was within their power to remove him, and appoint another engineer in his place. We are satisfied from the evidence that no defects appeared during the first year which challenged the attention either of the mayor or the city council or the city engineer. Those defects, if they ever appeared, appeared long afterwards, and the city is now trying by process of ex post facto reasoning to discover things in the pavement which did not attract the attention of anybody at the time, but which are now thought to have been the original causes of defects which subsequently appeared.

[4] We are also of the opinion that the trial court rightly held that a fair interpretation of the entire contract shows that the obligation of the Paving Company was to so construct the paving that it would be accepted by the city authorities at the conclusion of the work as a

fulfillment of the specifications, and in proof that the pavement was what it purported to be the Paving Company was further bound to maintain it in repair if any defects appeared during the first year. It is impossible to explain the specific requirements of the contract on the subject of repairs upon any other theory. There were also extensive negotiations between the city and the Paving Company providing for an insurance of the paving for a consideration for various terms of three, five and ten years. These negotiations are inconsistent with the city's contention that the pavement was to be of such material and workmanship that no repairs should in any case be necessary during the first year. It must be conceded that the first paragraph of the language above quoted gives color to the city's contention; but that language must be read in connection with all the other provisions of the contract, and when so read we think the obligations of the Paving Company are as we have pointed out.

[5] In the course of the trial the city asked to amend its reply so as to set up, as a defense against the city engineer's failure to give notice of defects during the first year, that he was corruptly hired by the Paving Company not to do so. The trial court ruled that this defense was equitable, and could not be set up in an action at law. In this the court was clearly wrong. The defense asked for no equitable relief such as cancellation or reformation. It was purely defensive, and was available in an action at law. It really charged the Paving Company with having fraudulently induced the failure to give notice upon which it was relying as a defense to the action. When used purely for purposes of defense, and not as a basis of affirmative equitable relief, such as cancellation or reformation, fraud not only may be, but in the federal courts must be, availed of in an action at law. Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501; Cable v. United States Life Insurance Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188; Riggs v. Union Life Ins. Co., 129 Fed. 207, 63 C. C. A. 365; Boise Water Co v. Boise City, 213 U. S. 276, 282, 29 Sup. Ct. 426, 53 L. Ed. 796.

[6] We do not think, however, that the decision of the trial court ought to be disturbed. First, the effort to introduce this new matter into the case came in the midst of the trial, at a time when the Paving Company could not have been prepared to meet it. It was a fact, if it existed, which must have been known to the city at all times, and should have been embraced in the pleadings before the trial commenced. We think, therefore, that the court properly refused to permit the amendment, though it gave a wrong reason for its decision. We are the more willing to reach this conclusion because we are of the opinion that the charge that the city engineer was corrupted is a purely paper defense. The city engineer testified as a witness, and was cross-examined by the city. The matter of his relations to the Paving Company was gone into. The utmost that was developed was that the city engineer, in 1908, two years after the pavement had been accepted, wrote a letter in which he spoke in commendatory terms of the paving in Hutchinson, and recommended bitulithic paving to other cities. There is no evidence whatever to show that this was not his

genuine opinion at the time; on the contrary, he testifies positively that it was, and there is no evidence developed from his examination that there were any improper relations between him and the Paving Company.

[7] The offer to amend was in the following language:

"That the city engineer of the city of Hutchinson, T. G. Elbury, in fact had no experience in laying or superintending the laying of bitulithic or any other kind of pavement, which was well known to defendant; that, the said pavement being the first pavement of that kind laid in the city of Hutchinson, the defendant the Kansas Bitulithic Company took advantage of the said engineer's ignorance and incompetence and fraudulently employed him to prepare long statements and testimonials praising and approving bitulithic pavement, and especially the Main street job in Hutchinson now in controversy. And as soon as a portion of said pavement was laid, and before its completion and acceptance, the said statements and testimonials of T. G. Elbury the then city engineer were delivered to the defendant the Kansas Bitulithic Company by him and were circulated by the said defendants through the country in various cities where the said defendant was seeking to promote its pavements. That thereby said city engineer corruptly and fraudulently became the employé and champion of defendant, and by reason thereof, and by reason of his incompetency as an engineer and an arbitrator to determine the quality of the said pavement, the said T. G. Elbury, during more than one year after the acceptance of said pavement, secretly, falsely and fraudulently neglected and refused to make any requirement of said defendant, the Kansas Bitulithic Company, regarding the repair or reconstruction of said pavement. And that said Elbury was city engineer all of said time, and thus secretly and fraudulently became an employé and dupe of said defendant, and was wholly incompetent by reason thereof to act as an arbitrator under the terms of the alleged agreement set forth in the defendants' answer."

We are satisfied that the charge of fraud and corruption contained in this proposed amendment is simply the argumentative conclusion of the pleader from the fact that the city engineer commended the paving, and that there is no evidence, and none could have been produced, to show that the city engineer was corrupted by the Paving Company.

The judgment is therefore affirmed.

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SECURITY TRUST CO. et al. v. BANK OF BERNICE.

(Circuit Court of Appeals, Fifth Circuit. February 17, 1917. Rehearing Denied March 20, 1917.)

No. 2947.

1. CHATTEL MORTGAGES ⊂⊃116—LIEN—PROPERTY SUBJECT.

A lumber company borrowed from a bank money to pay the wages due its laborers, and gave the bank a chattel mortgage on certain specifically described lumber. Thereafter a receiver was appointed in a suit to foreclose a mortgage on the lumber company's property, and the receiver was ordered to pay out of the proceeds of the sale of lumber and logs on hand the wages of the laborers, some of which had accrued before the chattel mortgage was executed, and some of which accrued thereafter. The bank intervened, and asked to have its chattel mortgage given a preference, and also asked to be subrogated to the lien of the laborers whose wages had been paid with the money loaned. The master's report, recommending payment to the intervener of the amount by which the sales of

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

the lumber and logs coming into the hands of the receiver exceeded the claims for wages due on the date the chattel mortgage was recorded, was confirmed by the District Court over the objections of the receivers that the amounts paid for wages exceeded the amount received from all the lumber and logs which came into the receivers' possession. Louisiana, Act No. 65 of 1912, provides that a chattel mortgage on recordation becomes a lien on the property described superior in rank to any privilege or lien arising subsequently thereto. *Held*, that the bank was entitled only to the excess of the fund arising from the sale of the mortgaged lumber, not of all the lumber and logs coming into the hands of the receivers, over the liens existing against that lumber at the time the chattel mortgage was recorded.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 198, 199.]

2. CHATTEL MORTGAGES ⊜138(1)—LIEN—PRIORITY—LOGGING LIEN.

Under Louisiana Act No. 145 of 1888, as amended by Act No. 52 of 1910 and Act No. 23 of 1912, giving laborers working in sawmills a lien on all logs, timber, or lumber manufactured in the mill for the payment of their wages, the lien attaches, at least as soon as the conversion into lumber is complete, so that a chattel mortgagee of the lumber acquires only an equity in the lumber above the amount of the liens.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 228, 229, 231–236.]

3. CHATTEL MORTGAGES ⊜157(1)—LIEN—APPORTIONMENT OF LABOR LIEN.

Where it is not possible to trace the labor which went into the production of the particular lumber covered by a chattel mortgage, the amount thereof may be determined as between the chattel mortgagee and the receiver of the mortgagor by apportioning to the quantity of the lumber covered by the mortgage the usual cost of labor in that mill for the production of an equal quantity of lumber.

4. LOGS AND LOGGING ⊜26(2)—LIEN—PERSONS ENTITLED—RAILROAD EMPLOYÉS.

Under Louisiana Act No. 145 of 1888, giving all laborers employed by or working in sawmills a lien on the logs, timber, and lumber produced, the operatives of a logging railroad owned by a subsidiary corporation acquire no lien on the lumber produced if they contributed nothing in the way of labor in converting the standing timber into the mortgaged lumber.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 60.]

5. RECEIVERS ⊜162—PAYMENT OF WAGES—ORDER—EFFECT.

Where a receiver of a lumber company, in order to protect the property from violence, threatened by unpaid laborers and to keep the mill in operation, applied for and received an order authorizing him to pay all claims for wages out of the proceeds of the sale of logs and lumber on hand, which claims would have had to be paid out of the corpus of the property if there had been no lumber or logs to sell, that order was merely intended to affect the interest of the mortgagee in corpus of the property, and did not preclude a chattel mortgagee from thereafter intervening and claiming the proceeds of the sale of the lumber covered by its chattel mortgage, subject only to the payment of the claims for wages which were liens on that lumber at the time the chattel mortgage was recorded.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 277.]

6. RECEIVERS ⊜162—INTERVENTION—ORDER—EFFECT.

An order in receivership proceedings upon the intervention of a chattel mortgagee, which allowed the intervener's claim and postponed for future determination the relative rank and priority of its mortgage, does not preclude the intervener from thereafter asserting its ownership to the lumber covered by its mortgage.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 277.]

Appeal from the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

Suit by the Security Trust Company and others against the Summit Lumber Company and another, to foreclose a mortgage, in which the Bank of Bernice intervened and claimed a share of the funds in the hands of the receivers. From a decree directing the receivers to pay a portion of the intervener's claim, complainants appeal. Reversed and remanded, with directions.

This is an appeal from an order of the District Court for the Western District of Louisiana, entered in an intervention filed by the appellee, in a suit for the foreclosure of a mortgage, in which the appellant was the plaintiff and the Summit Lumber Company and the Arkansas & Northeastern Railroad Company were the defendants. The latter was a corporation, whose entire capital stock was owned by the former, and whose railroad was a plant facility for the former. Upon the filing of the foreclosure suit and at the instance of the plaintiff therein, receivers were appointed by the District Court, and qualified and took possession of all the assets of the mortgagor companies. Separate bills were filed—that against the lumber company in January, 1914, and that against the railroad company in February, 1914—but for the purposes of this appeal they may be treated as one. After the receivers had taken possession, they found that the wages of the operatives of the lumber company and of the railroad company had not been paid for the months of November and December, 1913, and January, 1914, and that for the preservation of the estate and for the purpose of continuing its operation as a going concern, it was essential for them to pay the past-due wages of such employés. The receivers thereupon applied to the District Court for an order authorizing them to pay such wages, out of the proceeds to be realized from certain logs and lumber, which had come into their possession. On March 3, 1914, this application was by the District Court referred to a master, who made his report on March 23, 1914, recommending that the labor claims, both of the lumber company and of the railroad company, be paid out of the logs and lumber in the hands of the receivers, or their proceeds, by preference. This report was confirmed by the District Court on April 22, 1914. On March 24, 1914, the appellee, the Bank of Bernice, intervened in the causes, setting out that on December 27, 1913, it had advanced to the Summit Lumber Company $5,000 for the purpose of paying labor claims for labor previously performed, to secure which the Summit Lumber Company had executed to it a chattel mortgage on 594,723 feet of lumber, situated in the lumber company's yard and specifically described in the chattel mortgage, so as to be capable of identification. The intervener prayed that its chattel mortgage be recognized and rendered executory on the lumber described in it, according to its rank, and subject to any prior or superior mortgages or liens, and also asked to be subrogated to any lien or privilege, which the laborers who were paid out of the proceeds of the advance might have had. This intervention was referred to the same master, whose report, filed October 12, 1914, recommended the allowance of the claim of intervener; that the chattel mortgage be recognized and rendered executory upon the lumber described in it, according to its rank, and subject to any prior or superior mortgages or liens; and denying the intervener any right to be subrogated to the lien of the labor claims, which the proceeds of the loan went to satisfy. This report was confirmed by the District Court on June 5, 1915.

On November 27, 1915, the Bank of Bernice, as intervener, caused to be served a rule on the receivers to show cause why they should not pay the intervener the $5,000, represented by the chattel mortgage, and asking for an order, on final hearing of the rule, directing the receivers to make such payment by preference and priority over all persons. The receivers answered, setting up, among other defenses, that under the former order of the court it had paid out more than all the proceeds realized from the sale of the logs and lumber upon wage claims; that they had only received a part of the lumber covered by the chattel mortgage; that the intervener was bound by

that order, having filed no opposition to the master's report on which it was founded, and was estopped by it to dispute the receivers' payments of the proceeds of the logs and lumber to wage claimants. The rule was referred to the same master by the court, who, after hearing the matter, reported, recommending that the receivers be directed to pay to the intervener the sum of $4,000, together with $364.70, intervener's share of the costs as ascertained by the master, that being the value of the part of the lumber, covered by the mortgage, as found by the master. On May 24, 1916, the District Court overruled the opposition filed by the receivers to the master's report, and directed the receivers to make payment to the intervener, as recommended. The appellant, the Security Trust Company, substituted by consent for the receivers, has taken the present appeal from that order.

Leon R. Smith and N. C. Blanchard, both of Shreveport, La., and Thomas G. Long, of Detroit, Mich., for appellants.

J. M. Foster, F. J. Looney, and W. A. Wilkinson, all of Shreveport, La., and Arnold Barksdale and J. D. Barksdale, both of Ruston, La., for appellee.

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

GRUBB, District Judge (after stating the facts as above). The appeal presents the question of the right of the appellee to be paid its claim out of the proceeds of the sale of logs and lumber, which came into the possession of the receivers, and which were disposed of by them. It does not appear from the record whether the mortgage, which was being foreclosed, included such logs or lumber or not. The receivers, under an order of court, claim to have paid the entire proceeds of such sales, and more, in satisfaction of labor claims due from the defendants at the time of the filing of the foreclosure suit, and claim protection under that order against further payment. The intervener claims that its chattel mortgage upon recordation became, by virtue of Act 65 of 1912 of the General Assembly of the state of Louisiana, a lien on the property described in it "superior in rank to any privilege or lien arising subsequently thereto"; that the unpaid labor claims on December 27, 1913, when the chattel mortgage was given, were enough less in amount than the proceeds of the sale of lumber manufactured prior to that date to leave a surplus in the hands of the receivers from such proceeds, sufficient, after satisfying all labor claims then unpaid, to more than pay the amount of intervener's claim secured by its chattel mortgage. The master found this surplus to be sufficient to pay the portion of intervener's claim, represented by the value of the amount of lumber, which the master found came into the possession of the receivers, of that covered by the chattel mortgage.

[1] We are not satisfied that this was the correct way of determining the respective rights and priorities of the intervener and the appellant. Its effect was to treat the bank's lien under the chattel mortgage as if it were indistinguishably on the entire mass of lumber and logs that came into the possession of the receivers, when in fact and in truth it covered certain specific lumber described by items and located by piles numerically and readily ascertainable in specie. This being true, we think the respective rights of the parties should have been limited to and worked out through the specific lumber covered by the chat-

tel mortgage. The intervener should be charged with whatever prior liens or privileges the lumber covered by the chattel mortgage was subject to, when the intervener recorded its chattel mortgage on December 27, 1913. It was not chargeable with any lien or privilege, which the balance of the lumber then on the yard (not included in the chattel mortgage) or of logs subsequently manufactured into lumber, was subject to. We, therefore, think that the method of working out the equities of the parties through the mass of logs and lumber that came into the receivers' possession, instead of confining it to the lumber mortgaged in terms to the intervener was an erroneous one. The intervener lent its money on the security of certain lumber then in existence, described in its chattel mortgage. The question is what liens, if any, were on this specific lumber on December 27, 1913, when intervener took its chattel mortgage. Such, if any, as were, ranked the lien of the chattel mortgage. No subsequent ones could do so, nor could any liens, prior or subsequent, on lumber other than that described in the chattel mortgage.

[2] Act 145 of the Acts of the General Assembly of Louisiana of 1888, as amended by Act 52 of 1910, and Act 23 of 1912, confers on all managers, mechanics, or laborers employed by or working in sawmills, planing mills, or shingle mills a lien or privilege on all logs, square timber or lumber, and all material manufactured in such mills, where such managers, mechanics, and laborers are engaged or employed, for the payment of their salaries or wages. Under this legislation, the manufactured lumber covered by intervener's chattel mortgage was subject to a lien in favor of such managers, mechanics, and laborers as contributed to convert that specific lumber from standing timber into manufactured lumber, at least as soon as the conversion was complete. At the time the intervener's chattel mortgage was executed and recorded, the timber described in it had been so converted, and was therefore then subject to such labor liens. The intervener, therefore, took as its security, not the lumber, but the equity in it over and above the labor liens that had theretofore attached to it.

[3] It is true that it is not possible to trace the labor of each operative into this particular lumber and fix the separate amount due each such lienholder thereon, and so determine the aggregate. It is, however, possible to ascertain the usual cost of labor at this particular mill a thousand feet for converting timber into lumber, and the amount, so ascertained, applied to the quantity of lumber covered by the chattel mortgage, and which is shown to have come into the possession of the receivers, would give the amount of the labor liens, to which that portion properly was subject when the intervener accepted its chattel mortgage.

[4] If the operatives of the Arkansas & Northeastern Railroad Company contributed nothing in the way of labor in converting the standing timber into the mortgaged lumber, then no lien should be fastened on the lumber on that account. Only such labor as is within the description contained in Act 145 of the Acts of 1888, and which in fact contributed in some way to the conversion from standing timber to manufactured lumber of the mortgaged property, should be considered.

The receivers have paid all labor claims which were owing when they were appointed. The controversy is now between the Security Trust Company, as trustee under the mortgage sought to be foreclosed, and the intervener, as holder of the chattel mortgage. The impossibility of fastening a laborer's lien in favor of each laborer and in specific amounts, as between these contestants, is unimportant. The intervener should not be deprived of the security it bargained for, which was the equity in the mortgaged lumber, after satisfying the labor claims properly attributable to the lumber covered by its mortgage. The Security Trust Company should not cast on the intervener the burden of labor claims on the lumber other than that covered by the chattel mortgage, because the receivers were directed to pay all labor claims.

[5] We think that the order directing such payment was intended only to affect the interest of the Security Trust Company, it being the sole party to the record when the master reported recommending that the receivers make such payment, and that the court did not have in contemplation the claim of the intervener under the chattel mortgage to the lumber therein described, when it confirmed the master's report and directed the receivers to pay labor claims. The Security Trust Company, as trustee for the bondholders, had an interest in the payment of labor claims, in order to preserve the corpus of the estate and to keep it a going concern, that was wanting in the intervener. The order was made at its instance and for its benefit, and it would have been forced to pay the labor claims, even if there had been no lumber to resort to for that purpose.

[6] The effect of the order of the court, made upon the intervention of the Bank of Bernice, was to establish its claim and the chattel mortgage securing it and to postpone for future determination the relative rank and priority of its mortgage. We do not think that either or both of these orders precluded the intervener from asserting what rights, if any, it had to the lumber covered by its chattel mortgage, upon the hearing of the rule to show cause.

The situation of the defendant's (the Summit Lumber Company's) plant at the time the foreclosure suit was filed and the receivers appointed was such as to have made it necessary for the receivers to pay the past-due wages, even if there had been no fund other than the corpus to resort to for that purpose. The defendant had abandoned the plant, leaving the laborers on the premises three months in arrears, demanding payment, and threatening the destruction of the plant, if it was denied them. The plaintiff, representing the bondholders, applied for the appointment of receivers to take over the property and to operate it. It was absolutely necessary for the preservation, as well as for the future operation, of the plant to pay past-due wages. If there had been no lumber on hand subject to labor liens, the necessity would have been the same. In that event, it would have been proper for the District Court to have ordered their payment out of the corpus or out of the future earnings of the receivership, if there were any, by authorizing the issue of certificates to produce the ready money. This was, in fact, done, to anticipate the sale of the lumber, and the re-

ceivers now claim to have paid labor claims largely in excess of the amount realized from the subsequent sale of the lumber. Under these circumstances it was clearly proper for the court to have ordered the payment of all past-due wages, regardless of the sufficiency of the fund to be realized from the sale of lumber for that purpose, and although the corpus of the mortgaged estate would have to be resorted to in order to make such payments. The bondholders, through their trustee, could not ask for a receivership, and the operation of the property under it, without providing for the wage claims, first out of the proceeds of the lumber, and when they were exhausted, then out of the mortgaged estate. As it was proper and necessary for the receivers to have taken care of the wage claims, regardless of the insufficiency of the proceeds of lumber sales to that end, it seems unimportant whether it was primarily the duty of the receivers or of the intervener to bring such insufficiency, taking into consideration intervener's claim on part of the lumber, to the attention of the court. In any event, it would have been the duty of the receivers, under the order of the court, to have paid all the wage claims, relying for reimbursement on the proceeds of lumber sales, as far as they were available, and upon the corpus, in the event that the proceeds of the lumber sales fell short.

For the reasons assigned, the decree appealed from is reversed, and the cause remanded to the District Court, with directions that it be recommitted to the master to ascertain and report the amount due the intervener and to be paid to it by preference by the receivers, in pursuance of the rule herein prescribed, and for further proceedings in conformity herewith.

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## ROBINSON v. JOHNSON.

(Circuit Court of Appeals, Eighth Circuit. January 11, 1917.)

No. 4538.

1. LIBEL AND SLANDER ⟸7(1)—COMMUNICATIONS "LIBELOUS PER SE."

A false and unprivileged publication, which tends to impair the social standing of a man, to make him contemptible or ridiculous, or to deprive him of the confidence, good will, or esteem of his fellow men, is "libelous per se," and damage is implied, and therefore a false statement that plaintiff, while a special Indian officer in the service of the government, had private relations with cattle and water thieves, protected joint keepers and murderers among the Indians, and had relations with unsophisticated Indian women, that he had a record as a jailbird, that he was a lying, thieving, blackmailing, moral reprobate, and that he had misused government funds in defending an Indian, etc., is libelous per se, many of the charges being indictable.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 17, 23.

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

2. LIBEL AND SLANDER ⟸39—PRIVILEGE—PUBLICATION.

To be privileged as a public record, an entry, writing, or document must have been made by a public officer in the line of his official duty.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 124–126.]

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3. LIBEL AND SLANDER ⟸39—PRIVILEGE—PUBLIC DOCUMENTS.
Where defendant, in a publication attacking the character of a former special Indian officer, published only excerpts from a letter of the Assistant Secretary of the Interior, setting forth the reasons for the officer's dismissal, but did not print any part of the record tending to justify the conduct of the officer and made false and defamatory charges and comments, the publication is not privileged; the privilege of publication by a private person of official proceedings requiring the publication to be a fair and accurate account of the record or proceedings.
[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 124–126.]

4. LIBEL AND SLANDER ⟸104(1)—EVIDENCE—ADMISSIBILITY.
Where defendant claimed that the publication was privileged, because it contained excerpts from a letter written by the Assistant Secretary of the Interior explaining plaintiff's dismissal as an Indian agent, reports from the Commissioner of Indian Affairs, immediately preceding the incident, which were highly commendatory of plaintiff's discretion and efficiency, were admissible in evidence, defendant having pleaded good faith and a careful investigation of the facts, for it tended to show that defendant, with an evil motive, picked out for publication only that part of the record which served his purpose.
[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 284, 291.]

5. LIBEL AND SLANDER ⟸110(1)—PUBLICATION—EVIDENCE—ADMISSIBILITY.
Defendant, in a publication, charged that plaintiff, while special Indian officer, was guilty of subornation of perjury, publishing a letter of the Assistant Secretary of the Interior which assigned such reason as ground for plaintiff's dismissal. A trial was had on an answer asserting the truth of the charge. *Held* that, as defendant at all times asserted the truth of his charge, evidence of the reversal of the Assistant Secretary's determination prior to the filing of the answer was admissible to disprove the contention that plaintiff had been guilty of subornation of perjury.
[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 307–314.]

Carland, Circuit Judge, dissenting.

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

Action by William E. Johnson against U. G. Robinson. There was a judgment for plaintiff, and defendant appeals. Affirmed.

C. B. Williams, of St. Louis, Mo. (R. P. Williams, of St. Louis, Mo., on the brief), for plaintiff in error.

John F. Green, of St. Louis, Mo. (Judson, Green & Henry, of St. Louis, Mo., on the brief), for defendant in error.

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

HOOK, Circuit Judge. William E. Johnson sued U. G. Robinson for libel and recovered a judgment. For some years prior to his resignation in September, 1911, the plaintiff was in the service of the Indian Bureau of the Interior Department as chief special officer for the suppression of liquor traffic among the Indians. At the time of the libelous publication he was in the employment of an organization known as the "Anti-Saloon League." The defendant was the editor

and publisher of the National Issue, a monthly paper devoted to the cause of national prohibition. The article complained of was published by defendant in October, 1913. It charged the plaintiff directly or by necessary inference with having a "record for theft, attempted blackmail, and gross immorality in his early life in college"; that he "was naturally vicious and devoid of principle"; that as a real estate agent "he swindled and defrauded"; that as an editor of a paper he had conducted "a filth-dispensing, blackmailing sheet so vile that the government suppressed it"; that while a special Indian officer in the service of the government he had private relations with cattle and water thieves, "protected joint keepers and murderers among the Indians," had "relations with unsophisticated Indian women," and had been sued for damages because of them; that he had a "record as a jailbird"; that he was a "lying, thieving, blackmailing, moral reprobate"; that he had a "record with a certain grass widow," in whose affections he had supplanted another man, and took her with him into several states, "while he left his wife in the East, until government officials put a stop to the affair"; that he had "relations" with another unmarried woman, whom the government had discharged from the service and plaintiff re-employed "in violation of a department order"; that information at hand showed "their relations to, and the probable reason for, the murder" of a certain Indian by another, and "how desperate a defense they made for their tool, rather than risk the divulging of certain secrets he had incidentally or accidentally learned"; that defendant wanted a chance to show how the murderer had forced the plaintiff and the unmarried woman above mentioned "to rush to his defense with money and false testimony." As an explanation of the meaning of this last charge the article set forth excerpts from a letter written to the plaintiff by the First Assistant Secretary of the Interior, as follows:

"You were willing to set up in a court of justice another defense for Cruz which you knew to be untrue, and you spent altogether some $1,200 of government money in getting together a fictitious defense." "The defense which you were preparing to set up was an absolutely false one." * * * "It therefore follows that your payment of government funds for this purpose was a misuse of such funds." * * * "You were totally unfit to hold any position involving the exercise of discretion." * * * "To be guilty of moral cowardice in an extreme measure." * * * "I, too, felt that your immediate discharge was fully warranted."

The defenses set up in defendant's answer were that the charges in the article and every part of them were true, and that the publication of those relating to the letter of the Assistant Secretary of the Interior was privileged, for the reason that the letter was a public record and defendant acted without malice after a full investigation of the facts. Aside from this letter and what it covered there was practically no attempt at the trial to justify the publication by showing the truth of the charges.

[1] On the face of the petition the article was manifestly libelous. A false and unprivileged publication, which tends to impair the social standing of a man, to make him contemptible or ridiculous, or to deprive him of the confidence, good will, or esteem of his fellow

men, is libelous, and damage is implied. Van Wiginton v. Pulitzer Pub. Co., 218 Fed. 795, 134 C. C. A. 483. Some of the charges in the article before us were of the commission of indictable crimes, all of them of a most serious character. Much less would have been actionable per se. Peck v. Tribune Co., 214 U. S. 185, 29 Sup. Ct. 554, 53 L. Ed. 960, 16 Ann. Cas. 1075.

[2, 3] It is urged that the letter of the Assistant Secretary of the Interior was a public record, and that the jury should have been instructed that defendant's publication of the excerpts from it was privileged. To be a public record, an entry, writing, or document must be what the term implies. It must have been made in the line of official duty. It is not enough that he who made it happened to be an official, nor that it was lodged among the records of a public office. We shall assume, however, the status claimed, though there was evidence to the contrary. The privilege of participants in judicial, legislative, and administrative proceedings should not be confused with the privilege of private individuals, who make them the subject of publication to the detriment of others. There are well-defined limitations upon the latter. The privilege of publication by newspaper or otherwise by an unofficial person requires that the article be a fair and accurate account or transcript of the record or proceeding. If they be distorted, or but partly set forth, to give an evil aspect, or are accompanied by false and defamatory comments, there is no protection. Dorr v. United States, 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697, is quite in point. There an unfair newspaper report of an incident at a trial in court contained head lines in large type:

"Traitor, Seducer, and Perjurer. Sensational Allegations against Commissioner Legarda," etc.

It was held that the publication was not privileged. The case arose under a Philippine libel act which, however, did not change the common law in the particular under consideration here. The instruction requested by defendant in the case before us was properly refused. It was for an absolute privilege and immunity, without the qualifying conditions made necessary by the evidence in the case.

[4] Complaint is made of the admission in evidence of certain records of the Interior Department. They were reports of the Commissioner of Indian Affairs for the years 1907–1910, immediately preceding the year in which the letter of the Assistant Secretary was written. They were commendatory of the plaintiff's discretion and efficiency as an official and his devotion to public duty. Without more, the evidence was admissible on the question of privilege. It tended to show that defendant, who pleaded good faith and a careful investigation of the facts, had with an evil motive picked out for publication the part of a record which served his purpose.

[5] Complaint is also made of the admission in evidence of a record of the department showing a reversal of the prior action shown by the letter of the Assistant Secretary. The particular objection was that the reversal occurred after the libel, and after the action was

brought. It may be observed here that defendant did not confine his publication to an ordinary recital of the letter of the Assistant Secretary; but he himself made the positive charge of subornation of perjury under specially degrading circumstances. The letter of the Assistant Secretary was set out, as he said, to show what he meant. The defendant made the libelous charge and used the letter to explain it. Again the trial proceeded upon an amended answer, which defendant filed after the department had reversed its prior action and exculpated the plaintiff. In this answer the defendant asserted in detail and in the present tense the truth of his charges. And when the evidence in question was offered and received, he did not seek to qualify its effect by objection or request for instruction, but insisted upon its absolute exclusion. In effect he still maintained that his charge of subornation of perjury against the plaintiff was true, after the record foundation for it, assuming it had one, had conclusively disappeared. He did not say he was ignorant of the later record, nor that he was surprised by the evidence. He stuck to his post to the end, still maintaining that the plaintiff was guilty as he charged him to be. We do not think error was committed in this particular. There is nothing else in the case that requires mention.

The judgment is affirmed.

CARLAND, Circuit Judge (dissenting). The alleged libelous article was published in October, 1913, and a portion of the same was an excerpt from a letter of the Assistant Secretary of the Interior. The excerpt charged Johnson with the misuse of government money in the defense of one Cruz. On April 21, 1914, the Acting Secretary of the Interior approved the recommendation of the Commissioner of Indian Affairs that Johnson's account for expenses in the Cruz case be allowed. At the trial counsel for Johnson offered in evidence the record showing this allowance. It was objected to as incompetent, but no exception was taken. Counsel for Robinson, however, requested the court to charge the jury as follows:

"The court instructs the jury that in making up your verdict in this case you will not consider the evidence offered and introduced by the plaintiff that plaintiff's accounts concerning the Juan Cruz trial were passed upon and approved by the Department of the Interior after the publication of the article in question; such accounts being approved during the year 1914."

This request was refused, and an exception taken to the ruling. The record was not admissible on the question of good faith, as it was not in existence when the alleged libel was published. It is said that it was admissible on the question of malice. December 14, 1914, three days before the trial of the case, Robinson filed an amended answer, asserting the truth of the libel. The trial court, in reference to the refusal of the charge requested, charged the jury as follows:

"I may say to you in regard to instruction No. 10 in reference to the review of approval of these accounts of the plaintiff, I have noted the reason on the instruction as to why I did not give it. So far as these matters were transpiring and were matters of public record in the Department of the Interior at Washington when this amended answer was filed, this defendant had notice, or could have had notice, of the public files at Washington at that time, show-

ing what had been done in reference to this matter, before this answer was filed, and it was for that reason I refused it, and it was for that reason alone that I let the testimony in originally. So you will understand my position. If this had all happened after the answer was filed, the testimony would have been clearly incompetent, in my judgment."

The court said in the charge that the defendant had notice, or could have had notice, of the record at the time the amended answer was filed. There was no evidence that the defendant had actual notice of the record, nor was it constructive notice. I am unaware of any rule of law that would have required the defendant to search the records at Washington before amending his answer. Nothing was said to the jury by the court as to the subject concerning which the court held the record to be admissible, and the jury no doubt considered the evidence as bearing either upon the question of good faith in connection with the original publication or as to the falsity of the charge. I think the evidence was clearly inadmissible, and it must have been prejudicial.

For this reason, I think the case should be reversed, and a new trial ordered.

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## GUGEL et al. v. NEW ORLEANS NAT. BANK.*

(Circuit Court of Appeals, Fifth Circuit. February 22, 1917.)

No. 2906.

1. CONSTITUTIONAL LAW ⇐48—CONSTRUCTION OF STATUTES.

Where a statute is susceptible of two constructions, one of which works out more reasonable results and in no way infringes the Constitution, that construction will be adopted.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Statutes, Cent. Dig. § 56.]

2. BANKRUPTCY ⇐368—FEES OF OFFICERS—CONSTRUCTION.

Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act June 25, 1910, c. 412, 36 Stat. 838, provides that the trustee shall receive commissions on all moneys disbursed or turned over to any person including lienholders. The amendment added the provisions as to lienholders. Section 67d (Comp. St. 1913, § 9651) declares that liens given or accepted in good faith, and not in contemplation of or in fraud of the act, or for a present consideration shall not be affected by the act. *Held* that, on sale of personal and real property on which there were liens and mortgages greater in amount than the sum received from the sale in bankruptcy proceedings free from liens, the trustee is not entitled to the commissions provided for, despite the amendment, its language merely relating to the basis of computation of the commissions, and having no reference to the source from which payment is to be made; but where there is a real or apparent equity in incumbered property of a bankrupt estate, and reasonable grounds for administering it in bankruptcy, the lienholder should be charged with the reasonable costs of such proceedings in the bankruptcy court as are appropriate to foreclosing the lien and selling the incumbered property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 571.]

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

*Rehearing denied April 12, 1917.

3. BANKRUPTCY ⊂⊃258—SALE OF PROPERTY—PROCEEDINGS—LIENS.
Where a lienholder accepted service of a petition, filed in the bankruptcy proceeding of the owner, to sell the property free from liens, such acceptance amounts to a consent to that mode of disposition.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 358, 359, 362.]

4. BANKRUPTCY ⊂⊃223, 482(1)—FEES—RIGHT TO.
Where a trustee in bankruptcy is not entitled to statutory commissions for general administration of the estate out of the proceeds of the sale of mortgaged property, which amount to less than the liens, the referee is entitled to no commissions, and the trustee cannot take credit for counsel fees for services unconnected with the sale of the property.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–897.]

5. BANKRUPTCY ⊂⊃323—PROVABLE CLAIMS—MORTGAGES—ATTORNEYS' FEES—LEGAL PROCEEDINGS.
Where a mortgage note provided for a 10 per cent. attorney's fee in case it should become necessary to institute legal proceedings for the collection of the note or any part thereof, the mortgagee was not entitled to such fee, though placing the note in attorney's hands, where on bankruptcy of the mortgagor the property was with consent of the lienholders sold free from liens by the bankruptcy court, for no legal proceedings for foreclosure were instituted.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 503, 505, 513.]

Petition to Superintend and Revise from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

In the matter of the bankruptcy of Hector Francis Crosier. On opposition of the New Orleans National Bank, the claims of Andrew G. Gugel, trustee in bankruptcy, and others, for commissions and attorney's fees were denied, and the trustee and others petition to superintend and revise. Petition denied.

The mortgage note referred to provided that:

"In case it shall become necessary to institute legal proceedings for the recovery of the amount of said note, or any part thereof, the purchaser binds and obligates itself to pay the fees of the attorney at law who may be employed for that purpose, which fees are hereby fixed at 10 per cent. of the amount which may be due."

Edwin T. Merrick, Ralph J. Schwarz, John Dymond, Jr., and A. Giffen Levy, all of New Orleans, La., for petitioners.

Gustave Lemle and W. Catesby Jones, both of New Orleans, La., for respondent.

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

GRUBB, District Judge. This is a petition to superintend and revise an order of the District Court for the Eastern District of Louisiana, the effect of which was to disallow the referee and trustee commissions and the attorney for the trustee a fee out of the proceeds of the sale of personal and real property, on which there were liens and mortgages greater in amount than the amount realized from the sale of the property. The District Judge allowed to the trustee the amount it would have been required to expend to foreclose the liens in the state court, but disallowed commissions based on the gen-

eral administration of the estate by the referee and trustee and the general attorney's fee for counsel for the trustee. The District Court also declined to recognize the claimed right of the holder of the first mortgage to an attorney's fee, out of the proceeds of the sale, of 10 per cent., as provided for in the mortgage note. These are the two questions presented for review.

[1, 2] The contention of the trustee is that, whatever may have been the law before the amendment of June 25, 1910, to the Bankruptcy Act, as to the right of the trustee to commissions and attorney's fees to be paid out of the funds realized from the sale of the mortgaged property, though the funds were insufficient to satisfy the mortgage liens on it, the matter is set at rest by that amendment, which provides that trustees shall receive commissions on all moneys disbursed or turned over to any person, including lienholders. If the reference in the added words is to the *source* of payment, the language is undoubtedly broad enough to include payment at the expense of the lienholder. However, there seem to be two possible constructions that may be given the language—one, that it relates to the basis of computation of the commission, and has no reference to the source from which payment is to be made; and the other, that it has reference to the source of payment as well. There is nothing in the language of the amendment that would force the latter construction. It is necessary, therefore, to look beyond the language to the purpose to be subserved and the results that follow from the respective constructions, in order to reach a conclusion.

The purpose of Congress was evidently to increase the compensation of the trustee, but not necessarily at the expense of lienholders and with the effect of displacing their liens. Section 67d forbids such a construction. The purpose to increase is worked out by enlarging the basis of computation, so as to include amounts paid or turned over to lienholders, upon which, before the amendment, commissions were not, in many districts, computed, even where the payments of commissions, when so computed, were to be made out of the fund going to unsecured creditors. There was, therefore, a field of operation for the amendment without attributing to it the effect to displace liens and mortgages. To give it this broader construction would have the effect of imposing on the lienholder the burden of the expense of the general administration of the bankrupt estate, in which he has no interest and from which he derives no benefit. We cannot think that Congress intended any such inequitable result. Imposing upon the lienholder the burden of the cost of the general administration of an insolvent estate, when he has ample security for his debt, is a denial of an adequate remedy for the collection of the debt secured by the lien. Certainly a construction involving such a result would not be adopted by the court, unless the language of the amendment forced it.

The language of the amendment being susceptible of the two constructions, we do not hesitate to attribute to it that which works out the more reasonable results, viz. that it was intended to furnish an enlarged basis for the computation of the trustee's commissions, but was not intended to affect the source of payment, so as to displace

liens in violation of the provisions of section 67d, as amended and re-enacted in 1910. The case of In re Breakwater Co. (D. C.) 220 Fed. 226, is not in conflict with our conclusion. In that case there was a fund going to unsecured creditors, out of which the commissions based on the amount disbursed to lienholders were to be paid. The objection to the allowance of the commissions did not come from a lienholder, but from an unsecured creditor of the bankrupt.

It does not follow that the trustee is never entitled to compensation, where he sells mortgaged property, and where the property sells for no more than enough to pay the liens on it. If there is a real or apparent equity in the property for the estate, and so reasonable grounds for administering it in bankruptcy, the lienholder should be charged with the reasonable costs of such proceedings in the bankruptcy court as are appropriate to foreclosing the lien and selling the incumbered property, but not with the commissions and expenses of the officers of the bankruptcy court incurred in the general administration of the estate in bankruptcy, from which the lienholders receive no benefit. This was the holding of the Court of Appeals for the Ninth Circuit in the case of In re Williams' Estate, 156 Fed. 934, 84 C. C. A. 434, and we think it is the rule that should prevail under the amendment of June 25, 1910, as well as under the original act of 1898. In that case the court said (156 Fed. 939, 84 C. C. A. 439):

"By coming into the bankruptcy court, therefore, the holder of a valid lien upon the estate of a bankrupt comes into an appropriate place and into a court amply able to enforce and protect his rights. By doing so the lienholder waives none of his rights. The enforcement of his lien in another court would entail upon the proceeds of the property upon which the lien exists the payment of the appropriate court costs; and so, in the enforcement of such lien in a court of bankruptcy, the proceeds of the property of the bankrupt upon which such lien exists is properly chargeable with the costs of such court appropriate to such enforcement, but with no other or further costs. They are not chargeable with the general costs of the administration of the bankrupt's estate, such as the services of a receiver in carrying on the business of the bankrupt, the expenses and losses of such business, the fees of the attorney for such receiver, the general fees of the trustee or those of his attorney. If so, the valid lien upon the estate of the bankrupt, which the bankruptcy act expressly declares shall be unaffected by any of its provisions, might very readily be destroyed, as it would unquestionably be, should such costs equal or exceed the proceeds in cases like the present where the aggregate amount of the valid liens exceeds the proceeds of the entire estate of the bankrupt."

[3, 4] In this case there was an apparent equity in the incumbered property to the bankrupt estate, and the District Court properly allowed the trustee the reasonable cost of selling the incumbered property, measuring it by the usual cost in the state court of foreclosing the liens. The lienholder consented that the property be sold on such terms, when it accepted the service of the petition to sell free from liens. If the trustee is not entitled to his statutory commissions for general administration of the estate out of the proceeds of the sale of the mortgaged property, a fortiori the referee is not. Nor is the trustee entitled to take credit for counsel fees for services unconnected with the sale of the property.

[5] As to the right of the first mortgagee to be allowed an attorney's fee of 10 per cent., as provided in his mortgage note, it is sufficient to say that in our opinion the occasion which called that provision into effect had not arisen under the facts in this case when the petition in bankruptcy was filed, since there were no legal proceedings instituted on the note or mortgage before the petition in bankruptcy was filed or thereafter. The sale free from liens in the bankruptcy court was not the equivalent, in this respect, of a foreclosure by the mortgagee of the mortgage lien. Merely placing the note in an attorney's hands did not fix the liability, which, as we construed the terms of the note, depended upon the rendition of legal services. The case of In re Roche, 101 Fed. 956, 42 C. C. A. 115, decided by this court, supports our conclusion.

The petition to superintend and revise is denied.

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## AMERICAN SURETY CO. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 21, 1917. Rehearing Denied March 30, 1917.)

No. 2965.

1. CRIMINAL LAW ⊜1076(3)—WRIT OF ERROR—BOND—PAYMENT OF COSTS.
Rev. St. § 974 (Comp. St. 1913, § 1615), provides that, on every conviction for an offense not capital, the court may in its discretion award that the defendant shall pay the costs of the prosecution. Judicial Code (Act March 3, 1911, c. 231) § 128, 36 Stat. 1133 (Comp. St. 1913, § 1120), authorizes the Circuit Court of Appeals to review final decisions of the District Court, whether such decisions are in civil or criminal cases. Rev. St. § 1000 (Comp. St. 1913, § 1660), provides that every justice or judge signing a citation on any writ of error shall take security that the plaintiff in error shall prosecute his writ to effect, and if he fail to make his plea good shall answer to all costs, where the writ of error is not a supersedeas. Act Feb. 6, 1889, c. 113, § 6, 25 Stat. 656 (Comp. St. 1913, § 1703), provides that a writ of error shall be allowed as of right and without security in capital cases. *Held*, that Rev. St. § 1000, applied to writs of error in criminal as well as in civil cases, where the court had exercised the discretion given it to adjudge the costs against defendant, and a bond given to secure the prosecution of a writ of error from such judgment and the payment of costs, though the writ was not made a supersedeas, is valid.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2710, 3201.]

2. CRIMINAL LAW ⊜1004—REVIEW—NATURE OF RIGHT.
The right to an appellate review of a conviction in a criminal case does not exist, except by virtue of a statute conferring it, and the exercise of the right is dependent on compliance with the statutory requirements prescribed therefor.

3. COURTS ⊜92—RULES OF DECISION—OPINION OF SUPREME COURT—DICTA.
Expressions found in opinions of the Supreme Court cannot be given the effect of authoritative rulings on questions not involved in the particular cases respectively dealt with.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 335.]

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

The Waters-Pierce Oil Company was convicted of a crime, and adjudged to pay a fine and costs of the prosecution, and gave bond, on which the American Surety Company was surety, conditioned on prosecuting its writ of error and paying all costs, if it failed to make its plea good. From a judgment against the surety for the amount of the costs of the prosecution, the surety brings error. Affirmed.

J. D. Johnson, of St. Louis, Mo., and J. D. Wilkinson, of Shreveport, La., for plaintiff in error.

Geo. Whitfield Jack, U. S. Atty., of Shreveport, La. (Robert A. Hunter, Asst. U. S. Atty., of Shreveport, La., on the brief), for the United States.

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

WALKER, Circuit Judge. The Waters-Pierce Oil Company was convicted of rebating, and was adjudged to pay a fine and all costs of the prosecution. A writ of error to review that judgment was allowed upon the defendant therein giving bond according to law in the sum of $2,000 without supersedeas. Pursuant to that order a bond was given, with condition:

"That if said Waters-Pierce Oil Company shall prosecute said writ of error to effect, and answer all cost if it fail to make the said plea good, then the above obligation to be void; else to remain in full force and effect."

The judgment of conviction was affirmed by this court. The present writ of error presents for review a judgment against the surety on the above-mentioned bond for the amount of the costs of the prosecution which had been adjudged against the principal in that bond. The surety denied liability on said bond on the ground that it was executed without authority of law and was without consideration, because the Waters-Pierce Oil Company was entitled as a matter of right, and without being required to give any bond, to the writ of error to secure a review of the judgment convicting it of a criminal offense.

[1] The part of the judgment of conviction which awarded costs against the defendant therein was authorized by the statute (R. S. § 974 [Comp. St. 1913, § 1615]), which provides that:

"When judgment is rendered against the defendant in a prosecution for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs; and on every conviction for any other offense not capital, the court may, in its discretion, award that the defendant shall pay the costs of the prosecution."

The appellate jurisdiction of this court to review that judgment is conferred by a statute which is applicable alike to final decisions in the district courts, whether such decisions are in civil or criminal cases. Judicial Code, § 128.

"Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in

error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid." R. S. § 1000 (Comp. St. 1913, § 1660).

Nothing in the language of the provision just quoted indicates an intention to confine the operation of it to civil cases. It is not applicable to a writ of error on a conviction of a crime punishable by death, because another statute (25 Stat. 656) provides that:

"Every such writ of error shall be allowed as of right and without the requirement of any security for the prosecution of the same or for costs."

On a writ of error in such a case a bond for costs cannot properly be prescribed, as the statute forbids it. And it may be that the provision for taking security for costs on a writ of error which is not a supersedeas is not applicable to a judgment which does not award costs, such as a judgment in a criminal case in which the trial court, in the exercise of the discretion with which it is vested, refrains from adjudging the costs of the prosecution against the defendant. It may be inferred that the provision for securing damages and costs, both or one only, according as the writ is or is not a supersedeas, was not intended to apply to a case in which the judgment to be reviewed does not involve either damages or costs, such as a judgment of conviction which imposes imprisonment only, on a review of which no costs are allowable in this court. See subdivision 4 of rule 31 of this court (150 Fed. xxxv, 79 C. C. A. xxxv). But when the criminal case is one in which the costs of the prosecution may be awarded against the defendant, and they are so awarded, a writ of error to review such judgment is not within any express or implied exception to the provision of section 1000 of the Revised Statutes requiring the justice or judge signing a citation on a writ of error which is not a supersedeas to take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and, if he fail to make his plea good, shall answer all costs. The only provision we have found which entitles a defendant in a criminal case, who is not a pauper, to a writ of error as a matter of right and without the requirement of any security for the prosecution of the same or for costs is the above-quoted statute, which is applicable only to a conviction of a crime punishable by death.

[2] The right to an appellate review of a judgment of conviction in a criminal case does not exist, except by virtue of a statute conferring it, and the effective exercise of the right is dependent upon a compliance with applicable requirements prescribed pursuant to the statute governing the proceedings by which the remedy may be invoked. A statute (R. S. § 1000), the terms of which are as applicable to a criminal as to a civil case, requires the justice or judge signing a citation on a writ of error which is not a supersedeas, in a case not within any exception stated or to be implied, to take security that the plaintiff in error shall prosecute his writ to effect and pay all costs. As the judgment of conviction against the Waters-Pierce Oil Company awarded against it the costs of the prosecution, and as the case was not within any exception to that statute, the judge signing the citation

on the writ of error without a supersedeas to review that judgment was authorized to take the bond in question. The effect of the statute was to make a compliance with the requirement of security for costs a condition precedent to the acquisition of the right to an allowance of the writ without a supersedeas and the signing of a citation thereon. The condition may be as applicable to a criminal case not within any express or implied exception to the provision prescribing it, as to a civil case. The order imposing the condition in a case to which it is applicable, whether it is a civil or a criminal case, is to be complied with, though such compliance does not operate to stay execution of the judgment sought to be reviewed. The conclusion is that the order in question for security for costs was one which the statute authorized, indeed required, in such a case as the one in which it was made, and that the bond given in pursuance of that order cannot be regarded as having been required or executed without authority of law or as being without consideration. It follows that the court was not in error in overruling the objection made to the enforcement of the obligation evidenced by that bond. The bond covered costs adjudged by the trial court against the principal obligor. Fidelity & Deposit Co. v. Expanded Metal Co., 183 Fed. 568, 106 C. C. A. 114; Young v. Daley (C. C.) 185 Fed. 209.

We have not been referred to and have not found any former ruling on the question of the authority of a justice or judge signing a citation on a writ of error, which is not a supersedeas, to review such a judgment as the one under consideration, to require security for costs. In the argument opposing the conclusion we have reached the counsel for the plaintiff in error relied on expressions found in the opinions in the cases of In re Claasen, 140 U. S. 200, 208, 11 Sup. Ct. 735, 35 L. Ed. 409, and Hudson v. Parker, 156 U. S. 277, 284, 285, 15 Sup. Ct. 450, 39 L. Ed. 424, to the effect that, in a criminal case in which a writ of error is allowable, it is a matter of right, and that no security, such as is necessary in a civil case, is required. In the Claasen Case it was decided that a justice of the Supreme Court had authority to allow a writ of error to review a judgment of conviction on which the defendant was sentenced to imprisonment in the penitentiary, and to grant a supersedeas without requiring the giving of security; the court saying with reference to the last-mentioned feature of its ruling:

"In a criminal case there are no damages; and in such a case, the United States being a party, it is provided, by subdivision 4 of rule 24 of this court [32 Sup. Ct. xi], that in cases where the United States are a party no costs shall be allowed in this court for or against the United States."

This amounted to saying that security for damages and costs is not required where neither damages nor costs are involved. In the case of Hudson v. Parker it was decided that the allowance by a justice of the Supreme Court not assigned to the particular circuit of a writ of error, to operate as a supersedeas, to review a judgment of conviction sentencing the defendant to the penitentiary, was authorized, though the order contained no requirement of security for damages

and costs. In neither of those cases was there a decision on the question of the authority to require security for costs on a writ of error, not to operate as a supersedeas, to review a judgment of conviction which awarded the costs of the prosecution against the defendant, as in neither of those cases were there either damages or costs to be secured.

[3] Expressions found in the opinions in those cases cannot properly be given the effect of authoritative rulings on questions not involved in the particular cases respectively dealt with. Hardesty v. United States, 184 Fed. 269, 106 C. C. A. 411. Nothing in either of the opinions mentioned indicates that the view was entertained that any provision of sections 1000 and 1007 of the Revised Statutes (Comp. St. 1913, §§ 1660, 1666) governing the procedure to be followed to secure an appellate review of a final judgment, with or without a supersedeas, could properly be disregarded in a criminal case, not in some way excepted from the operation of the provision, which involves a state of facts to which the provision is applicable.

For the reasons indicated, we are of opinion that obedience to the statute requires the conclusion above stated, and that no former authoritative ruling stands in the way of that conclusion. It follows that the judgment under review should be affirmed; and it is so ordered.

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## OREGON-WASHINGTON R. & NAV. CO. v. PENSO et al.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1917.)

No. 2739.

1. TRIAL ⊂⊃260(7)—INSTRUCTIONS—REQUESTS—REPETITION OF CHARGE.
In an action for the death of a man, struck by a railroad motorcar while crossing a bridge, it was not error to give a charge, requested by defendant, that if deceased saw, or by the exercise of reasonable care and caution could have seen, that the motorcar was approaching, and could have gotten into a place of safety and avoided being injured, he was guilty of negligence contributing to his own injury, and the verdict must be for defendant, where the court charged that, if the jury found the deceased contributed in any way proximately to his own death by his own negligence, they should return a verdict for defendant, and that he was bound to use ordinary care for his own safety, and if he failed to use ordinary care to keep or get out of the way of the approaching car the plaintiff cannot recover.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 657.]

2. RAILROADS ⊂⊃400(1, 10)—INJURIES TO PERSON ON TRACK—EVIDENCE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.
In an action for the death of a pedestrian, who was struck by a railroad motorcar while he was crossing the railroad bridge, evidence *held* sufficient to take to the jury the issues of the railroad's negligence and of deceased's freedom from contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365, 1367, 1377.]

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

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

Action by Esther Romi Penso and another against the Oregon-Washington Railroad & Navigation Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

The river that separates East Hoquiam from West Hoquiam, in the state of Washington, is crossed by a bridge used by the plaintiff in error in the operation of a line of railway in Chehalis county, state of Washington. That company was the defendant to the action brought in the court below by the widow and minor son of Haim Jack Penso, who was killed, while on the bridge, by a motorcar of the railroad company, at the time propelled by a gasoline engine.

The complaint alleged, among other things, that at the time of the accident the deceased was returning from his place of work in East Hoquiam to the place where he lived in West Hoquiam, as he was accustomed to do; that the bridge was at the time in question, and for a long time had been, used as a common passageway by the deceased and many other persons, with the knowledge and consent of the defendant company and of the Northern Pacific Railway Company, which practice had been continued for some years and was at the invitation of both of the companies mentioned, and which invitation, practice, and custom was well known to their agents, officers, and employés; that on the night in question, which was that of the 4th of November, 1913, the deceased, about 6 o'clock, "following the said custom and accepting the said invitation, was in the act of crossing said bridge as aforesaid, and had reached a point somewhere near the middle of said bridge, when a certain passenger car, propelled by gasoline engines and known as a gasoline motorcar, owned and operated by the defendant, approached said bridge, and the point where the said Haim Jack Penso was crossing said bridge, at a high and unusual rate of speed, and was carelessly and negligently driven upon the said Haim Jack Penso, in such a careless and negligent manner that the said Haim Jack Penso was knocked from the bridge into the waters of the Hoquiam river, and was either killed by the striking of the car or drowned as a result of being knocked from such bridge."

The answer of the defendant company, besides putting in issue the material allegations of the complaint, set up as affirmative defenses: First, contributory negligence on the part of the deceased; and, second, that the deceased knew and appreciated the dangers in undertaking to cross the bridge, and assumed the risk in doing so.

Upon the conclusion of all of the evidence the defendant moved for a directed verdict in its favor, and excepted to the ruling of the court denying the motion, assigning here the ruling as error.

Bridges & Bruener, of Aberdeen, Wash., Sullivan & Christian, of Tacoma, Wash., and Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for plaintiff in error.

Morgan & Brewer, of Hoquiam, Wash., and A. Emerson Cross, of Aberdeen, Wash., for defendants in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The ground of the action being that the plaintiff in error's car approached the bridge, and the point where the deceased was crossing, at a high and unusual rate of speed, and was carelessly and negligently driven upon him, resulting in his death, we first look to see what, if any, evidence the record contains in support of those allegations.

There is very little real conflict in it upon any essential point involved

in the case. It shows without conflict that the bridge is approached from both ends by a trestle with a slight upgrade, and that between the points of commencement of the trestle, at the respective west and east ends, there are two curves, but that from the west end of the bridge proper (which, according to the evidence, is a drawbridge, enabling the water craft plying on the river to pass) the track is straight for from 250 to 300 feet westerly. The drawbridge was operated by a man in the tower house or engine room, over the turning gear in the center of the bridge. One G. M. Rogers was one of the towermen at the time in question, and he testified, among other things (his testimony being uncontradicted), that, including cars, trains, and switch engines, from 35 to 40 crossed the bridge each day—the evidence showing that the bridge was used in common by the Northern Pacific Railroad, the Milwaukee Railroad Company, and the plaintiff in error. There was but the one railroad bridge across the river between West and East Hoquiam, although there was at the time a wagon road bridge, on which there was also operated an electric road, a short distance from the railroad bridge, by which wagon road bridge the deceased, as we shall presently see, went each morning from where he lived in West Hoquiam, to the Coats Mill Factory in East Hoquiam, where he worked. In returning home from his work in the evening, however, the deceased, for more than a year previous to the accident, went by way of the railroad bridge, as did hundreds of other workmen, according to the evidence.

The motorcar of the plaintiff in error was operated between West Hoquiam and a place called Montesano, and made two trips each way each day. The car was about 76 feet in length, with a place at the end for the motorman, then next a compartment for baggage and express matter, then next a smoking compartment, and then the main space for passengers. Its schedule time for leaving West Hoquiam in the evening was 6 o'clock, and the evidence shows without dispute that it left on time on the occasion in question. So far from there being any evidence that the car approached the bridge or crossed it at a high and unusual rate of speed, as alleged in the complaint, it appears from the uncontradicted evidence that its speed, in this instance, at least, was only from 6 to 8 miles an hour. It also appears from positive testimony in the case that the bell on the motor car was an automatic air bell, started by a small valve in the cab, the opening of which valve starts the air to flow and the bell to ring; that on the occasion under consideration the bell was put in operation (as, according to the evidence, it always was) before leaving West Hoquiam, and rung continuously until the car was stopped after the accident; that there was no way to stop the bell, except by shutting the valve by the engineer; and that the bell could be heard a distance of from 1,000 to 1,200 feet. It appears in evidence without conflict that the bridge was equipped with a semaphore, by which signals were given to approaching cars and engines of the condition of the bridge—a red light being a signal to stop, and a green light the signal to proceed. It appears that the trains or cars approaching the bridge from either end were required to blow two whistles about a half block from the bridge

proper, which signal would be returned by the semaphore man and the appropriate light displayed, upon receiving which signal the engineer of the approaching car or train would answer by two short blasts of the whistle, indicating that he would proceed. Such, it appears, was the regulation and practice of the railroad companies using the bridge and the practice in the instant case. It also appears by uncontradicted testimony that this car was equipped with a strong headlight and threw its rays along the entire straight stretch of track that has been mentioned, on which the deceased and a companion, the witness Balabanas, were proceeding on their way westerly to their home from their place of work in East Hoquiam, the motorcar at the same time going easterly on its regular evening run from West Hoquiam to Montesano.

It is unnecessary to refer to the numerous witnesses introduced, both on the part of the plaintiff and the defendant company, to the effect that the bridge and its approaches were and for years had been used, at any and almost all times, as a footway in crossing the river by the hundreds of workmen engaged in work in the various mill plants that existed on both sides of the river, particularly in returning home in the evening after their day's work was done, very likely because the distance was shorter than by the wagon road bridge that has been referred to, but, whatever the cause, no question is made about the fact. And the evidence is abundant, both of witnesses on the part of the plaintiff, as well as those testifying for the defendant company, that until the present accident happened no one had ever been hurt in doing so by any train, car, or engine—their custom being, upon meeting such trains, cars, or engines, to step to the end of the ties of the road and lean against the various steel beams or uprights which constituted a part of the bridge, or else step down from the ties to the girders, and thus give way to the passage of the trains, engines, or motorcars, as the case might be.

Balabanas testified on behalf of the plaintiffs, among other things, as follows: That he and the deceased left the Coats shingle mill factory, where they had been working for about a year, at a quarter of 6 in the evening of the day the deceased was killed, and had reached the bridge at 6 o'clock (which was the same time the motorcar left the station in West Hoquiam going westerly). We extract from the testimony of the witness, as stated in the record, as follows:

When crossing the bridge, deceased and witness were walking together. At the time deceased was struck by the car, witness stopped to roll a cigarette, and Penso went on ahead. They were in the middle of the bridge when the car was approaching. That when walking across the bridge there were planks that they walked on, and were going towards Hoquiam. That witness did not know when the car was coming, but he and deceased were passing on the bridge every night. They were crossing the bridge every night. Witness did not know whether the car would cross the bridge at that time or not. The witness did not hear any whistle from the car. Did not hear any bell ringing. That the way he knew the car was coming was when he stopped to roll his cigarette, and deceased passed a few steps ahead, then the car passed right ahead. That when witness saw the car he started to walk, and when deceased was struck witness went over and dropped onto an iron post on the bridge. That he got over to the iron post by stepping on the rail and then

putting his hand upon the post. * * * That as the witness stopped deceased was right on the step, and deceased was struck by the car, and then the passengers and some of the brakemen came down the ladders and were looking for the body, and they only found his dinner pail. That witness stepped over and put his hand around the post and stopped there. Asked how soon he did that after he saw the light on the car, he answered it was about 24 feet. That after the witness saw the light of the car, and before he moved to the post, he put his arms around. Witness had walked 4 or 5 feet after he saw the car coming, then he put his hands around the post and stayed there, and then came down again. When the deceased was struck, witness dropped the post. That there was no place deceased could have gotten off the bridge, excepting the platform that deceased was going towards, after the car was seen. That there was no other room or platform, excepting the stairs. That Penso was killed, but that he did not see him. After witness saw the light of the car, deceased was running to cross the steps, and as he tried to cross the steps deceased was knocked down by the car. Deceased was trying to put his feet on the stairs when he was struck by the car. He meant, by the stairs, on the platform; right on the platform. That one of the feet of deceased was on the rail, and one on the platform. That after witness saw the light of the car there was no place deceased could have gotten to as a place of safety, excepting the platform towards which he was running. That as to why there was not any other place he did not know. There were only a few boards inside the rails, and no other room at all. That deceased could not have stepped off on the side, like witness did, because deceased was ahead, right close to the stairs. That there was no place on the side of the bridge where deceased could have got hold of before getting to the platform. That he did not know how many minutes it was after witness saw the light on the car until deceased was struck by the car, but that he did know that deceased was running to get to a place of safety.

The foregoing is the only testimony we find in the record from which the jury could have concluded or inferred that there was negligence on the part of the defendant company in not stopping the car before it and the approaching deceased came in contact, which was, according to the evidence, at the west end of the bridge proper, where there was a platform—there also being one in the middle and at the east end of the bridge proper. That testimony, however, also tended to show that the deceased was guilty of contributory negligence in running on the track of the defendant company towards its oncoming car, the light of which, according to the uncontradicted testimony, was plainly visible, after the car reached within about 300 feet of the west end of the bridge proper, clear through it, and far beyond. The jury might well have inferred and concluded that, when Balabanas stopped to roll his cigarette, the deceased might have gotten out of the way of the car by stepping to the end of the ties and leaning against one of the upright bars, instead of going ahead and taking chances in running to reach the platform at the end of the bridge.

[1] It is insisted on behalf of the appellant that the court below erred in refusing, as it did, to give this requested instruction:

"You are instructed that if you believe from the evidence that the deceased saw, or by the exercise of reasonable care and caution could have seen, that the motorcar was approaching the bridge, or was coming on the same, and you further believe that the deceased could at that time have gotten into a place of safety on such bridge, and thus avoided being injured, then the deceased would be guilty of negligence contributing to his own injury, and your verdict must be for the defendant."

A sufficient answer to the contention is that the court did instruct the jury substantially as was requested, as will be seen from the following excerpts from its charge:

"The defendant, having alleged contributory negligence on the part of the deceased, which it is averred proximately contributed to his death, if you get to that phase of the case, the burden of establishing the deceased's negligence, and that it proximately contributed to his death, rests upon the defendant.

"The order in which you would naturally take up the consideration of these issues would be, first, to determine what, if any, relationship this boy and this woman bear to the deceased. If there be a fair preponderance of the evidence that one was the wife, and is to-day the widow, and that the other was the son, then the next step would be logically to determine whether the deceased himself contributed in any way proximately to his own death, by his own negligence. If you find by a fair preponderance of the evidence that he did so, you would stop there, and return a verdict for the defendant. If you find that he was not himself guilty of contributory negligence, you would then pass to the next point, to determine whether the defendant, in any of the manners described in the complaint, was guilty of negligence, and whether it proximately contributed to the death of the deceased."

And again:

"The deceased man, while using the footpath on the bridge, in going across this river, was bound to use ordinary care for his own safety, and if he failed to use ordinary care to keep or get out of the way of the approaching car, the plaintiffs in this case cannot recover, even though you should find from a fair preponderance of the evidence that the defendant company, or its operatives, were negligent in the operation of the car."

See Grand Trunk Railway v. Ives, 144 U. S. 408, 433, 12 Sup. Ct. 679, 36 L. Ed. 485; Rio Grande Western Railway v. Leak, 163 U. S. 280, 287, 288, 16 Sup. Ct. 1020, 41 L. Ed. 160.

[2] While we are of the opinion that the evidence tending to show negligence on the part of the defendant company was slight, and that there was evidence tending to show contributory negligence on the part of the deceased, we conclude that both questions were properly submitted to the jury for determination.

The judgment is affirmed.

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## HENRY A. HITNER'S SONS CO. v. AMERICAN CREDIT INDEMNITY CO.

(Circuit Court of Appeals, Third Circuit. February 26, 1917.)

No. 2184.

INSURANCE ⟸511—INDEMNITY RISK—POLICY—CONSTRUCTION.

On application executed March 18, 1912, a bond, indemnifying plaintiff against loss on sales of merchandise upon credit to parties given specified ratings by a mercantile agency, was issued, the term of the bond being from March 18, 1912, to March 17, 1913, inclusive. A rider provided that losses should be covered although the goods might have been shipped as far back as December 18, 1911, but declared that no loss should be covered which might be sustained before actual payment of the premium notes. Shortly after issuance plaintiff surrendered the original bond and secured another in double the amount, which was issued April 6th. This bond retained the original term, and also carried back the earliest date of

shipment to December 18th, but provided that no loss occurring before April 4th, which date was arbitrarily fixed as the date when payment should be regarded as having been made, should be covered. Premium notes, however, were not due or payable until May 1st at which time they were paid. The bond further declared that no loss on goods shipped between December 18th and March 17th should be covered if the debtor to whom the shipments had been made should suffer a detrimental change of rating at the hands of the governing mercantile agency between the first shipment and April 4th, the arbitrary date of payment. Plaintiff sustained a loss on goods shipped between December 18, 1911, and March 17, 1912, and it appeared that the debtor suffered a detrimental change of rating before April 4th. The second bond declared that in case the insurer should issue to the indemnified a new bond and the premium thereof should be paid prior to the expiration of the bond, losses occurring during the term of the new bond, on sales of merchandise shipped and delivered within the 12 months next prior to the expiration of the bond, should be covered and might be proven under the new bond subject to its provisions and limitations the same as though the goods had been shipped during its term and the governing rating of the debtor under the bond at the date of each shipment should apply. *Held*, that the provisions as to subsequent bonds did not apply to the loss suffered by plaintiff, such provisions contemplating the expiration of the original bond by lapse of time; and, the original bond having been surrendered and a substitute bond obtained, no recovery could be had on the loss, as it did not fall within the terms of the latter bond.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1296, 1297, 1299.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Action by Henry A. Hitner's Sons Company against the American Credit Indemnity Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Wm. Clarke Mason and Howard S. Baker, both of Philadelphia, Pa., for plaintiff in error.

Frank P. Prichard, James Wilson Bayard, and John G. Johnson, all of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This suit is before us for the second time. On the first writ of error (228 Fed. 654) the facts did not appear as fully as on the present writ, and therefore it may be desirable to set forth the controversy again, but as briefly as possible.

The plaintiff seeks to recover on a policy, or bond, of credit insurance for two losses, one for a small amount that may be passed over for reasons not now important, and the other for nearly $4,000, a loss incurred by the bankruptcy of Dreifus & Co. The bond sued on was issued April 6, 1912, but it now appears that the parties had made an earlier contract. On the trial under review the plaintiff proved that on March 18 the first and only written application was executed, and that a bond was issued thereon in the amount of $10,000 under date of March 20, the bond coming into the plaintiff's hands on March 25. Within a few days the plaintiff decided to increase the amount to $20,-

000, and negotiations with this object were entered upon and completed, the first bond was surrendered, and the bond sued on was issued. In many respects the two instruments are identical, but several important changes appear in the second. The maximum amount at risk, the premium, and the amount of loss on account of a single debtor, were all doubled, and what is called the "initial loss"—that is, the proportion to be borne by the insured before the credit company could be called upon—was increased from one-fifth per cent. to one-third per cent. A change still more important in the present controversy was made, and this requires a fuller explanation.

The first bond covered losses sustained during a term beginning March 18, 1912, and ending March 17, 1913, both days included, but a rider provided that such losses should be covered although the goods might have been shipped as far back as December 18, 1911. But there were certain limitations, one of them being this: As the premium, $550, had not been paid in cash, but was secured by two notes, the rider provided that unless the notes should be paid at or before maturity no loss should be covered that might be sustained before actual payment; but, if the notes should be duly met, the bond should stand as if the premium had been paid by check, i. e., in cash. The second bond retained the same term—March 18 to March 17—and also carried back the earliest date of shipment to December 18, but a vital change was made in dealing with the payment of the premium. The premium was now $1,100, and for this two notes were given (the previous notes being apparently surrendered), and the bond fixed a definite date, April 4, as the date when payment should be regarded as having been made, and expressly declared that no loss occurring before that date should be covered. The bond still covered a loss occurring during the term, even if the goods had been shipped as far back as December 18, but such a loss must occur *after* April 4, the date arbitrarily fixed as the date of payment, and, moreover, no loss on goods shipped between December 18 and March 17 should be covered if the debtor to whom the shipments had been made should suffer a detrimental change of rating at the hands of the governing mercantile agency (R. G. Dun & Co.) between the first shipment and April 4, the arbitrary date of payment. Each of the 2 notes was for $550, was dated March 18, was payable May 1, and was paid at maturity. The effect of such payment was to make it certain that the bond was in force according to its terms, and (as already stated) one of its terms fixed the date of payment as April 4, regardless of the fact that the notes were not to be actually paid until May 1.

The loss in dispute was on goods shipped to Dreifus & Co. after December 18 and before March 17, and as it was sustained after April 4 it is covered by the bond, unless the credit rating of the bankrupt firm was detrimentally changed before April 4. In our view, this is the central question in the case; on the former writ we held that a detrimental change had been made, and we find nothing in the record of the second trial to raise any doubt on this subject. The first writ required us to decide whether the jury was the proper tribunal to determine the true date of payment, much stress being laid by the Hit-

ner Company on the fact that in spite of what the bond and rider said about the date of April 4 the credit company had nevertheless accepted notes bearing interest from March 18, the date of the original application, and had shown thereby that April 4 was not the true date. But we upheld the written contract, and decided that the court, and not the jury, should have declared its effect. On the trial now under review, these rulings were followed, and a verdict was directed in favor of the defendant. In our opinion, this action of the court was correct. Very little additional evidence was offered, the principal item being the first bond, and the situation was not materially changed. The facts were more fully presented, and one or two obscurities were cleared up, but no important difference appeared.

The plaintiff in error's chief contention now is founded on the following clause, which appears in both bonds:

"*Advantages of Subsequent Bond.*—In case this company issues to the indemnified a new bond, and the premium therefor is paid prior to the expiration of this bond, losses occurring during the term of the new bond on sales of merchandise shipped and delivered within the twelve months next prior to the expiration of this bond shall be covered and may be proven under the new bond, subject to its provisions and limitations, the same as though the goods had been shipped during its term, and the governing rating of the debtor under this bond at the date of each shipment shall apply. From the net losses so covered and proven, in conjunction with all others covered and proven under the new bond, there shall be deducted the initial loss provided for by the new bond before any liability on the part of this company shall accrue; but the amount of the shipments made during the said prior twelve months shall not be taken into the calculation of sales in computing the amount of the initial loss under the new bond."

We think the object of this clause is reasonably clear, and we agree with the credit company's discussion of the subject. We cannot do better than give the substance of what is said in the brief: The term of these credit bonds is usually for one year. The company does not agree to renew on the same terms, but (as an inducement to renew on some terms) it agrees that the new bond shall cover a loss occurring during the new term by reason of shipments made during the preceding term, and, moreover, it agrees that such mercantile rating of the debtor as would have justified a sale to him under the old bond shall still apply, although otherwise the new bond might require a higher rating. But these provisions evidently contemplate a new bond issued when the term of an old bond comes normally to an end. The new bond is a "subsequent" bond; the company speaks of the "twelve months next prior" in describing the losses to be covered, and uses the phrase "expiration of this bond" instead of "termination"; the latter word being elsewhere used when the contract is dealing with the ending of the bond by other events that may bring its life to a close. Here the facts are different: The bond sued on was not issued when an old bond expired; it merely took the place of the first bond. They cover, not successive terms, but the same term, namely, from March 18, to March 17, and both are carried back to December 18. The first bond was surrendered and canceled at the wish of the insured, mainly in order to obtain a new bond that would increase the amount at risk

to $20,000. Naturally this doubled the premium, and for some reason that does not appear a change was also made in the rate of "initial loss," and an arbitrary date was agreed upon as the date when the premium should be regarded as paid. In a word, the bonds were not "successive"; one was intended to be a substitute for the other, and therefore the clause just quoted does not have the application contended for by the plaintiff in error. Moreover, the conditions and limitations of the new bond are controlling, where they are inconsistent with the conditions and limitations of the old.

We see no occasion to discuss the subject further. The Dreifus loss is not covered by the contract, and the plaintiff has no case.

The judgment is affirmed.

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## CONSUMERS' BREAD CO. v. STAFFORD COUNTY FLOUR MILLS CO.

(Circuit Court of Appeals, Eighth Circuit. January 23, 1917.)

No. 4677.

1. SALES ⟸62—CONSTRUCTION—ENTIRE CONTRACTS.
A contract for the sale of 10,000 barrels of flour, 2,500 barrels to be shipped each month for a period of four months, is an entire contract; the provisions for delivery in installments not dividing it into separate contracts for each installment.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 171–179.]

2. SALES ⟸89—CONSTRUCTION—DELIVERY IN INSTALLMENTS.
A contract for the sale of 10,000 barrels of flour provided for the delivery of 2,500 barrels per month for the months of January, February, March, and April. Concessions as to time of delivery of installments were made by each party, neither party repudiating the contract until the seller after numerous promises defaulted in June. Thereupon the buyer after reasonable notice purchased other flour and sued to recover the difference in the price of the flour so bought and that which the seller contracted to deliver. *Held* that, the contract being entire, the mutual concessions did not abrogate it, and the seller was liable for its nondelivery within a reasonable time after notice, although it might have thereafter asserted the right to make delivery according to the specified monthly installments.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 251, 252, 259.]

3. SALES ⟸89—MODIFICATION—TIME FOR PERFORMANCE.
When no time is fixed for performance of a contract for the sale of goods, the goods are to be delivered within a reasonable time; and hence, where parties by mutual concessions have carried the time for delivery beyond that fixed in the contract, each party is entitled to a reasonable time for performance to be determined under the circumstances of the case.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 251, 252, 259.]

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

Action by the Consumers' Bread Company against the Stafford County Flour Mills Company. There was a judgment for defendant,

and plaintiff brings error. Reversed, with directions to grant a new trial.

John H. Atwood, of Kansas City, Mo., and Chester I. Long and Austin M. Cowan, both of Wichita, Kan., for plaintiff in error.

Frank L. Martin, Van M. Martin, and John M. Martin, all of Hutchinson, Kan., for defendant in error.

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

AMIDON, District Judge. On August 15, 1911, the parties to this action entered into a contract in writing by which the defendant, the Stafford County Flour Mills Company, agreed to sell and deliver to the plaintiff, the Consumers' Bread Company, 10,000 barrels of flour, at $4.25 a barrel, 2,500 barrels to be shipped in each of the four months of January, February, March, and April, 1912, with draft payable on sight to accompany bills of lading. Concessions as to time of delivery were made by each party to the other during and subsequent to the entire period covered by the contract, first at the request of the mills company, and then at that of the bread company. Neither treated the defaults of the other as abrogating any part of the contract. Down to June 1, 1912, only 3,425 barrels of flour had been delivered. The negotiations between the parties were carried on by correspondence which was put in evidence. It leaves no doubt as to the manner in which the parties themselves interpreted their contract, and the waiver of its provisions as to the time of performance. In May and June, however, the mills company began to indicate its inability to complete the delivery of the remaining part of the flour. It did not say that it would not deliver, but, in answer to the urgent requests of the bread company for shipments, wrote explaining that they had sent their rolls away to be reground, and added:

"We will do all we possibly can to hurry matters up. We will make shipment as soon as we possibly can, but cannot state exact date."

May 28th, in answer to a request for shipment, the Mills Company wired, "Will ship car flour to-morrow." May 29th it again wrote, in answer to a similar request:

"We are very sorry to not be able to ship as fast as we would like, but wheat has moved out faster than what we had any idea. Trusting that you will hold with us we will do the very best possible."

At no time did the mills company assert any right of forfeiture under the contract, or treat it as otherwise than in full force. They simply failed to perform. Finally, on June 15th, no further shipments having been made, the bread company purchased flour to supply the balance of the contract, and subsequently brought this action to recover the difference in price.

[1] The trial court disregarded the interpretation put upon the contract by the parties, and held each installment a distinct obligation, and time the essence of its performance, and, as the bread company failed to buy in the balance of each installment at the end of each month in

which it was to be delivered, it forfeited all right to damages. There was no conflict in the evidence. Both parties moved for a directed verdict. The trial court directed a verdict in favor of the defendant, and the plaintiff brings error.

The action of the trial court was wrong. Beyond question the contract was entire. Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; Cleveland Rolling Mills v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; McDonald v. Kansas City Nut & Bolt Co., 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110; Alpena Portland Cement Co. v. Backus, 156 Fed. 944, 84 C. C. A. 444.

"The provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries." 115 U. S. 203, 6 Sup. Ct. 14 [29 L. Ed. 366].

[2] Upon default by either party as to any installment, the other party might, if it saw fit, treat the contract as abandoned by the other party. Neither party, however, was obliged to do this. It was open to them to waive strict performance. That is especially true in regard to the matter of time. There is no element of a contract with which parties are so free to deal as the time of performance. Waiver of a breach as to that element will be more readily inferred than as to any other feature. Here correspondence between the parties leaves no room for doubt as to the waiver. Both parties treated the entire contract as in force. Each continued to express in unequivocal terms its desire and purpose to adhere to the performance of the balance of its terms. Surely parties have the right to thus modify a contract as to the time of performance. It was only when the breach took the form that it did in June, of a total failure, that either party insisted upon its rights. The bread company then gave reasonable notice to the mills company that it required the shipment of the balance of the flour. Failure to meet that requirement was a breach of the contract, and authorized the bread company to do what it did, and it was clearly entitled to recover the difference between the contract price and the market price of the flour. A verdict should have been directed in its favor.

The questions involved in this case have not been much considered by American courts, but were directly presented to the Exchequer Chamber in England in Tyres v. Rosedale & Ferry Hill Iron Company, L. R. 10 Ex. 195. The facts and the law are briefly stated in the opinion by Chief Justice Cockburn as follows:

"There was a contract to purchase 2,000 tons of iron to be delivered in monthly installments. It did not suit the purchasers to take the iron in the installments originally contemplated by the parties, and they proposed to the sellers to postpone from time to time the delivery of the monthly installments. Now, it would have been perfectly competent to the defendants to say: 'We will not acquiesce in that proposal of yours. You are bound to take the iron month by month, and you must so take it, or consider the contract at an end.' Instead of doing that, the defendants, as I read the letters, acquiesced, not in holding the contract at an end, but in postponing the period of delivery. The iron was to be delivered in the course of the year 1871, and there was, by reason of this postponement, a very considerable arrear at the end of this

year. Then the plaintiffs call on the defendants to deliver at once the whole of what remained undelivered. I think that this was a demand which they were not entitled to make. I think that the postponement had the effect of carrying the period of delivery over the year 1872, but that the defendants could not be called upon to deliver 1,000 tons of iron at one time, but only in such quantities as was originally provided for. Therefore the defendants might have said, 'We shall not deliver the whole that remains in one mass, but we will deliver it according to the terms of the contract.' But they did not say this. What they said was, 'We will not deliver you anything at all.' There I think they were wrong. Consequently there was a breach of the contract, for which the defendants are liable in damages.

"The question of the damages might have been a matter of nice calculation, as to what was the damage in respect of each monthly installment of the period which still remained for delivery. But, fortunately, that question does not arise here, for the assessment of damages at the December market price is advantageous to the defendants, and not to the plaintiffs. I think the true effect of the correspondence is that there was merely a postponement of the period of delivery of the installments, the contract still remaining open, and both parties being bound by it. I think therefore that the judgment of the court below should be reversed."

This opinion is concurred in by Judge Blackburn. On the question as to whether the plaintiff could insist upon a delivery of the entire amount remaining undelivered in one installment, Judge Blackburn observes:

"Had they said, 'We want a reasonable time, and no more,' I should have been willing to construe the agreement in that way."

We construe the contract in the present case in the same manner. If the mills company had said, "We are willing to deliver the flour at the rate of 2,500 barrels per month until the balance is all delivered," we think they would have been entitled to thus distribute their performance. It should be observed that the case of Tyres v. Rosedale & Ferry Hill Iron Company presented facts which were more favorable to the defendants than the facts in the present case, for there delivery of the monthly installments had been delayed solely at the request of the plaintiffs. Then after the price of iron had greatly advanced the plaintiffs insisted upon delivery of what remained undelivered. As all the postponing had been done at plaintiffs' instance, it would seem at first that they were in no position to impose upon the defendants the hardship of performing after there had been a change in the price of iron. The court, however, rules that, inasmuch as the defendant had acquiesced in plaintiffs' request for postponement, that kept the contract alive, and the obligation to supply the iron in full force. Here the postponements were granted some at the request of the mills company and some at the request of the bread company, but much more at the request of the former than the latter. So the enforcement of the present contract after the advance in price is not as great a hardship as it was in the English case. The prevailing and dissenting opinions in the Tyres Case when it was before the lower court bring out the controlling considerations forcibly. L. R. 8 Ex. 305. See, also, Ogle v. Earl Vane, L. R. 2 Q. B. 275; Shaw's Braw Iron Co. v. Birch Grove Steel Co., 6 Times L. R. 50 (C. A. 1889); Wilson v. London & Globe Finance Corporation, 14 Times L. R. 15 (C. A.

1897); Ralli v. Rockmore (C. C.) 111 Fed. 874; Brown v. Sharkey, 93 Iowa, 157, 61 N. W. 364; Williston on Sales, p. 991; Sedgwick on Damages, § 737; Roberts v. Benjamin, 124 U. S. 64, 8 Sup. Ct. 393, 31 L. Ed. 334; McDermid v. Redpath, 39 Mich. 372.

[3] When no time is fixed for performance of a contract for the sale of goods, the law by implication fixes a reasonable time. What that will be depends upon the nature of the transaction. Sedgwick on Damages, § 737. The same principle ought to control when parties by mutual concessions have carried the time of performance beyond that fixed by the contract. The law would then allow to each party a reasonable time, depending upon the terms of the contract, and the other circumstances of the case.

We are convinced that the conclusions which we have reached are not only sound as a matter of law, but are in accord with the general practice of the business world. Concessions as between buyer and seller respecting the time of delivery are quite common in sales of articles like flour, coal, and iron, and in the practice of upright business men they do not impair any of the other obligations of the contract.

The case is reversed, with directions to grant a new trial.

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## In re BROOKSTONE MFG. CO. et al.

(Circuit Court of Appeals, First Circuit. January 23, 1917.)

No. 1242.

1. BANKRUPTCY ⊜384—ORDER—INFORMALITY.

A paper filed by a District Judge in a bankruptcy proceeding, which, after reciting the approval of an offer of composition by a large majority of creditors and the opposition of others, and the failure of the latter to sustain their contentions by proofs, closing with the words, "The composition is therefore confirmed," *held* to constitute an order of confirmation, although entered on the docket by the clerk as an "opinion confirming composition"; it being shown that it was the practice to treat such an order as a final order.

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

2. BANKRUPTCY ⊜461—ORDER CONFIRMING COMPOSITION—APPEAL.

Assuming the right of appeal from an order confirming a composition, such appeal is governed by Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 (Comp. St. 1913, § 9609), and must be taken within 10 days.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920–923.]

3. MANDAMUS ⊜57(1)—TO REQUIRE ENTRY OF ORDER BY LOWER COURT—DISCRETION.

A petition to an appellate court for a mandamus to require a lower court to enter an order for the purpose of enabling petitioners to appeal therefrom is addressed to the discretion of the court, and is not to be granted unless a clear case of necessity, in order to prevent substantial injustice, is made out.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 114, 115, 117–120.]

Petition by the Brookstone Manufacturing Company and others for mandamus or prohibition or certiorari. Petition dismissed.

Joseph B. Jacobs, of Boston, Mass. (Maurice E. Rosen, of Portland, Me., on the brief), for petitioners.

Frank A. Morey, of Lewiston, Me., for respondent.

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

DODGE, Circuit Judge. [1] The objections specified by these petitioners to an accepted composition were heard by the District Judge August 30, 1916. Their petition states that on September 1, 1916, he "handed down, and had filed, an opinion, a copy of which is hereto annexed, marked 'A,' confirming the composition offered." The paper thus described is dated August 31, 1916. Though called an "opinion" in the petition, it is not so entitled, nor is it otherwise entitled. The clerk's docket entry was: "September 1, 1916, opinion, Hale, J., confirming composition filed." The answer of the District Judge calls it an "opinion and order." It concludes with these words, "The composition is therefore confirmed," which it would certainly be difficult to understand otherwise than as an order.

The words just quoted were preceded by a recital that nonassenting creditors opposed confirmation, that confirmation had been approved by a large majority, that the opposing creditors had the burden of showing that acceptance was not for the creditors' best interests, and that upon consideration of the proofs that burden had not been sustained.

The petitioners took no action whatever within 10 days from September 1, 1916. On September 21st, they filed a motion that a final decree confirming the composition be entered. This the court denied September 23d, "it appearing that the composition was confirmed by order of this court more than 10 days before the date of the filing of this motion."

The petitioners now allege that no decree confirming the composition has been entered or filed and that they desire to appeal from any decree or order confirming it. They ask that the judge be ordered to "sign and docket a decree or order" confirming it, for the obvious purpose of allowing them a further opportunity to appeal.

[2] In Ross v. Saunders, 105 Fed. 915, 919, 45 C. C. A. 123, this court declined to pass on the right of appeal against an order confirming a composition; and has not since been called on to pass upon it. Assuming, in view of Re Bay State, etc., Co., 223 Fed. 778, 139 C. C. A. 598 in the Second Circuit, and of like decisions in other circuits, that the right exists, the appeal is required by section 25a of the Bankruptcy Act to be taken "within ten days after the judgment appealed from has been rendered." If the court "rendered a judgment" confirming this composition on September 1st, the petitioners' right to appeal from it expired on September 11th, and no longer existed when they first took any step regarding it. There is no suggestion that they were without notice of the rendition of the order dated September

1st. The practice in the Maine district, as stated by the District Judge in his answer, is to treat such an order as he entered as the final order upon which an appeal is taken, if taken at all.

The petitioners rely here on General Order 38 (89 Fed. xiv, 32 C. C. A. xiv), requiring the official forms to be "observed and used with such alterations as may be necessary to suit the circumstances of any particular case"; also on Official Form 62, for an "order confirming composition." This form provides for a somewhat fuller recital than is found in the paper filed September 1st, as above, of the proceedings had regarding the composition confirmed; but there is no suggestion that any of the steps to be so recited had been omitted in this case. Following such recital in the official form are the concluding words, "It is therefore hereby ordered that the said composition be, and it hereby is, confirmed," which is for all practical purposes the same as the order made in this case, whatever may be said as to the recitals preceding it. No indication is found in the official form that the order is to be either "signed" or "docketed" by the District Judge, as prayed for in this petition.

This proceeding was not one of those to which General Order 37 (89 Fed. xiv, 32 C. C. A. xiv), makes the Supreme Court equity rules applicable. Nor was it covered by local rule 23, requiring all appealable decisions in equity or admiralty to be supplemented by a "formal decree giving effect thereto." In cases not governed by similar express requirements it cannot be said that an appealable order, decree, or judgment may never be embodied in an "opinion" so as to be rendered when the opinion is filed. Admitting that an opinion, generally speaking, only announces the court's conclusions or rulings and contemplates future settlement of the precise terms whereby they are to become operative in the case as an order, decree, or judgment, and that an opinion of this kind does nothing in the case from which an appeal will lie (Herrick v. Cutcheon, 55 Fed. 6, 5 C. C. A. 21; Rush v. Lake, 122 Fed. 561, 58 C. C. A. 447), we see no reason to doubt that an opinion, if sufficiently explicit to that effect, may, besides announcing the conclusions or rulings, embody the order, decree, or judgment which they require. When, as in this case, the conclusions or rulings announced leave no room for controversy as to the brief terms needed for embodiment of the resulting order, and the opinion concludes with an order in those terms, there can be no sufficient ground for saying that the order is not rendered by filing the opinion so including it.

We find no such difference in matter of substance between the recitals and order which the District Judge included in the opinion filed September 1st, and the official form, as would warrant us in saying that he did not on that day render a judgment confirming the composition, from which any appeal must be taken within 10 days. We see no reason to doubt that it would be entirely within his power now to enter the same order, in the full official form, as of September 1st. This, as in the case of a docket entry, "Bill dismissed," under Massachusetts practice, though proper for the regular completion of the records, would not be essential, but a mere extension of the order al-

ready entered, having relation to the time of entry of that order. Snell v. Dwight, 121 Mass. 348. The petitioners make no attempt to explain or excuse their failure to appeal within 10 days from September 1st, and therefore, in view of the local practice, fail to show that they have lost any substantial right.

[3] An application of this kind is an application to the discretion of the appellate court, and is not to be granted unless a clear case of necessity, in order to prevent substantial injustice, is made out; nor are the petitioners' interests alone in question. The effect of issuing the writ upon other interests involved are to be considered. It appears from this petition that on September 23d the court entered an order of distribution in the case, and that on the same day a pay order was issued, which, according to the docket entries, made part of the record, was on the same day mailed to the referee. No attempt by the petitioners to review this order of distribution, or the action of the court thereon, appears to have been made. Their present petition was not filed until September 28th.

In view of the effect which the issue of the writ prayed for might have upon proceedings had under the order of September 1st, we cannot consider such informality as here appears in the rendition of the judgment sufficient warrant for interference by this court in the manner desired.

The petition is dismissed, with costs.

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## BLANDIN v. OSTRANDER.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 92.

1. PROCESS ⊂⊃149—DISTRICT FOR BRINGING SUIT—SERVICE—FRAUD—EVIDENCE.

On motion to set aside the service of a summons for fraud, evidence *held* to show that defendant was induced by a friend of plaintiff to come into district of plaintiff's residence, so that plaintiff might serve him there, by false representations that the friend desired to meet defendant on business.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 202-205.]

2. PROCESS ⊂⊃65—FRAUD—LIABILITY OF PRINCIPAL FOR FRAUD OF AGENT.

Where plaintiff expected a friend to give him assistance in procuring service on defendant in the district of plaintiff's residence, he is responsible for the fraud of the friend in procuring defendant's presence, though he did not know that fraud was employed.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 51.]

3. PROCESS ⊂⊃61—DISTRICT FOR BRINGING SUIT—SERVICE—FRAUD—"FOUND WITHIN THE DISTRICT."

A party enticed by false representations by plaintiff, or one acting in his behalf, to enter the district for the purpose of making service upon him, cannot be said to be "found within the district."

[Ed. Note.—For other cases, see Process, Cent. Dig. § 69.]

4. PROCESS ⊂⊃166—DEFECTS—WAIVER OF OBJECTION—FRAUD.

The objection to the court's want of jurisdiction, because of the fraud by which defendant was brought into the district for service, is not

waived by defendant going to trial on the merits, especially when a bill of exceptions was prepared explicitly covering the refusal of the court to set aside the service.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 250–255.]

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

Action by George N. Ostrander against Amos N. Blandin. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions to set aside the service of the writ.

See, also, 211 Fed. 733.

Writ of error to review a judgment entered in the District Court for the Northern District of New York, in favor of Ostrander, who was plaintiff below, and against Blandin, in an action to recover commissions as broker upon the sale of certain timber standing on lands in the state of Vermont.

Hermon E. Eddy and Clarke C. Fitts, both of Brattleboro, Vt., and Joseph B. McCormick, of Granville, N. Y., for plaintiff in error.

Edward M. Angell, of Glens Falls, N. Y., for defendant in error.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. This action was tried, and plaintiff had a verdict, after defendant had moved to set aside service of summons, on the ground that he (a citizen and resident of New Hampshire) had by fraud and trick been induced to come within the state and Northern district of New York, in order that service might be effected. The motion was denied by the trial judge and exception duly taken.

[1] Though Blandin lived in New Hampshire, his business was at Wilmington, Vt., where through divers corporations he controlled or was much interested in certain timber lands. Ostrander wished to bring this action to recover a brokerage upon a sale to the Rich Lumber Company of some land, or of the lumber thereon standing, by a corporation in which Blandin was prominent; it being further alleged that the latter had lawfully assumed responsibility for the commission demanded.

One Hanley was superintendent for the Rich Lumber Company, a friend of Ostrander, and a resident of Albany, where the plaintiff maintains an office for the practice of law. Some months after the Rich Company had closed its purchase from the Blandin interests, Hanley telephoned Ostrander from Manchester, Vt., that he (Hanley) had made an engagement with Blandin for the following day at the Rensselaer Hotel in Troy. Ostrander said he was obliged for the information, and would send a man to serve Blandin. Service was made accordingly, and it is admitted that all this was done pursuant to an antecedent agreement on Hanley's part to let Ostrander know when and where he could find Blandin within New York.

There is conflict as to why, or upon what inducement, Blandin went to the hotel in Troy, when he did; but the evidence is to us very clear. That he went there to meet Hanley is admitted; that Hanley wrote and telegraphed to him from Manchester, Vt., asking an appointment for the place, day, and approximate hour of service is not denied, for

Hanley contents himself with saying that he and Blandin "met by appointment," while Blandin gives the particulars.

The latter, however, adds that Hanley had given him as a reason for the Troy meeting that the representative of a manufacturing establishment in want of hardwood lumber would be in Troy, and wished to meet Blandin. Having been served almost as soon as he arrived at the hotel, Blandin met Hanley, who said that the man whom Blandin was to meet was one Ventres, of Port Allegheny, Pa., who had just telegraphed that it was impossible to keep the appointment. Blandin deposes that he had no other reason for going to Troy except to meet Ventres, at Hanley's suggestion. Ventres swears that he never had any appointment to meet Blandin, nor any suggestion for such appointment from Hanley.

Hanley's version is that he wanted to see Blandin on behalf of his employer, the Rich Company, and for that purpose alone suggested the Troy rendezvous; a meeting place easy for Blandin, who was on his way to Rutland, Vt., and "it was convenient for him to stop at Troy overnight and take the morning train for Rutland." But Hanley does not say or suggest whence Blandin started for Rutland, nor deny that he communicated with Blandin from Manchester, Vt., on the day before service; Blandin being then at or near Wilmington. Nor does he explain why (if he made no engagement for Ventres) he telegraphed Blandin, "*We* will meet you" at the hotel in Troy on the day of service. The use of the plural is inexplicable, if Hanley tells the truth, while his statement (of course, denied by Blandin) that the latter was en route to Rutland is absurd. A trip from anywhere near Wilmington to Rutland, via Troy, is a serious tax upon credulity.

We find that Hanley falsely pretended a desire on the part of Ventres to see Blandin in Troy and on business, that Hanley did this in order to enable his friend Ostrander to sue in the latter's home jurisdiction, and that Blandin was thereby induced to go to Troy, when he otherwise would not have done so. It may be true that Hanley did wish to talk to Blandin about the timber lands of the Rich Company, but it is not true that he asked Blandin to come to Troy for that purpose.

[2] There is no evidence tending to show that Ostrander knew or suggested the means employed by Hanley to inveigle Blandin within the jurisdiction. But this is immaterial, for it is admitted that he expected assistance from Hanley in advising him regarding Blandin's whereabouts, and he thereby assumed responsibility for Hanley's methods.

[3] The law on this subject is familiar, though happily not often invoked. A party found within the jurisdiction may, of course, be there served; "but it cannot be said that he was so found there, if he was inveigled or enticed into the district for the purpose of making * * * service upon him, by false representations and deceitful contrivances of the plaintiff in the suit, or by any one acting in his behalf." Per Clifford, J., in Union Sugar Refinery v. Mathiesson, Fed. Cas. No. 14,397, 2 Cliff. 304, cited in Re Johnson, 167 U. S. at page 126, 17 Sup. Ct. 735, 42 L. Ed. 103. See also Olean, etc., Co. v. Fair-

mount, etc., Co., 55 App. Div. 292, 67 N. Y. Supp. 165, citing Metcalf v. Clark, 41 Barb. (N. Y.) 45, a case especially applicable.

[4] The ultimate question here presented is one of jurisdiction, for no jurisdiction can be permitted to rest upon a fraudulent service. The general rule, applicable here, is that defendant did not waive his objection by going to trial on the merits (Foster, etc., Co. v. Chinn, 202 Fed. at page 177, 122 C. C. A. 577, and cases cited), especially when (as here) a bill of exceptions was prepared covering explicitly the refusal of the court to set aside the service of summons. The practice below was that approved in Commercial, etc., Co. v. Davis, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782. We have no doubt of our jurisdiction to consider the point raised under Boston & Maine R. R. Co. v. Gokey, 210 U. S. at page 161, 28 Sup. Ct. 657, 52 L. Ed. 1002; a decision the more in point, because the jurisdictional point there considered was of the "alleged defective service" of a writ; there can be no more serious defect in the service of process than fraud.

We conclude that the trial court, and indeed no court, ever obtained jurisdiction of Blandin in this litigation, and it is therefore ordered that the judgment be reversed, and the cause remanded, with directions to the lower court to set aside the service of the writ.

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## In re UNITED STATES HAIR CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 111.

1. BILLS AND NOTES ⊂=359—BONA FIDE PURCHASER—CONSIDERATION—PAYMENT OF EXISTING INDEBTEDNESS.
The payment of an existing indebtedness from a firm to a corporation is valuable consideration for the transfer to the corporation of a check payable to the firm.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 924–936.]

2. BILLS AND NOTES ⊂=359—BONA FIDE PURCHASER—CONSIDERATION—PAYMENT OF EXISTING INDEBTEDNESS—PRESUMPTION.
Where a firm indorsed a check payable to a corporation to which it was indebted, and there is no evidence as to the purpose of such transfer, it will be presumed to have been a payment of the existing debt, since the law does not presume a gift or a fraudulent purpose.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 924–936.]

3. CORPORATIONS ⊂=428(12)—NOTICE—KNOWLEDGE OF AGENT—FRAUD.
Where the president of a corporation, engaged in a fraudulent scheme to convert the corporation's assets to his own use, obtained a check from another by false representations and indorsed it to the corporation, his interest in concealing the fraud by which he obtained the check rebuts the presumption that he informed the corporation of the facts, as it was his duty to do, so that his knowledge of the fraud is not imputed to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1761.]

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

4. BANKRUPTCY ⊂⊃318(3)—CLAIMS—MONEY RECEIVED—BONA FIDE PURCHASER OF CHECK.

A claim against a bankrupt for money received cannot be based on a check secured from claimant by fraud and indorsed to the bankrupt, who was a bona fide purchaser for value without notice.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 481.]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of the United States Hair Company, bankrupt. Petition by J. & W. Seligman & Co. to revise an order of the District Court disallowing the claim of petitioners as alleged creditors of the bankrupt. Order affirmed.

The bankrupt is a New York corporation of which one P. M. Musica was president during the occurrences giving rise to this litigation. He was also a partner in the firm of A. Musica & Son, which firm and its several members are likewise adjudicated bankrupts. Musica & Son had long been in business. In January, 1913, P. M. Musica organized the Hair Company, in pursuance of a fraudulent scheme of his own, having for its object the assumption of all the debts of Musica & Son by the corporation, and the ultimate conversion to his own use of such assets as said corporation might possess. The business of both firm and corporation was dealing in human hair.

On March 8, 1913, the Hair Company was a creditor of Musica & Son to an amount exceeding $17,000. On or before said date P. M. Musica had fraudulently converted to his own use upwards of $50,000 belonging to the Hair Company; but no other officer or director of the Hair Company was aware of this embezzlement, nor were they, nor any of them, cognizant of Musica's fraudulent purpose in organizing that corporation. On March 11, 1913, P. M. Musica caused a draft on London to be drawn by Musica & Son, which draft he sold to Seligman & Co. inducing said sale by false and fraudulent representations relied upon by Seligman & Co., who consequently bought the draft for $16,793.33, for which amount they gave P. M. Musica their own check to the order of Musica & Son. This check P. M. Musica, as a partner in Musica & Son, indorsed to the order of the Hair Company, delivered the same to that corporation, and thereupon, as president of the Hair Company, again indorsed it, and caused its deposit in the bank account of that corporation.

Shortly thereafter Musica's frauds were discovered, the draft on London was returned unpaid, Musica became a fugitive from justice, and both his firm and the Hair Company became bankrupt. There is no evidence produced, and none probably producible, as to the purpose or intent of P. M. Musica in regard to these transactions, except that hereinabove summarized. Seligman & Co. filed claim in the Hair Company proceedings, as for money had and received by the bankrupt. Such claim was disallowed by the referee and the District Court. To the expunging order this petition was filed.

Seligman & Seligman, of New York City (George W. Seligman, of New York City, of counsel), for petitioners.

Parker & Aaron, of New York City (Henry Root Stern and Rushmore, Bisbee & Stern, all of New York City, of counsel), for B. W. Brown, trustee in bankruptcy.

Before COXE, WARD, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Much argument has been devoted to matters considered by us unnecessary to decision; it being our opinion that this case lies within narrow limits.

[1] The existing indebtedness (irrespective of that caused by P. M. Musica's embezzlement) of Musica & Son to the Hair Company constituted a valuable consideration for the transfer of Seligman & Co.'s check to the bankrupt. In Holly v. Domestic, etc., Missionary Society, 92 Fed. 747, 34 C. C. A. 651, Wallace, J., thus summarized the law as recognized in the federal courts on this question:

"He who receives money or acquires negotiable paper in payment of a debt is a holder for value, and if he receives the money innocently, or acquires the commercial paper before its maturity, and without notice of any infirmity, has a perfect title, which cannot be subordinated to the equities of any third person."

[2] There is, to be sure, no direct evidence that P. M. Musica caused Seligman & Co.'s check to be transferred to the Hair Company and the proceeds deposited in its bank account "in payment of" any part of the then existing indebtedness of Musica & Son. But there is nothing to rebut the presumption arising from what was admittedly done. "It is undoubtedly the general rule that, in the absence of explanation, the presumption arising from the delivery of a check is that it was delivered in payment of a debt. * * * The law does not presume a gift." Nay v. Curley, 113 N. Y. 575, 21 N. E. 698, and cases cited. Neither, it may be added, does it presume a fraud. Therefore, since indebtedness at date of transfer is shown beyond doubt, "we must presume that a payment made * * * after such debt accrued was made on account of the debt. If it was really made on some other account, we must have some evidence of this before we can change the presumption." Masser v. Bowen, 29 Pa. 128, 72 Am. Dec. 619.

[3] The question remains whether the Hair Company received what the law presumes to have been a payment, innocently and without notice of any infirmity. This depends upon whether Musica's own knowledge of his own evil intent, and especially of the fraud which as a member of Musica & Son he had worked on Seligman & Co., is to be imputed to the bankrupt corporation because he was the president thereof; no other officer or director having any knowledge in the premises or any reason to suspect fraud or falsehood. On this point American National Bank v. Miller, 229 U. S. 521, 33 Sup. Ct. 883, 57 L. Ed. 1310, is conclusive. Changing to Musica the name of the corporation president who in that case occupied the rascal's position, a quotation from the decision is apt; for—

"the evidence before us presents another phase of the recurring question as to when and how far notice to an agent is notice to his principal. In view of the many decisions on the subject it is unnecessary to do more than to apply them to the facts of this case. If [Musica] within the scope of his office had knowledge of a fact which it was his duty to declare and not to his interest to conceal, then his knowledge is to be treated as that of the bank; for he is then presumed to have done what he ought to have done, and to have actually given the information to his principal."

See Carlisle v. Norris, 215 N. Y. 414, 109 N. E. 564; Stallo v. Wagner, 233 Fed. 383, 147 C. C. A. 315; also citations in Wilson v. Pauly, 72 Fed. 134, 18 C. C. A. 475.

It is obvious that Musica was in duty bound to declare the origin of the check whose proceeds he caused to be added to the funds of the Hair Company; but it is equally plain that, if he was to carry through for even a little longer the elaborate scheme to defraud of which the Hair Company was an innocent party, his interest was to conceal that which he knew.

[4] It follows from the foregoing that the Hair Company became a holder for value, in good faith, and without notice, of Seligman's check before its maturity; i. e., before its presentation to the bank upon which it was drawn.

Since the Hair Company, and therefore its trustee in bankruptcy, occupies the favored position of bona fide holder for value of commercial paper, the maker of such paper cannot be creditor of such holder, by reason of the way in which the paper originated.

For this reason the order appealed from is affirmed, with costs.

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BRENNEMAN, U. S. Marshal, et al. v. FAGERBERG.

(Circuit Court of Appeals, Ninth Circuit. February 5, 1917.)

No. 2679.

UNITED STATES MARSHALS ⊂=34—PARTNERSHIP ⊂=54—EVIDENCE—SUFFICIENCY.

In an action against a United States marshal and his deputy for an alleged wrongful levy of an attachment upon the property of plaintiff, evidence *held* to warrant a finding that plaintiff was not a partner of the debtor whose property was sought to be attached, and hence the attachment was illegal.

[Ed. Note.—For other cases, see United States Marshals, Cent. Dig. § 35; Partnership, Cent. Dig. §§ 77, 79.]

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska; Fred M. Brown, Judge.

Action by H. M. Fagerberg against F. R. Brenneman, United States Marshal, and another. There was a judgment for plaintiff, and defendants bring error. Affirmed.

The plaintiffs in error were defendants in the court below to an action there brought by the defendant in error here, the amended complaint in which, after alleging the official capacity of the defendants, set up, among other things, that on the 6th day of August, 1914, the plaintiff was the owner and in possession of a certain roadhouse and its furniture, outbuildings, and appurtenances, at a place called Blackburn, in Alaska, and within the jurisdiction of the court below, and also of five head of horses, and certain harness, saddles, sleds, and wagons, all of which were then and there seized by the defendants and by them wrongfully and by force taken from the plaintiff and withheld from him; that the plaintiff was at the time the property was so seized engaged in running the place as a public roadhouse, and was using the horses in doing a general freighting and packing business to the surrounding mining camps, in which business he was making an average daily profit of $30, and by which alleged unlawful acts the plaintiff was further damaged by loss of trade in the sum of $2,000, besides $1,000 on account of his personal expenses thereby incurred and necessarily to be incurred in the case, and that the value of the property not including the land upon which the buildings stood was $8,350. The prayer was for judgment for the return of the

property, or its value in the sum of $8,350 in the event delivery thereof could not be had, for damages at the rate of $30 a day from the time of such seizure, and additional damages in the sum of $3,000 and for costs.

The amended answer of the defendants to the amended complaint admitted their official capacity, put in issue the averments in respect to the value of the property and the amount of damages alleged, and for a further and separate answer set up, in substance, that on the 31st day of July, 1914, the plaintiff and one J. A. Fagerberg were joint partners engaged in operating the roadhouse mentioned, and were then indebted to the Carstens Packing Company in the sum of $6,274.47, besides interest, on which last-mentioned date that company commenced an action in the court below against the said J. A. Fagerberg to recover that alleged indebtedness, in which action a writ of attachment was duly issued and delivered to the defendant marshal for levy, under which writ he, through his deputy and codefendant, duly levied upon the property mentioned; that on or about July 15, 1913, the said J. A. Fagerberg, for the purpose of cheating and defrauding the creditors of the said alleged partners doing business under the alleged firm name of Fagerberg Bros., executed to the plaintiff in the present action a pretended bill of sale, pretending to transfer and convey to the plaintiff H. M. Fagerberg all of the property here involved, and also other described property of the alleged copartnership, which alleged conveyance the plaintiff in the present action accepted with full knowledge of its purpose, and without giving any consideration therefor; that the amount so sued for by Carstens Packing Company was at the time of the levy due from the alleged copartnership to that company, and was subject to the levy made by the defendants to the action.

The replication of the plaintiff put in issue the averments contained in the amended answer, and the case came on for trial before the court with a jury, which latter returned a verdict to the effect that the plaintiff was entitled to a return of the property, the value of which was fixed in the verdict, and assessed the damages sustained by the plaintiff by reason of its wrongful taking and detention at $4,725, and also returned answers to the following special findings submitted to them by stipulation of the parties:

"I. Was H. M. Fagerberg, on the 6th day of August, 1914, the sole and lawful owner of the property described in the amended complaint, that is, the Blackburn roadhouse, furniture and equipment, the barns and outbuildings, and the horses, harnesses, sleds, etc., as set forth in plaintiff's Exhibit A, attached to the amended complaint? He was.

"II. Was there a partnership existing between H. M. Fagerberg and J. A. Fagerberg at any time previous to the 6th day of August, 1914? There was not."

C. F. Wilt, of Tacoma, Wash., and Lyons & Ritchie, of Valdez, Alaska, for plaintiffs in error.

T. C. West, of San Francisco, Cal., and Donohoe & Dimond, of Valdez, Alaska, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The record shows that the complaint, in the action in which the attachment that was levied on the property here in controversy was issued, was filed by Carstens Packing Company against J. A. Fagerberg, and contained two counts, the first being based upon a judgment therein alleged to have been recovered by the plaintiff company in February, 1913, in the superior court of King county, state of Washington, against J. A. Fagerberg, for $2,651.72, with interest, no part of which, it was alleged, had been paid, and the second count alleged that between May 10, 1914, and June 12th of the same year the plaintiff sold and delivered to J. A. Fagerberg goods, wares, and merchandise of the agreed

value of $4,170.97, no part of which had been paid, and all of which was therein alleged to have been then due and owing to the plaintiff from the defendant J. A. Fagerberg.

We do not find it necessary to decide whether upon such allegations a writ of attachment issued in that action could be legally levied upon property in the actual possession of one not a party to the action, on the theory that he was a partner of the defendant thereto (see Mason v. Eldred et al., 73 U. S. [6 Wall.] 231, 238, 239, 18 L. Ed. 783), for the jury in the present case expressly found that the plaintiff in the present action, H. M. Fagerberg, was not at the time of the levy complained of, and never theretofore had been, a partner of J. A. Fagerberg, the defendant to the action in which the attachment was issued.

The main point contended for on behalf of the plaintiffs in error here is that such finding by the jury was unsupported by the evidence. It is true that the record contains some testimony, and shows some circumstances tending to support the claim that the two Fagerbergs, who, it appears, are brothers, were partners in the business at Blackburn, but there is much testimony disclosed and many circumstances shown by the evidence tending to support the conclusion of the jury that no partnership between them existed. And among the evidence going to sustain that conclusion is some of the testimony of Carstens, the president of Carstens Packing Company and its principal owner, in which he repeatedly stated that as early as 1907 he caused the store at Chititu, which had theretofore been conducted by a corporation called Nizina Trading Company, practically all of the stock of which was owned by himself and one Myers, to be turned over to J. A. Fagerberg, and that he thereafter caused the Carstens Packing Company to furnish him with goods, wares, and merchandise and from time to time also furnished him with money, at all times charging him therewith and looking to him alone for payment. It is undisputed that during much, if not all of, that time the plaintiff in the present case was a clerk in the store so conducted by J. A. Fagerberg, and there was evidence given tending to show, not only that Carstens was well aware of that fact, but of the further fact that his salary was in arrears to the extent of several thousand dollars. It further appears that subsequently J. A. Fagerberg transferred all of his property in Alaska to his brother H. M. Fagerberg, but before doing so offered to transfer it to Carstens or his company, which offer was declined.

We are unable to hold that the jury was not justified in finding that the defendant in error here was not a partner of J. A. Fagerberg.

The only other point in the case requiring special mention is the contention that the amount of damages awarded was unsupported by the evidence. As has been said, the jury awarded the plaintiff in the case $4,725, which amount was reduced by the court to $3,000 on the ground of excessiveness, and, the plaintiff consenting to the reduction, judgment was entered in his favor accordingly. An examination of the record satisfies us that the evidence justified the action of the trial court.

The judgment is affirmed.

## In re FRANK.

### Appeal of SHEIBLEY TYLER CO. et al.

(Circuit Court of Appeals, Third Circuit. February 23, 1917. Rehearing Denied March 9, 1917.)

No. 2187.

1. APPEAL AND ERROR ⟸959(1)—PLEADING ⟸236(1)—REVIEW—DISCRETION OF COURT—AMENDMENT TO PLEADING.
   The allowance of amendments to pleadings is in the discretion of the court, and such discretion will ordinarily not be disturbed.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825, 3826; Pleading, Cent. Dig. § 601.]

2. BANKRUPTCY ⟸84—INVOLUNTARY PROCEEDINGS—AMENDMENT—VERIFICATION OF PLEADING.
   Where it appeared at the trial on a petition for involuntary bankruptcy that the petition had not been verified, the refusal of the court to permit it to be verified, based on the ground that the testimony already given had shown that petitioners had no personal knowledge of the facts which they sought to verify as within their knowledge, was not an abuse of discretion.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 126–129.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

In the matter of involuntary proceedings in bankruptcy against Charles Frank. From an order of the District Court dismissing the petition (234 Fed. 665), the Sheibley Tyler Company and others, petitioners, appeal. Affirmed.

Alexander Simpson, Jr., Jerome J. Rothschild, and Joseph Sternberger, all of Philadelphia, Pa., for appellants.

Clinton A. Sowers and Robert M. Bernstein, both of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This is an appeal from an order of the District Court, dismissing an involuntary petition in bankruptcy against Charles Frank. The facts are as follows:

On November 20, 1915, the petition was filed, charging Frank with certain preferential payments, and also with the fraudulent removal of goods. He accepted service of the subpœna, entered an appearance and afterwards filed an answer, in which he denied the preferences and the fraudulent removal, but admitted the other averments in the petition. He demanded a jury trial, and while this was proceeding, certain facts were testified to concerning the verification of the petition. The paper is regular on its face, and the oath is certified to by Meyer Sack, notary public, but his statement was shown to be untrue. Sack had apparently been guilty of flagrant misconduct, for the paper had been presented to the petitioners by Daniel Meyers, an employé of one of the petitioners' attorneys, and none of the petitioners had

sworn to it before Sack. Meyers (who also may have been a notary) did not attempt to administer an oath, and Sack's conduct seems to have been a deliberate violation of duty, which he did not try to explain. Thereupon the bankrupt moved to dismiss the proceedings, alleging that the petition had not been properly verified, and that he had learned this fact for the first time at the trial. The petitioners offered orally to correct the admitted defect by taking the oath nunc pro tunc, but the court refused to permit the amendment and dismissed the petition. A week later, the petitioners presented a formal application praying to be allowed to verify either as of November 20, or as of February 18 the date of the oral application. They attached a duplicate creditors' petition properly verified, and asked also that the order of dismissal be vacated. To this the bankrupt filed an answer, and on the issue thus formed depositions were taken and counsel were heard, the result being that the District Judge refused the amendment again, and adhered to his former order. The present appeal attacks the correctness of all these rulings.

[1] The reasons that moved Judge Thompson will be found in his opinion reported in 234 Fed. 665. We think it unnecessary to add much to what he has there said. While amendments are, and should be, freely allowed in the federal courts, it must not be forgotten that the allowance is in the discretion of the court, and that such discretion will not ordinarily be disturbed. The record before us shows that the amendment was refused at the trial on the ground that "the defect was jurisdictional and was not susceptible of amendment * * * that, there being no verification made to the petition, there was nothing to amend." This is the principal point of attack, and the appellants rely on the decisions in Leidigh Carriage Co. v. Stengel, 2 Am. Bankr. Rep. 383, 95 Fed. 637, 37 C. C. A. 210; Re MacNaughton, 16 Fed. Cas. 323; Re Plymouth Cordage Co., 13 Am. Bankr. Rep. 665, 135 Fed. 1000, 68 C. C. A. 434; Re Vastbinder (D. C.) 11 Am. Bankr. Rep. 118, 126 Fed. 417; Millan v. Exchange Bank, 24 Am. Bankr. Rep. 889, 183 Fed. 753, 106 C. C. A. 327; Ryan v. Hendricks, 21 Am. Bankr. Rep. 571, 166 Fed. 94, 92 C. C. A. 78; Conway v. German, 21 Am. Bankr. Rep. 577, 166 Fed. 67, 91 C. C. A. 653; Re Pangborn (D. C.) 26 Am. Bankr. Rep. 40, 185 Fed. 673; Commonwealth v. Barnett, 199 Pa. 177, 48 Atl. 976, 55 L. R. A. 882; Walden v. Craig, 14 Pet. 147, 10 L. Ed. 393; Hardy v. Moore (D. C.) 4 Fed. 843; Bank v. Manufacturing Co., 52 Fed. 98, 2 C. C. A. 637, 18 L. R. A. 201; Bowden v. Burnham, 59 Fed. 752, 8 C. C. A. 248; Nevada Co. v. Farnsworth (C. C.) 89 Fed. 164; MacDonald v. Nebraska, 101 Fed. 171, 41 C. C. A. 278; and Mexican, etc., Co. v. Duthie, 189 U. S. 76, 23 Sup. Ct. 610, 47 L. Ed. 715.

[2] As it seems to us, however, the question thus raised need not be considered. Assuming, but not deciding, that the defects were jurisdictional but were also amendable, it is apparent from the opinion of the district judge that he rested his final action on another ground as well. The original petition contained positive averments (not averments on information and belief) that the acts of bankruptcy charged had been committed, and the amended petition contains the same aver-

ments. The record before us does not show what the petitioners testified to during the trial, but the trial judge (who heard this testimony) evidently regarded it as a contradiction of "the facts now sworn to," that is, the facts presented to him on the formal application to amend. He based his refusal, at least in part, on this contradiction, and as we have no means of reviewing the correctness of his statement we accept it as true. If true, the court was asked to permit the filing of an amended petition in which the petitioners swore to positive averments of fact, although they had already testified that they had no such knowledge as would justify the averments.

In refusing to allow the appellants to take such a contradictory attitude, we cannot say that the court abused its discretion, and accordingly the orders appealed from are affirmed.

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## COLEMAN et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. March 6, 1917.)

No. 2909.

POST OFFICE ⟸50—OFFENSES—EVIDENCE—SUFFICIENCY.

In a prosecution under Pen. Code (Act March 4, 1909, c. 321) §§ 190, 192, 35 Stat. 1124, 1125 (Comp. St. 1913, §§ 10360, 10362), for breaking into a post office with intent to commit larceny and for stealing stamps and money therein, the property of the United States, evidence *held* sufficient to go to the jury.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87–89.]

In Error to the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

J. W. Coleman and another were convicted under Pen. Code, §§ 190, 192, of breaking into a post office with intent to commit larceny, etc., and they bring error. Affirmed.

Geo. Du Relle, of Louisville, Ky., for plaintiffs in error.

Perry B. Miller, U. S. Atty., of Louisville, Ky.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Plaintiffs in error and one Brayton were arrested, by virtue of an indictment under sections 192 and 190, respectively, of the Penal Code of the United States, for breaking into the post office at Smithland, Ky., with intent to commit larceny, and for stealing postage stamps and money belonging to the United States. Coleman and Harding (hereinafter called defendants) were tried; Brayton did not appear at the trial. At the conclusion of the testimony defendants asked direction of verdict in their favor, which was denied. There was a verdict of guilty, followed by judgment.

The only question presented here is whether the peremptory instruction in defendants' favor should have been given; that is to say, whether the evidence was sufficient to warrant the verdict. Upon a careful

consideration of the testimony, we think the motion to direct verdict was properly denied.

Smithland is a town of a few hundred inhabitants located near the Ohio river, about 12 miles above Paducah; it has no railroad and no electric lights; its mail is brought in from a point several miles distant. The post office door was opened by a key on the night of March 19–20, the safe blown open apparently by nitroglycerine, and the stamps and money stolen therefrom, including considerable silver change. There were found in the store, among other things, a pick and wrench which the testimony tended to show were stolen on the night of the post office robbery from a general store situated a short distance from the post office; this store also having been entered by opening the door with a key. In blowing open the safe a cup of soap had been made in the upper end of the door, and soap had also been used in filling up the space in the door openings, to facilitate explosion. The soap had been spattered upon various articles in the vicinity of the safe. There was also found a piece of cloth, apparently brought there by the burglars.

The defendants and Brayton had been in and about Paducah for several weeks before the robbery. There was evidence tending to show that they had no legitimate business there, that they were intimately associated, and that at different times and places they registered, in the case of one or more of the parties, under names not always the same, and with given places of residence not always the same; also that about three weeks before the robbery defendants and a third person came to Smithland in a gasoline motor boat owned by defendant Coleman; that they paid a short visit to the post office, with the announced purpose of getting mail, and stayed at a hotel at Smithland overnight; that the next morning they had the boat pump repaired in the rear of the store referred to, and had opportunity to see the location of the pick and wrench which were later stolen on the night of the post office robbery. There was evidence further tending to show that, on the evening of and before the robbery, a gasoline boat came up the river and landed a fraction of a mile below Smithland, and that the tracks of three persons were found the next morning leading from the place where the boat landed toward Smithland, and returning; that toward the following morning, and before daylight, a gasoline boat went down the river between Smithland and Paducah; that that morning Coleman's launch was found moored perhaps a mile below Paducah, not at a regular boat landing, and that Coleman had the boat taken away for repairs; there was evidence having a tendency to show that it was Coleman's gasoline boat referred to which made this up and down trip on the night of the robbery.

Defendants and Brayton were arrested at Paducah on the next evening after the robbery. Soon after the arrest there were found in a grip, which the testimony tended to show belonged to defendant Harding, two pistols, a flashlight, a candle, and a pair of pants like the coat then worn by Coleman. There was testimony that on each of the three arrested was found more or less silver change of the kind

taken from the post office, and that on some of the money taken from one of the defendants was found soap; that neither of the three would give any account of himself; that in Brayton's grip were found two pistols, on one of which was soap—the evidence tending to show that one of these pistols belonged to Coleman. There was also testimony that on July 2d following the robbery a grip was found buried on the river bank, from 50 to 100 yards from the point where Coleman's boat was found moored on the morning following the robbery. In this buried grip were found a large quantity of stamps, identified by package number as the stolen stamps in question; also burglars' tools, fuse, and caps, and in addition a piece of cloth resembling that found at the post office, also a bunch of keys, one of which would unlock the post office, and another would unlock the store door.

There was further testimony tending, in greater or less degree, to connect defendants with the robbery. While the testimony was entirely circumstantial, it is a commonplace that circumstantial evidence, if of such character as to produce conviction of guilt beyond a reasonable doubt, is sufficient to sustain a judgment of conviction. As already said, we think the testimony presented a case supporting the verdict rendered.

The judgment of the District Court is accordingly affirmed.

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## CENTRAL R. CO. OF NEW JERSEY v. PASLICK.

(Circuit Court of Appeals, Second Circuit. January 23, 1917.)

No. 65.

COMMERCE ⇐27(8)—INJURIES TO SERVANT—"ENGAGED IN INTERSTATE COMMERCE"—REPAIRING CAR.

A car repairer, employed by an interstate carrier, who was injured while working on a car belonging to another interstate carrier, and which must be returned in interstate commerce, is not engaged in interstate commerce within the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]).

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

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

Action by Joseph Paslick against the Central Railroad Company of New Jersey. Judgment for plaintiff, and defendant brings error. Reversed.

Henry L. de Forest, of New York City, for plaintiff in error.
Frank J. Felbel, of New York City, for defendant in error.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. Paslick sued in reliance on the federal Employers' Liability Act; and the only question here presented is whether he received the injuries for which action is brought at a time

when he was engaged in the defendant in error'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. 248, 58 L. Ed. 591, Ann. Cas. 1914C, 159.[1] That he was a servant of the railroad company is admitted. Plaintiff below was a helper in the blacksmith shop appurtenant to and part of the repair establishment of the railroad company, a carrier admittedly engaged in interstate commerce. It is, in effect, the finding of the jury that Paslick was hurt by the negligent descent of a steam hammer which at the time was working on the repair of a Baltimore & Ohio car. From this fact it is urged that the repair of a car—an instrumentality of commerce belonging to another interstate carrier, which must have come from another state, would naturally there return, and is only used and usable in that movement which is commerce—brought Paslick within the Pedersen Case, supra, and enabled him (as may be inferred from the pleadings) to evade the operation of the New Jersey Workmen's Compensation Law (P. L. 1911, p. 134).

It is not profitable to discuss the cases following the Pedersen decision, further than to point out that in Chicago, etc., R. R. v. Harrington, 241 U. S. at page 180, 36 Sup. Ct. 517, 60 L. Ed. 941, it was held that the true test of employment in interstate commerce in the sense intended by the statute 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?*" This decision was filed after trial in the court below, and was here relied on as leaving to the jury the duty of answering under the evidence herein the question above stated. On the day this writ was argued, however, the Supreme Court rendered judgment in Minneapolis, etc., Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. —— (No. 420 Oct. Term, 1916), and declared in respect of a plaintiff who was repairing an engine which had been used in hauling trains both in intrastate and interstate commerce, and was so used after the plaintiff's injury, that such facts did not show engagement in interstate commerce.

"This [said Holmes, J.] is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. * * * It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate" or not. "At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

This language affixes a meaning to evidence legally identical with that offered herein, and furnishes a rule of interpretation binding on lower courts. If the repair of an engine in the intervals between its interstate occupations is not sufficiently close to commerce to be a part of it, the repair of a car, which moves only when the engine hauls it, is certainly no closer.

Judgment reversed.

[1] 34 Sup. Ct. 305.

## HOLBROOK, CABOT & ROLLINS CORP. v. SPERLING.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 56.

ACTION ⇐23—RELEASE—MISTAKE—ACTION AT LAW.

While plaintiff, in an action at law, can admit that because of fraud he signed the paper called a release, but that he did not execute it as a release, re cannot avoid a release signed by him as such, for omission of a provision of the contract agreed on, even if it was omitted by mutual mistake; his remedy in such case being in equity.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 146–152.]

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

Action by Hugo Sperling against the Holbrook, Cabot & Rollins Corporation. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for a new trial.

It appeared without contradiction that Sperling had been an employé of the Holbrook Corporation, and in its service received personal injuries. For these injuries he signed a release in ordinary form, whereby he discharged the corporation from all "demands of any kind" which he then had or might thereafter have "for personal injuries, breach of contract, or any other liability whatsoever by reason of any and all matters and things" occurring on the day he was hurt. The expressed consideration for this release was a weekly allowance to be paid him until such time as he should be able to resume work. Sperling recovered and resumed his occupation with the Holbrook Company. Some six months after such resumption of work he was discharged, and then began an action against his late employer upon the same demand that he had released. That action was dismissed. He then instituted the present suit, claiming that it was a part and condition of the compromise evidenced by the release that he should be employed by the defendant for the balance of his natural life, and assigned as breach of that contract the discharge aforesaid.

Defendant denied any such contract, agreement, or promise, and alleged that Sperling's discharge was caused by his own misconduct, in that he became intoxicated and attempted to assault a fellow workman with an ax. The release was pleaded in bar of this suit, together with other defenses; but the trial court submitted it to the jury to declare whether the contract sued on had been made, and, if made, broken. Sperling had a verdict, and this writ was sued out to the judgment thereupon.

Benjamin Patterson, of New York City (George Bell, of New York City, of counsel), for plaintiff in error.

Baltrus S. Yankaus, of New York City (Frank J. Felbel, of New York City, of counsel), for defendant in error.

Before COXE, WARD, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). This action is at law, and the complaint does not attempt to allege fraud. The plaintiff below can read and write, and admitted that he had read at least a portion of the release he signed, but averred that it did not represent all of the promises made to him by the representative of his employer who settled the claim, viz. it omitted the agreement for life employment.

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

Under the pleadings in this action and the facts shown the release was a bar. Where fraud is asserted, a plaintiff may admit that he signed a paper called a release, yet assert that he did not execute it as a release; and if the jury finds fraud in the execution of the instrument it may be held for naught. De Lamar v. Herdeley, 167 Fed. 530, 93 C. C. A. 239; and see Drobney v. Lukens, etc., Co., 204 Fed. 11, 122 C. C. A. 325. This is as far as it was possible to go in an action at law, where a release under seal had been pleaded. On this plaintiff's own story, there was no more than an omission from a document intended as a release, and which the plaintiff examined before execution being able to read and understand it. Even mutual mistake will not at law overcome such a document, nothing but proven fraud in its execution will do that. His remedy, if any, was in equity.

Judgment reversed, with costs, and cause remanded for a new trial.

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## SCHUNNEMUNK CONST. CO. v. SBARATTA.

(Circuit Court of Appeals, Second Circuit. January 16, 1917.)

No. 125.

MASTER AND SERVANT ⊂=286(3)—INJURIES TO SERVANT—QUESTION FOR JURY—SAFE PLACE TO WORK.

Where an employer directed an ignorant immigrant to load gravel from a gravel bank into a wagon by standing between the wagon and the gravel bank, without warning him of the danger or taking any precautions, and the gravel bank caved on him and killed him, the question whether the employer negligently failed to furnish a safe place to work was properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1010.]

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

Action by Giuseppe Sbaratta, as administrator of Rosario Sariti, deceased, against the Schunnemunk Construction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

On writ of error to review a judgment in favor of the defendant in error who, as administrator of Rosario Sariti, deceased, brought this action to recover damages for the death of the said Sariti. His death is alleged to have been caused by the negligence of the Schunnemunk Construction Company in failing to provide suitable means and appliances and a safe place in which to work, while he was engaged, with others, in removing gravel from a bank located at Chester, N. Y. The jury found a verdict in favor of the plaintiff for $4,500.

Elwood C. Smith, of Monroe, N. Y. (Herbert C. Smyth and James B. Mackie, both of New York City, of counsel), for plaintiff in error.

Nelson L. Keach, of New York City (Samuel F. Frank, of New York City, of counsel), for defendant in error.

Before COXE, and WARD, Circuit Judges, and AUGUSTUS N. HAND, District Judge.

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

COXE, Circuit Judge. The plaintiff's intestate was killed by being buried under a gravel bank where he and two other laborers were at work. He was dead when his body was discovered. He had been in this country but three days when the accident occurred. The wagon which was being loaded with gravel was only a few feet from the bank and in this space the plaintiff's intestate and two other Italians were, by the direction of the defendant, at work shoveling gravel, when the upper part of the bank suddenly slid down and caused the accident. There were minor disputes upon the evidence but these were disposed of by the verdict of the jury. The testimony warranted the finding that plaintiff's intestate, an ignorant Italian, was directed by the defendant's agents to do work of a dangerous character without providing safeguards or informing him of the hazardous conditions which he was likely to encounter and of the method of avoiding them.

That the accident might have been avoided if the defendant had taken a few necessary precautions is clearly shown. The work might have been begun at the top and sufficient gravel removed there to prevent the sliding of the entire bank. Surely no more dangerous conditions could have existed than those adopted by the defendant. By sending the men to work beneath the almost perpendicular embankment with the horses and wagon very near the base, they were making the theatre of operation so contracted that escape was rendered well nigh impossible if a slide occurred. The case was presented to the jury by a clearly stated and impartial charge and no exception relating thereto has been argued in this court.

We are fully convinced that it would have been error to have taken the case from the jury. The controlling question was one of fact. An ignorant man was required by his employer, who knew or should have known the character of the business in hand, to work beneath an almost perpendicular wall of gravel which fell without warning and buried the plaintiff's intestate under a mass of earth and stones. This occurred without any precautions on the part of the defendant or notice that such danger was to be apprehended.

We think the record shows that the paramount and controlling questions were of fact and that it would have been error to withdraw these questions from the jury.

The case was properly sent to the jury and the judgment is affirmed with costs.

M. C. KISER CO. et al. v. CENTRAL OF GEORGIA RY. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 5, 1917.)

No. 3011.

Appeal from the District Court of the United States for the Southern District of Georgia; Wm. Wallace Lambdin, Judge.

Suit by the M. C. Kiser Company and others against the Central of Georgia Railway Company and others. Complainants appeal from an order vacating a temporary restraining order and refusing to grant an interlocutory injunction. Affirmed.

For opinion below, see 236 Fed. 573.

William A. Wimbish and Charles E. Cotterill, both of Atlanta, Ga. for appellants.

T. M. Cunningham, Jr., of Savannah, Ga., for appellees.

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

PER CURIAM. The appellants brought their bill against the Central of Georgia Railway Company and the Ocean Steamship Company of Savannah, praying that the appellees be enjoined from increasing the rates on boots and shoes from Boston, Providence, and New York to Atlanta until the Interstate Commerce Commission should hear and determine the reasonableness and justice of the existing rates. The rate from said points of origin to Atlanta was 95 cents per hundred pounds. On August 1, 1916, the principal carriers participating in said traffic, including the appellees, filed and published in accordance with the Act to Regulate Commerce, a tariff to become effective September 15, 1916, increasing the rate on said commodity to $1.19 from Boston and Providence to Atlanta, and $1.14 from New York to Atlanta.

The bill was filed September 12, 1916, and on the same day a temporary restraining order was granted, and a rule to show cause why an interlocutory injunction should not be granted was issued, returnable September 22, 1916. Upon the hearing of the rule to show cause, the temporary restraining order was dissolved, and the interlocutory injunction was refused. This appeal is from an order vacating the temporary restraining order and refusing to grant an interlocutory injunction.

We find that the reasons given by the District Judge in 236 Fed. 573, fully cover the points in the case and justify the conclusion reached.

The decree is affirmed.

## DOYLE v. MITCHELL BROS. CO.

(Circuit Court of Appeals, Sixth Circuit. February 16, 1917.)

No. 2864.

On motion for rehearing. Denied.

For opinion on appeal, see 235 Fed. 686, — C. C. A. —. See, also, 225 Fed. 437.

PER CURIAM. We have held the application for rehearing in the expectation that the decision of the Supreme Court in Von Baumbach v. Sargent, 242 U. S. 503, 37 Sup. Ct. 201, 61 L. Ed. —, might affect the reasoning or the conclusions of our opinion in this case. The opinion in that case was announced on January 15, 1917. It does not consider those features of the case that are here involved, and so does not add to the existing knowledge on those subjects.

The merits of the petition have been considered, and we are not convinced that there was any substantial error in the opinion.

The petition is denied.

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## NORTHROP et al. v. DRAPER CO.

(Circuit Court of Appeals, First Circuit. January 9, 1917.)

No. 1236.

1. PATENTS ⊂=137—CONSTRUCTION AND OPERATION OF ASSIGNMENT—RIGHT OF ASSIGNOR TO REISSUE.

An assignee of the Northrop patentee, No. 987,817, for a misthreading device for looms, *held* entitled to a specific enforcement of the implied covenant of the patentee, as assignor, to execute an application for a reissue on the ground that through inadvertence the language of the specification and certain of the claims misstated the mode of operation of a certain feature of the device intended to be covered by the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 199.]

2. PATENTS ⊂=137—ASSIGNMENT—CONSTRUCTION—IMPLIED COVENANT TO APPLY FOR REISSUE.

An assignment of an application for a patent to the assignee, his heirs, executors, administrators, and assigns, with the patent to be issued thereon and any right to a reissue, carries with it an implied covenant, which runs with the grant, that the assignor will make application for a reissue in case the patent manifests an intention to claim a feature disclosed therein, but which it fails to state accurately in a claim; and such implied covenant is not defeated as to subsequent assignees by a further covenant, personal to the first assignee, and which does not run with the grant, to make such an application if the assignee shall deem it necessary.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 199.]

3. WORDS AND PHRASES—"HOPPER MISTHREAD"—"REAL MISTHREAD."

As applied to looms, a "hopper misthread" is one that occurs following the act of replenishment, by the thread becoming broken at the moment of transfer or prior to the arrival of the shuttle in the box at the side of the loom remote from the hopper. A "real misthread" occurs after the shuttle is replenished by a new bobbin, a laying of filling in the shed on the first pick of the shuttle, and failure of filling on the return pick, due to

breakage. In the case of a hopper misthread no filling is laid on the first pick, or on the return pick of the shuttle; while in the case of a real misthread filling is laid on the first pick, but not on the return pick, and, as the shuttle, under such circumstances is not replenished when it reaches the hopper side of the loom, no filling is laid on the subsequent picks of the shuttle preceding replenishment.

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

Suit in equity by the Draper Company against Jonas Northrop and another. Decree for complainant, and defendants appeal. Affirmed.

Horace Van Everen, of Boston, Mass., for appellants.

W. K. Richardson, of Boston, Mass., for appellee.

Before BINGHAM, Circuit Judge, and HALE and MORTON, District Judges.

BINGHAM, Circuit Judge. This is a bill for specific performance of an alleged agreement, wherein it is sought to have the defendant Northrop execute an application for a reissue patent covering an invention made by him and now owned by the plaintiff, and to have the defendant Draper restrained from in any way interfering with Northrop's taking such action as may be necessary to obtain the reissue. The case is here on an appeal by the defendants from a decree of the District Court ordering Northrop to execute the application.

[1] It appears that on March 28, 1911, United States letters patent No. 987,817 were issued to defendant Draper, assignee of Northrop, on an application filed by the latter July 12, 1910, for an invention for misthreading devices for looms, and that on September 8, 1911, the defendant Draper assigned the invention and patent to the plaintiff. In February, 1915, the plaintiff discovered that the language employed in the specification of the patent (page 3, line 86) misstated the mode of operation of a certain feature of the device, and that a like misstatement was incorporated in claim 8 (lines 103 and 104, page 4), rendering it defective. It was also discovered that in claim 6 the sequence of events upon which, in the operation of the device, it was stated in the claim that the loom would stop, was defective, in that the loom would not stop upon such sequence. Shortly after discovering these defects the plaintiff sent an application for reissue, embodying the desired corrections, to the defendant Draper, with a request that he present it to Northrop for his signature. Draper later returned the application unexecuted, with the statement:

"That if the claims were amended as proposed by the reissue they would be broader than the invention * * * which the application for the original patent was intended to cover."

On this appeal the defendants concede that the defects complained of in the specification (line 86, page 3) and in claim 8 (lines 103 and 104, page 4) are obvious defects, and the desired corrections should be made, as they may properly be predicated upon the invention intended to be patented in the original patent. The controversy, therefore, is limited to the correction which the plaintiff asks to have made in claim 6. The defendants' contention is that the correction sought as to claim

6, if allowed, would result in introducing into the reissue patent a claim for a different invention from the one patented or intended to be patented in the original patent, and would also result in a broadened reissue.

The Revised Statutes of the United States provide:

"Sec. 4916. Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the Commissioner shall, on the surrender of such a patent and the payment of the duty required by law, cause a new patent for the *same invention*, and in accordance with the corrected specification, to be issued to the patentee, or, in the case of his death or of an assignment of the whole or any undivided part of the original patent, then to his executors, administrators, or assigns, for the unexpired part of the term of the original patent. * * * The specifications and claim in every such case shall be subject to revision and restriction in the same manner as original applications are; * * * but no new matter shall be introduced into the specification, nor in case of a machine patent shall the model or drawings be amended, except each by the other." Comp. St. 1913, § 9461.

In Stafford Company v. Coldwell-Gildard Co., 202 Fed. 744, 121 C. C. A. 110, Judge Putnam, in discussing the above statute, said:

"Two leading and imperative requirements stand in the path of a reissue: First, that the error must have arisen 'by inadvertence, accident or mistake'; and, second, that the new patent is to be for the 'same invention.' Consequently, it must appear, in some manner provided by law, that the invention for which the reissue is granted was in the contemplation of the patentee at the outset, and that he failed to acquire it by reason of 'inadvertence, accident or mistake.'

"Starting with these propositions, the rules which govern the commissioner and the courts are those applied by the fundamental principles of equity, that, in order to relieve against 'inadvertence, accident or mistake,' there must be clear and positive proof that there was such 'inadvertence, accident or mistake,' and that the party asking for relief acquires no more than he was originally entitled to. The burden of maintaining the facts to which these requirements relate is of a character that requires clear and positive proof, in harmony with the universal rules of equity not to disturb the existing status except by proof of that character. No mere inferences can take the place of such proof. Ordinarily, what is called for by the words 'same invention' should appear in some way on the face of the original patent, and it cannot be gathered from mere inferences or suggestions with reference to what the patentee might or might not have conceived."

The first question, therefore, is: What was the invention intended to be covered by the original patent as manifested by the terms employed in that instrument?

The patent is entitled "An improvement in misthreading devices," and relates particularly to looms of the filling replenishing type, wherein at desired times a fresh supply of filling is automatically furnished. In looms of this character the shuttle is thrown from the hopper side of the loom through the shed, across the warp, to the opposite side of the loom. Following this flight of the shuttle the lay beats up, pressing the thread just laid against the fell of the cloth, and is at once withdrawn. The shuttle then makes its return flight through the shed to the hopper side of the loom, and is then followed by another beat of the lay, and so on. The first pick of the shuttle and the succeeding

beat of the lay are known respectively, as the "detecting pick" and the "detecting beat," and the return pick of the shuttle and the following beat of the lay are known as the "nondetecting pick" and the "nondetecting beat." When the filling becomes exhausted, or breaks, a new bobbin is transferred from the hopper to the shuttle to replenish the filling, and this is done without stopping the loom. The free end of the thread of each bobbin is attached to the hopper, so that, when the shuttle containing the bobbin is thrown through the shed, the thread is left in the shed to be beaten up by the lay.

[3] In these looms certain defects of operation are liable to occur when replenishment takes place. They are spoken of in the patent as hopper misthreads and a real misthread. A hopper misthread is one that occurs following the act of replenishment by the thread becoming broken at the moment of transfer or prior to the arrival of the shuttle in the box at the side of the loom remote from the hopper. A real misthread occurs after the shuttle is replenished by a new bobbin, a laying of filling in the shed on the first pick of the shuttle, and failure of filling on the return pick due to breakage. This occurrence usually takes place because the shuttle is not properly threaded following replenishment. It will be noted that in the case of a hopper misthread no filling is laid either on the first pick or the return pick of the shuttle, while in the case of a real misthread filling is laid on the first pick, but not on the return pick, and, as the shuttle, under such circumstances, is not replenished when it reaches the hopper side of the loom, no filling is laid on the subsequent picks of the shuttle preceding replenishment.

Prior to the patent in suit devices had been made to stop the loom on two hopper misthreads in succession, but in such devices, should filling be laid once on a detecting pick following a hopper misthread, the stop mechanism would return to its normal or initial position, so that, to effect stoppage of the loom thereafter, two successive hopper misthreads were required, with the result that loom stoppage for a real misthread was precluded, and the loom would continue to operate until the hopper became exhausted.

In the specification, where the inventor first considers the object to be accomplished by his invention, he states it to be:

> "To provide means whereby, if filling is absent on two alternate detecting beats, the loom will stop, regardless of whether filling is present or not on the intermediate beat."

This is only another way of saying that, if filling is absent on two successive hopper misthreads following replenishment due to a first absence of filling, or if a real misthread occurs following replenishment due to a first absence of filling, the loom will stop, and also for saying that, if filling is absent on a first detecting beat, causing replenishment, present or absent on the next detecting beat, and absent on the next detecting beat, the loom will stop, and manifests an intention to disclose means for loom stoppage upon two successive hopper misthreads and also upon a real misthread. All three statements are but different methods of saying the same thing.

There is also one other place in the specification where the inventor states the object of his invention as follows:

"Thus in the present invention it will be noted that upon the occurrence of a double hopper misthread the loom will stop, and will also be stopped by the occurrence of a real misthread; in other words, the loom will stop if on two alternate detecting beats the filling be absent, that is, if it be absent on one detecting beat, present on the next detecting beat, and absent on the next detecting beat the loom will stop."

In the foregoing sentence it is apparent that the inventor was undertaking to state the object of his invention in three ways, each of which is the equivalent of the other two. He there states as his first proposition that the loom will stop "upon the occurrence of a double hopper misthread," and also "by the occurrence of a real misthread"; and, in prefacing the second and third clauses of the sentence by the phrases "in other words" and "that is," he indicates that he was undertaking to restate in different language in each clause the same thing which he had previously stated in the first clause. There can be no question but that the second clause states the exact equivalent of the first clause; and the third clause, although clearly intended to state the equivalent of the two preceding clauses, is manifestly defective and incomplete, for it fails to employ language conveying the equivalent idea of loom stoppage on the occurrence of a double hopper misthread. To have carried out the idea intended to be conveyed, the third clause should have read:

"That is, if it be absent on one detecting beat, present *or not* on the next detecting beat, and absent on the next detecting beat the loom will stop."

Its meaning, however, is clear when read in connection with what precedes it.

We have also examined carefully the remaining provisions of the specification, including the drawings, and, in particular, the portions providing means and describing their workings for accomplishing loom stoppage, and find that they are all based upon the idea of providing means for loom stoppage upon the occurrence of either of two sequences—a double hopper misthread or a real misthread—and that no means are disclosed in the specification for loom stoppage upon the occurrence of a sequence consisting of a real misthread alone.

Now, as to the claims of the patent: An examination shows that some of them claim means for loom stoppage in general terms, while others set forth the particular means by which this object is to be accomplished. But in every one of them, apart from claim 6, means are claimed for loom stoppage upon the occurrence of two sequences consisting, one of a double hopper misthread and the other of a real misthread, and not upon the occurrence of a single sequence consisting of a real misthread alone.

Thus far it is clear, both as to specification and claims, that the inventor has not disclosed an intention of providing means for loom stoppage upon the occurrence of a sequence constituting a real misthread alone. It remains, however, for us to consider claim 6. This claim reads:

"In a loom of the character described, the combination of means for detecting the presence or absence of filling in the shed, filling replenishing controlling means adapted to be actuated when filling is absent on a detecting beat, and means for stopping the loom when the filling is absent on a detecting beat *following* replenishment, present on the next detecting beat, and absent on the next detecting beat."

It is conceded that the claim purports to state that the loom will stop on the occurrence of the following sequence: Absence (replenishment), absence (replenishment), presence, absence; that it calls for mechanism for loom stoppage on the occurrence of a single sequence composed of a hopper misthread and a real misthread; and that the specification discloses no means by which the loom will stop upon that sequence.

The plaintiff desires to amend the claim by striking out the word "following," and inserting in its stead the word "causing," so that the portion of the claim material for our consideration would read:

"Means for stopping the loom when the filling is absent on a detecting beat *causing* replenishment, present on the next detecting beat, and absent on the next detecting beat."

It is thus seen that the unamended claim calls for means for loom stoppage upon the sequence of a hopper misthread and a real misthread, and that the specification does not provide means for loom stoppage, either upon the sequence of a hopper misthread and a real misthread, or upon that of a real misthread alone.

While it is true that the specification does not disclose means for loom stoppage upon a real misthread alone, it is equally true that amended claim 6 does not call for means which will function on such a misthread alone, but for means that will function on a real misthread, even though they will also function upon a double hopper misthread, and that, to this extent, the intention of the inventor as to this feature of his invention is manifest: (1) Because it is not covered by the other claims of the patent; and (2) because claim 6, as originally drawn, is wholly inoperative and could have been intended to cover no other feature of the invention. In other words, although the means disclosed in the specification function in two ways, the inventor is not precluded from having a claim for those means based upon their functioning in one of the ways disclosed, and is entitled to have it, inasmuch as his intention to claim it is disclosed in the patent.

Whether a device disclosing means that would operate on a real misthread alone would infringe claim 6 as amended is of little consequence in this proceeding, as we think the patent clearly discloses an intention on the part of the inventor to claim means that will function on a real misthread and produce loom stoppage, although they may also function on a double hopper misthread, and that the use in the claim of the word "following," instead of "causing," was, as found by the court below, due to "inadvertence, accident or mistake" on the part of the solicitor.

We do not regard the rule—that a reissue which broadens a patent cannot be had after two years from the granting of the patent—as ap-

plicable to the facts in this case: (1) Because amended claim 6 is not broader than original claim 6, as each calls for a single sequence of misthreads; and (2) because amended claim 6, as understood, does not introduce a distinct invention from that shown in the patent, but covers means disclosed in the specification which the inventor intended to claim in original claim 6.

As to the defendants' contention that it was the duty of the plaintiff, immediately after purchasing the patent, to have caused an examination to be made for the purpose of ascertaining whether claim 6 covered the scope of the intended invention and the detection of any error that might exist therein, we think it sufficient to say that the evidence discloses that, shortly after the plaintiff purchased the patent, it caused its experts to make an examination of it with this object in view, and that their examination failed to disclose the defects now complained of, and that they were not discovered until February, 1915, when the plaintiff's expert, on examining a device which the defendants had put upon the market, discovered that it embodied means causing loom stoppage on a real misthread, and, knowing that this was one of the fundamental features of the patent in question, again made an examination of the patent and discovered the defects here complained of. This evidence, instead of tending to show a failure on the plaintiff's part to take reasonable steps for the ascertainment of any defects that might exist in the patent, discloses that it took such steps as it, in the exercise of reasonable care and prudence, was called upon to take, and that the failure to discover the defect in claim 6 was due to no fault on its part.

Furthermore, we do not think that the defendants are in a position to assert rights due to action taken by them in reliance upon the plaintiff's conduct in failing at an earlier date to ascertain the defects in its patent and apply for a reissue. The defendants do not stand in the shoes of a person acting in good faith in reliance on plaintiff's conduct; for defendant Northrop was the inventor of the patent, and defendant Draper the party to whom it was issued, and the former, by reason of his knowledge of the scope of the invention, would be far more reprehensible for failure to ascertain defects in the claim than would be the plaintiff. Besides this, in their answer, the defendants admit that in 1913 their attention was "called to the fact that claim 6 was not predicable upon the structure illustrated and described in the specification of the patent," which information was apparently acquired prior to their taking action in the way of producing and putting upon the market devices providing for loom stoppage upon a real misthread. The defendants, therefore, in 1913, and probably at an earlier date, knew that claim 6 was defective, in that it did not state what it was intended to claim.

[2] As we regard the remaining questions raised on this appeal rightly determined in the court below, it is not our purpose to again review any of them, except the one as to whether the defendant Northrop is under an obligation to the plaintiff, express or implied, to make application for a reissue. The assignment was to Draper, his heirs,

executors, administrators, and assigns, and was of the invention disclosed in the application, the patent to be issued thereon, and any right to a reissue. If Northrop had not inserted an express covenant for further assurance in the assignment, it cannot be doubted that a covenant would be implied to this extent, at least: That Northrop would make application for reissue in case the patent manifested an intention to claim a feature disclosed therein, but which it failed to state accurately in a claim. The implied covenant would be for the benefit of the grant, and the grant being to Draper and his assigns, would inure to the plaintiff. The contention is made that the express covenant is a restricted covenant; that is, that it confers rights upon Draper less than an implied covenant would confer, and that, because of this, no covenant can be implied in favor of the grant and, being personal to Draper, will not inure to the plaintiff. But we do not regard the express covenant as of less scope than the one that would be implied. It imposes, rather, a greater obligation, in that it requires Northrop to apply for a reissue if Draper deems it necessary, and under circumstances to which the implied covenant would not extend. The rights conferred by the express covenant beyond what would be implied, being personal to Draper, would not run with the grant; but, in so far as the rights conferred are only what would be contained in the implied covenant, it is evident it was intended they should inure to an assignee; otherwise, the full enjoyment of the grant could not be had by Draper's assigns, which it was expressly stipulated they should possess.

It having been determined that the plaintiff is entitled to a reissue for the purpose of correcting claim 6, and it being conceded by defendants that the plaintiff is entitled to the corrections desired in the specification (line 86, page 3) and in claim 8 (lines 103, 104, page 4), the decree of the District Court must be affirmed.

The decree of the District Court is affirmed, with costs to the appellee.

## MONROE v. BRESEE.

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

No. 2355.

1. PATENTS ⟸328—VALIDITY—ROAD LEVELING MACHINE—PRIOR PUBLIC USE.
The Monroe reissue patent, No. 13,708, for a road leveling machine, *held* void because of the unrestricted sale to a township for actual public use of one of the machines more than two years before the filing of the application for the original patent.

2. PATENTS ⟸76—VALIDITY—PRIOR PUBLIC USE.
After proof of the sale without reservation of a machine for actual use more than two years before application for a patent therefor, evidence as to whether the patentee regarded it as a completed or experimental machine is immaterial.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 92, 98.]

3. PATENTS ⟸310(9), 311—SUIT FOR INFRINGEMENT—DEFENSES.
Objection to proof of prior public use, pleaded generally in the answer in an infringement suit, on the ground that notice of the names of the alleged users, required by Rev. St. § 4920 (Comp. St. 1913, § 9466), had not been given, is waived by failure to move to strike out the defense as insufficient, or to object to the evidence in due time to raise the question in the District Court.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 535–542.]

4. EVIDENCE ⟸187—SECONDARY EVIDENCE—PHOTOGRAPHS.
The reception in evidence of photographs or descriptions of a chattel n place of the object itself is largely discretionary with the court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 674, 675.]

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

Suit in equity by Nathaniel S. Monroe against J. M. Bresee, trading as the Bresee Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

Thomas A. Connolly, of Washington, D. C., for appellant.
George P. Fisher, of Chicago, Ill., for appellee.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. This is an appeal from the decree of the District Court dismissing the complainant's bill for want of equity. The bill charged infringement of claims 8, 10, 19, and 20 of the Monroe reissued patent, No. 13,708, for a road leveling device. It is unnecessary to set out the claims or specifications, as we shall consider but one of the several defenses, the one principally relied upon, that a device embodying the alleged invention was sold by the complainant and was in public use by others more than two years prior to March 24, 1911, when application for the original patent was filed.

[1] 1. In 1908, one of his machines was sold by Monroe without

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

reservation to the township of Pesotum, and then and there put into complete public use. There was no supervision by the inventor, nothing in the nature of testing or experimenting; indeed, it was not seen by him or on his behalf for nearly two years. Other sales of similar machines were admitted to have been made between 1901 and 1908. The sales were ordinary commercial transactions. The machines may not have been perfect; the inventor and manufacturer may have intended to improve his product; but the transactions were nevertheless not merely, or even primarily, an arrangement for trying out and testing the road leveler, but were sales of completely operative machines. The machines were purchased, not in order to aid Monroe in his experiments, but in order to secure efficient street scrapers for actual use. One such sale is sufficient. Wende v. Horine, 225 Fed. 501, 140 C. C. A. 543.

[2] 2. There was no error in sustaining objections to certain questions. After proof of the sale without reservation in 1908, it was utterly immaterial whether the inventor regarded the machine so sold as "a wholly complete machine embodying your [his] ideas of completeness or an experimental machine." American Ballast Co. v. Davy Burnt Clay Ballast Co., 220 Fed. 887, 136 C. C. A. 453.

3. The complainant himself and his son admitted that the Pesotum machine, when sold, had all the essential features and operated on the same principle as the machine described in the reissued letters patent. They testified to only one difference alleged to be of importance, namely, that while under the express language of claim 10 and, as contended, by implication in the other claims, a looped chain and pulley constitutes the flexible means by which the scraper bars are suspended from the frame, and by which the vertical adjustment of the bars is effected, these earlier machines had only a single chain. There is, however, sufficient evidence in the record to justify the conclusion that, contrary to this testimony, the looped chain and pulley were on the machine when sold in 1908. In any event, the change involved no invention; the combination with looped chain and pulley was patentably not to be distinguished from that with the single chain; it was the usual substitution of an old mechanical device to secure increased power.

[3] 4. It is urged, however, that the evidence concerning the sale of the Pesotum and the other machines was inadmissible, because the notice required by Revised Statutes, § 4920 (Comp. St. 1913, § 9466), was not duly given. The section, so far as here pertinent, reads as follows:

"In any action for infringement the defendant may plead the general issue, and, having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial any one or more of the following special matters: * * * That it had been in public use or on sale in this country for more than two years before his application for a patent; * * * and in notices as to proof of previous invention, knowledge, or use of the thing patented, the defendant shall state the names of the patentees and the dates of their patents, * * * and the names and the residences of the persons alleged to have invented or to have had * * * prior knowledge of the thing patented, and where and by whom it had been used."

An amendment to the answer, filed by stipulation, set up the defense in general terms that the invention had been in public use or on sale by the complainants and others in this country for more than two years prior to the application for the original letters patent. Appellant contends that the defense cannot be asserted because neither by the answer nor by other notice was he informed by defendant where and by whom the use relied upon as a defense had been made. If, contrary to the decision in American H. & L. S. Co. v. American T. & M. Co., Fed. Cas. No. 302, such specific notice were required where such prior public use or sale is by the inventor himself, the requirement was waived through the failure of the appellant, by motion to strike out the defense as insufficient or by objection to the evidence, to raise the question in due time in the district court. Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177; Zane v. Soffe, 110 U. S. 200, 3 Sup. Ct. 562, 28 L. Ed. 119. It was only after the appellee's evidence had been introduced, and when, as a matter of precaution, counsel for the appellee had asked leave to amend the answer, so as to allege specifically the prior use by the townships of Pesotum and Tuscola, that any objection on this score was brought to the attention of the court. Then counsel withdrew the amendment so far as it pertained to the Tuscola machine, and no further objection was made to the allowance of the amendment as to the Pesotum machine. When later in the course of the trial the amendment was offered, the court, without objection or contradiction, stated that counsel had objected only to that part relating to the Tuscola machine and that the amendment as to the Pesotum machine had been allowed.

[4] 5. The reception in evidence of photographs or descriptions of a chattel in place of the object itself is largely discretionary with the court. In view of the bulky character of this device and the adequacy of the secondary evidence, there was clearly no abuse of discretion in not compelling its production or in refusing to adjourn the hearing to the courtyard for the inspection of the Pesotum machine and its introduction in evidence as a physical exhibit.

Decree affirmed.

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GUY et al. v. STEIN.

(Circuit Court of Appeals, Seventh Circuit. December 7, 1916.)

No. 2366.

1. PATENTS ⟸328—VALIDITY—MINER'S LAMP—PRIOR PUBLIC USE.
The Guy patent, No. 1,097,716, for a miner's carbide lamp, *held* invalid for public use of the invention by persons to whom it was supplied by the inventor for more than two years before application for the patent.

2. PATENTS ⟸81—VALIDITY—PRIOR USE—BURDEN AND MEASURE OF PROOF.
Proof of prior public use, to defeat a patent, must be very clear and beyond a reasonable doubt; but, when such public use is clearly shown, the burden is cast upon the patentee to establish the fact that it was experimental.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 104.]

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

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

Suit in equity by Frank Guy and George R. Shanklin against Meyer Stein, doing business as the M. Stein Manufacturing Company. Decree for defendant, and complainants appeal. Affirmed.

Samuel W. Banning, of Chicago, Ill., for appellants.

John W. Hill, of Chicago, Ill., for appellee.

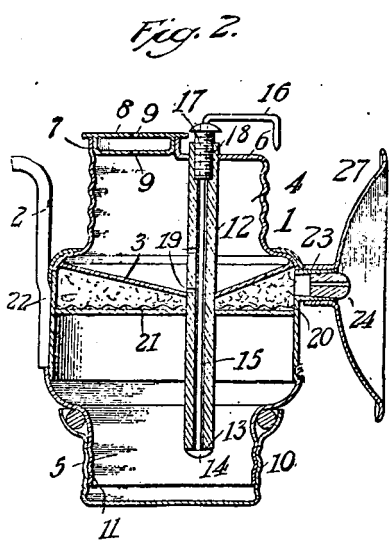
Before KOHLSAAT, MACK, and EVANS, Circuit Judges.

KOHLSAAT, Circuit Judge. [1] The only question here involved is whether certain seemingly public uses were in fact such or merely experimental. The device in suit is the miner's carbide lamp of patent No. 1,097,716, granted to F. Guy on May 26, 1914, upon an application filed March 1, 1911. The new element in the lamp, so far as is here concerned, was the so-called Guy dropper valve.

Claim 1, which is typical of all the claims, reads as follows, viz.:

In an acetylene lamp, in combination with a lamp body, comprising a water chamber and a carbide chamber, a stationary tube in communication with the water chamber and having one terminal within the carbide chamber, a valve stem adapted to rotate and move longitudinally within said tube, and a valve rigid on the valve stem and having a face adapted to engage and grind on the terminal of the tube within the carbide chamber.

Fig. 2 of the drawings is herewith reproduced:




Acetylene gas is produced by the chemical union of water with calcium carbide. As will be seen from the drawing, the water chamber is arranged above the carbide chamber and carries both the water supply tube and the valve stem and head; the carbide chamber being detachable. The water supply tube extends from above the casing top into the gas or carbide chamber. Through this tube extends the valve stem, terminating in an operating handle above the casing and having an adjustable screw connection with a threaded socket in the upper part of the water tube, whereby the valve head below the lower end of the water tube can be adjusted up or down at pleasure, opening or closing the lower end of the water tube, and at the same time affording a rotary grinding motion to the valve head upon the seat, whereby, the patentee claims, the valve and seat are kept free from sediment and other clogging substances.

[2] It appears from the admissions of Guy shown in the record that he had hit upon the substantial idea of the invention and reduced it to practice as early as 1906, but had not yet reduced it to commercial form, especially as to shell or outward form. His first lamp was too cumbersome. His next was contained in a shaving soap box and was too small. There seems to be no doubt that he had completed the device as contained in his dropper valve as early as 1906 or 1907, but was seeking to have it tested. As it turned out, he made no substantial changes in the dropper after that date, but only in the housing thereof. The principle of the device was completely developed, so far as here involved. As above stated, the only controversy before us is: Did Guy make or permit to be made public use of his lamp more than two years prior to filing his application for a patent, or before March 1, 1909? Proof of that fact, in order to prevail, must be very clear and beyond reasonable doubt. Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed Wire Co.; Same v. Norwood and Same v. Wiler —the barbed wire patent—143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; Mueller Mfg. Co. v. Glauber, 184 Fed. 609, 106 C. C. A. 613; Moline Plow Co. v. Rock Island Plow Co., 212 Fed. 727, 129 C. C. A. 337; Mast, Foos & Co. v. Dempster Mill Mfg. Co., 82 Fed. 327, 27 C. C. A. 191; Taigman v. Forsberg, 223 Fed. 790, 139 C. C. A. 607.

The trial judge decided the case practically upon the admissions of the appellant, finding that Guy himself had placed the lamp in public use more than two years prior to filing his application for a patent, and that the patent was therefore invalid. It was the patentee's contention that the acts upon which the District Judge rested his decision were merely experiments made in testing out the invention. One feature which he was anxious to attain was a steady flame. This he had accomplished as early as 1907 by extending the tube and valve stem into the carbide. Indeed, there remained after the year 1907 nothing but the lamp shell and the commercial features to be adjusted. There were a number of miners' lamps in existence in 1906. Guy appropriated the shell of one called the barrel and of one made by one Bleser. The exact date of the application of the Guy dropper to these shells is somewhat uncertain.

The acts alleged to constitute public use may be summed up as follows: In 1908 Guy remodeled a Bleser lamp and gave it to his brother. This he repaired several times. Afterwards the brother procured two more, under instruction not to let any one see them. This first lamp was made under the patent. Guy testified that he asked his brother to give it a thorough test. It was used by his brother for two years in a mine. Guy then made and gave one of his lamps to a friend named McGuire. This, Guy claims, was to be returned when tested. It was never returned. Then, as he first testifies, he sold one lamp to a friend named Dant for $1 in 1908. This date he changes to 1909 subsequently, which would bring the transaction within the protected period. It was to be returned, but never was, though brought in for repair several times. In explanation of his acts in letting the lamp

pass out of his hands, he stated that he wanted the news to spread that he had something good in the way of carbide lamps. This lamp was sold Dant for testing, Guy claims. When asked how he expected the news of his lamp to spread he said:

I visited every day in that mine, met 100 or 150 men; all the men in the mine saw me many times using these lamps, and they made remarks about how nice and steady that lamp burned. Now, there, the news traveled all over the country right there; miners change places—go from one part of the country to the other, all over the United States; some wanted to see the dropper. I would unscrew the lamp and show them the dropper; they could see there was a difference in the dropper, and it became known that Guy had a dropper—it was called a dropper—that was a good deal different and a good deal better than any other; then it brought about a demand for it. X-Q. 109. So that, when you carried, for instance, this one into the mine, they saw you had a successful carbide lamp; these 100 men or more in the mine would gather around and ask you about it, and you told them it was a carbide lamp, and disconnected and showed it to them? A. Yes, sir. X-Q. 110. You went to other mines, did you? A. I believe I did; I worked in the Klondike Mine all the time, but I believe it burned down once. X-Q. 111. These other men you gave samples of the lamp to, did they do the same way? Did miners ask them about the lamp? Did they show them the dropper? A. Don't think they showed them the dropper; at least I instructed them not to. X-Q. 112. You did that yourself? A. Yes, sir; I feared, if they should get it, they would take it in their hands and get a closer view; but still they would not have seen much. X-Q. 113. You was seeking to get a general demand for Guy's dropper, so you could build up a business? A. No, sir. X-Q. 114. Didn't you calculate to build up a business? A. No, sir; my object was to take up a patent and sell the patent. X-Q. 115. But you did want to get inquiry as to Guy's dropper, so there would be a demand for it? A. Wanted to make a reputation for Guy's dropper. X-Q. 116. You made one for your brother, and he took it down and tested it in 1908, I believe? A. That is this identical one here that is marked "Complainants' Exhibit Remodeled Bleser Lamp with Guy Dropper." X-Q. 117. Did he show it to the boys down there? A. I don't know; I cautioned him not to.

In an affidavit filed with his application for the patent in suit he says:

The first lamp embodying my invention was completed and used by me in Klondike Mine, Springfield, Ill., about February 1, 1907. Afterwards numerous other lamps embodying my said invention were used by other miners at different times in mines at Springfield, Ill.

Early in 1909 Guy gave a lamp embodying his invention to one John Robson. About November, 1909, Guy took out a patent upon another lamp, which used no valve. Guy says his lamp was known all over the United States. He received orders for it, but replied that he was not making lamps. Martin W. Moore testified he made a lamp like Guy's in 1908, except that the valve was tapered and not flat. He saw the Guy lamp first in 1910. He took out a patent August 12, 1913, on an application filed May 6, 1912, No. 1,070,352, for his lamp with a tapered valve. One Jacaway testified he took a miner's lamp to Moore to be fixed early in 1908. The lamp was produced in court. It involved the principle of Guy's lamp. Moore took out a slide wire and put in a Guy stem valve feed.

There is evidence to show that defendant Stein was repairing lamps for different miners and inserting Guy droppers in 1908. One Denton says he used several of the devices with the Moore or tapering valve in 1907 or 1908. A coal miner by the name of Luscher says he used a lamp produced in evidence as the Luscher lamp in 1908, at the Sangamon, Ill., Coal Company's mine. This lamp he purchased at a store in Springfield and used until it sprung a leak. The lamp seems to have a flat valve head. The valve stem seems to be shorter than Guy's. It discloses no evidence of having been broken off, as claimed by the witness. In other respects it follows Guy. He claims to have seen "lots of fellows" using them. J. A. Thomas, a miner, testified that he had his lamp supplied with a Guy dropper in or prior to 1908. He was told by the man who took his lamp to be repaired that Guy was putting in the dropper himself for 50 cents. C. J. Lemasters, a miner, testified he bought a Guy lamp from Guy in 1907. He testified that he used it about one year at the Devereaux mine at Springfield, Ill. He identified the lamp produced as the one he bought. Guy himself says:

"I have loaned lamps, 10 or 15, to McGuire; maybe 8 or 10, and he would use them that day and return them to me. I never sold a lamp to McGuire. * * * I don't call to mind all the lamps I let the men use."

He kept up the habit of showing his lamp right along through four or five years and explained it at different times to various people.

The Moore device, which, was substantially the Guy device, differing only, as aforesaid, in that its valve was conical instead of flat, was being freely and publicly used in 1908. Several witnesses testified to this fact. Moore would fix over miners' lamps, inserting his tapered valve with the Guy valve stem, making a charge of 50 cents therefor. Thus it appears that little effort was made for several years to protect Guy's invention. The device was not one which required years of experimenting. It was simple and easily comprehended. It could not be repaired without disclosing its construction. No reason appears why Guy should not have availed himself of the benefit of the patent statute at once, rather than indulge in several years of delay.

Appellants attack the credibility of the various witnesses, and it may be that in several instances the latter have fixed a date earlier than the true one; but it is difficult to conceive that in the multitude of instances adduced the witnesses have generally been in error. No ulterior motive is discoverable. The whole atmosphere of the case leaves the clear impression that the device was well known and freely used in public as early as 1908. When once the public use is shown, the burden is cast upon the patentee to establish the fact that such use was experimental. Smith & Griggs Mfg. Co. v. Sprague, 123 U. S. 249, 8 Sup. Ct. 122, 31 L. Ed. 141; Eastman v. Mayor of New York, 134 Fed. 844, 69 C. C. A. 628; Root v. Railroad, 146 U. S. 210, 13 Sup. Ct. 100, 36 L. Ed. 946; Worley v. Tobacco Co., 104 U. S. 340, 26 L. Ed. 821; Swain v. Holyoke Machine Co., 109 Fed. 154, 48 C. C. A. 265; Star Mfg. Co. v. Crescent Forge & Shovel Co., 179 Fed. 856, 103 C. C. A. 342.

One may not, by merely calling a use experimental, practically make such a full public demonstration of his patented device as to create a market for it and bring it to the notice of the trade without protecting himself as provided by statute. There must be diligence. The delay must be plainly justified by the circumstances. While Guy may have intended not to disclose his invention, it is evident that it was publicly practiced and that he was receiving the benefits by way of creating a market for it in 1908.

Courts are not slow to give an inventor the full results of his exploits in the realm of invention, but the same law which thus protects him requires that he use diligence in protecting himself. He should apply for his patent within reasonable time and not rely on unnecessary so-called experimentation to prolong the statutory period. In the the present case we are unable to get away from the conviction that his reliance upon the immunity of experimentation was not justifiable.

The decree of the District Court is affirmed.

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## LEONARD v. CORN PRODUCTS REFINING CO.

(Circuit Court of Appeals, Seventh Circuit. December 8, 1916.)

No. 2367.

PATENTS ⊂=328—INFRINGEMENT—RUBBER SUBSTITUTE.

The Leonard patent, No. 615,863, for a rubber substitute and process of producing the same, consisting of heating together, until vulcanized, corn oil, sulphur, and paraffine in stated proportions, in view of the prior art, must be strictly construed, and limited to the product and process therein described and claimed. As so construed, *held* not infringed by a product containing no paraffine.

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

Suit in equity by William K. Leonard against the Corn Products Refining Company. Decree for defendant, and complainant appeals. Affirmed.

On December 13, 1898, appellant was granted a patent, No. 615,863, for the process of producing rubber substitute and in the composition matter to be used therefor. The two claims of the patent read as follows, viz.:

"1. A composition of matter to be used as a rubber substitute consisting of corn oil, sulphur, and paraffine, in the proportions as and for the purpose described.

"2. The above-described process of producing a rubber substitute by mixing corn oil, sulphur, and paraffine, in the proportions substantially of 76 per cent. of corn oil, 21 per cent. of sulphur, and 3 per cent. of paraffine, subjecting the mass to heat until the mass is vulcanized or the process of vulcanization begins, then shutting off the heat and allowing the process of vulcanization to continue and the mass to cool, substantially as and in the manner described."

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

The original application contained three claims. These read as follows:

"1. The above-described process of making a rubber substitute, which consists in mixing corn oil, sulphur, and a small quantity of paraffine, or its equivalent, and submit the mass to heat in the manner and for the purposes described.

"2. As an article of manufacture, a rubber substitute made of corn oil, sulphur, and paraffine, or its equivalent, heated to about 300 degrees Fahrenheit and then allowed to cool, substantially as and for the purpose described.

"3. The above-described process of producing a rubber substitute by mixing corn oil, sulphur, and paraffine in the proportions substantially of 76 per cent. of corn oil, 21 per cent. of sulphur, and 3 per cent. of paraffine, subjecting the mass to heat until the oil is vulcanized or the process of vulcanization begins, then shutting off the heat and allowing the process of vulcanization to continue until complete and the mass to cool, substantially as and in the manner described."

The examiner rejected claim 1 as containing no patentable matter, in view of the prior art, citing Simpson patent, No. 46,610, of February 28, 1865—the process of manufacturing india rubber, etc., from sulphur and linseed oil and other similar vegetable oils combined with gum. This rejection appellant acquiesced in. Original claim 2 was pronounced by the examiner to be in objectionable form, with the suggestion that appellant's invention resided in the particular composition of the matter described, and that the claim should be amended to cover such a composition, in which the several ingredients should be distinctly enumerated. Thereupon appellant substituted present claim 1 for original claim 2, having first at the requirement of the examiner stricken therefrom the words "or its equivalent," immediately following the word, "paraffine." The present claims were then allowed.

The specification calls for a process in which the patentee mixes in a heating pot a quantity of corn oil, some "flowers of sulphur" and a small quantity of paraffine wax, substantially in the proportion of corn oil 76 per cent., sulphur 21 per cent., and paraffine wax 3 per cent. The sulphur and paraffine should be added before the oil reaches 300°. "I have found in practice," reads the specification, "that the small quantity of paraffine wax used is better adapted to produce the desired result than any other like substance, though a substantially equally good result may be obtained by equivalent forms of wax, and I do not limit myself to paraffine alone for this purpose, the object being to prevent the mass from becoming sticky and impracticable to handle. With paraffine or equivalent substances used for that purpose, the rubber substance will not stick to the rolls when it is being ground or worked in practice."

The alleged infringement consists of a process in which only corn oil and sulphur, with heat, are used. The ingredient of the patented product used to prevent stickiness—paraffine—is omitted by appellee. Talcum is however used, but not as an ingredient. It is merely sprinkled upon the receptacles holding the product.

In 1899 appellant was given access to the factory of appellee's predecessor, to ascertain appellee's methods of manufacturing its rubber substitute. Appellant took no step to restrain appellee until about the time this suit was begun, in January, 1911, or 12 years after learning appellee's process. In the meantime the alleged infringer had transferred its rights to the Corn Products Company and the latter to the appellee. All these companies manufactured the rubber substitute from corn oil extensively, without protest from appellant.

Appellee contends that: (1) The patent is invalid for want of invention. (2) That no infringement is shown. (3) That the appellant was guilty of such laches as to bar any right to an accounting, even if infringement be shown.

The District Court dismissed the bill for want of equity.

Charles K. Offield, of Chicago, Ill., for appellant.

Percival H. Truman, of Chicago, Ill., for appellee.

Before KOHLSAAT, MACK, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). It is conceded that the manufacture of substitute rubber from vegetable oil and sulphur, subjected in combination to high temperature, was old in the art. Linseed oil, rape seed oil, mustard seed oil, peanut oil, castor oil, cocoanut oil, cotton seed oil, olive oil, and many other vegetable oils had been successfully employed as an ingredient in making a substitute for true rubber, long prior to the date of appellant's discovery of the availability of corn oil for that purpose. The latter has no distinctive properties over other vegetable oils as an element of the combination with sulphur for the manufacture of rubber substitute. It is, however, readily obtainable and well adapted to such manufacture.

An examination of the files in the Patent Office, as set forth in the statement of facts, forces us to the conclusion that the patent to appellant was allowed only as a very limited one. It covered a process wherein three ingredients were used in certain fixed proportions. McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; Vance v. Campbell, 1 Black. 427, 17 L. Ed. 168.

Appellant insists that the paraffine plays no part in the manufacture of the rubber substitute, and should be ignored in construing his patent in this suit. We think otherwise. Without it no patent would have been issued.

Appellant having claimed corn oil, sulphur, and paraffine specifically, and appellee not having used the three elements in combination, there was no infringement.

We deem it unnecessary to consider the other questions raised in the record.

The decree of the District Court is affirmed.

## In re DAYTON COAL & IRON CO., Limited.

(District Court, E. D. Tennessee. November 23, 1916.)

Nos. 1598, 1600.

BANKRUPTCY ⇐273—FUNDS OF BANKRUPT—DEPOSIT.

Bankr. Act July 1, 1898, c. 541, § 61, 30 Stat. 562 (Comp. St. 1913, § 9645), requires courts of bankruptcy to designate banking institutions depositaries of funds of bankrupt estates and to require bonds for the safekeeping and forthcoming thereof. Section 47a (3) (Comp. St. 1913, § 9631) makes it the duty of a trustee to deposit all money received by him in one of the designated depositaries, while General Order 29 (32 C. C. A. xxviii, 89 Fed. xii) prescribes the method of withdrawals. *Held*, that such provisions are mandatory, and in the absence of consent of the creditors the trustee cannot deposit funds belonging to the bankrupt estate as savings accounts in the authorized depositaries; the bonds given semble, not extending to such deposits, even though interest was paid on such savings deposits and the estate increased in that manner.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 347.]

In Bankruptcy. In the matter of the bankruptcy of the Dayton Coal & Iron Company, Limited. On request by referee for ruling as to deposit of funds belonging to the estate of the bankrupt. Ruling given.

J. M. Trimble and Frank Spurlock, both of Chattanooga, Tenn., for trustee.

Sizer, Chambliss & Chambliss, of Chattanooga, Tenn., for bondholders and others.

Cooke, Swaney & Hope, of Chattanooga, Tenn., for Southern Ry. Co.

SANFORD, District Judge. The summarized statement filed by the referee in bankruptcy on January 25, 1917, in accordance with section 2 of Standing Order No. 6 in reference to the deposit of moneys of bankrupt estates, shows that the trustee herein, without any order directing or authorizing him to do so, has since last February had on deposit in the savings department of the First National Bank, the regular depositary of the money of the bankrupt estates, and the Hamilton National Bank, heretofore designated as a special depositary for the moneys of the bankrupt estate which were on deposit with it at the time of the adjudication in bankruptcy, large sums of money for which the banks have been monthly paying interest at four per cent. per annum, thereby increasing the funds to December 31, 1916, by $4,188.48. On December 31, 1916, said savings account in the First National Bank aggregated, with interest, $63,177.69, and said savings account in the Hamilton National Bank $61,315.43. The referee states in his certificate that he was not aware of this arrangement until comparatively recently, and while he is pleased to see the estate increased by these interest payments, he knows of no law authorizing bankruptcy funds to be deposited at interest, and in view of the fact that it will be some time before the funds in this cause can be disbursed he requests a ruling by the District Judge in reference to this matter.

It furthermore appears from said certificate that the checking account on deposit in the First National Bank on December 30, 1916, in all cases other than this one, aggregated $19,225.25, so that the total amount in said Bank, including the general checking account and the savings account in this cause, aggregated $82,402.94, or $32,402.94 more than the aggregate of the general depositary bonds of the said Bank then in force. And while the funds deposited in the checking account in the Hamilton National Bank in this cause were only $852.17, so that the total amount in said Bank on said date in this cause, in both the checking and savings account was less than the amount of its bond as a special depositary, it is not altogether clear that either the general bonds of the First National Bank or the special bond of the Hamilton National Bank cover anything more than the regular deposits on checking account, or include the savings account, which, if not subject to check, might well be regarded as loans merely, rather than as deposits.

Regardless of this question, however, it is entirely clear that under the provisions of the Bankruptcy Act in reference to the deposit of money of bankrupt estates, the placing of funds by the trustee in these two banks in special interest-bearing savings account instead of depositing them in a general checking account, was unauthorized.

In Huttig Mfg. Co. v. Edwards (8th Circ.) 160 Fed. 619, 622, 87 C. C. A. 521, 524, in which it was held that the District Court had no authority, without consent of the parties, to direct the withdrawal of bankruptcy funds from a regular depositary for the purpose of being deposited in a national bank at interest, the court, in an opinion concurred in on this point by all three of the Circuit Judges, although Judge Sanborn dissented as to another matter, said:

"Section 61 of the Bankruptcy Act (July 1, 1898, c. 541, 30 Stat. 562, U. S. Comp. St. 1901, p. 3446) makes it the duty of courts of bankruptcy to designate by order banking institutions as depositaries of funds of bankrupt estates, and to require of them bonds for the safe-keeping and forthcoming thereof. * * * Section 47a (3) (30 Stat. 667, U. S. Comp. St. 1901, p. 3438) makes it the duty of a trustee to deposit all money received by him in one of the designated depositaries, and general order 29 (32 C. C. A. xxviii, 89 Fed. xii) prescribes the method of withdrawals. These provisions of the act and the general order are mandatory in form, and were designed to insure the safety of the funds rather than an increment by way of interest while they were idle. The funds were those of litigants and the risk which always attends the making of profit should not be incurred unless the right is clear. Doubtless consent by all parties interested would justify a departure from the prescribed rule. Rev. St. § 5504 (U. S. Comp. St. 1901, p. 3710). But such consent was not obtained."

I entirely concur in the views expressed in this opinion, and accordingly direct that the referee forthwith call a meeting of creditors to which this matter shall be presented, and that unless the action of the trustee is ratified by creditors and provision made, with their consent, for the deposit of funds in these Banks on special savings account, upon such security as may be agreed to by the creditors, the referee forthwith direct the trustee to withdraw the funds in question from these savings accounts and deposit them on checking account in the usual way in said depositaries, depositing in the Hamilton Na-

tional Bank such sum as it may be entitled to receive under its special designation as a depositary in this cause, and the remainder in the First National Bank, the regular depositary. And in the event the amount thus deposited in the First National Bank shall cause the deposits in said Bank to exceed the amount of its bonds now in force, the referee will forthwith file with the clerk for transmission to the judge of the court, a certificate of such fact, as required by clause 2 of Standing Order No. 6, in order that the bonds of said depositary may be appropriately increased to cover its total deposits, in accordance with the provisions of section 61 of the Bankruptcy Act.

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RENSSELAER & S. R. CO. v. IRWIN, Internal Revenue Collector.

(District Court, N. D. New York. March 5, 1917.)

1. INTERNAL REVENUE ⟸9—INCOME TAXES—"INCOME."

Income Tax Act Oct. 3, 1913, c. 16, § 2, G (a), 38 Stat. 172 (Comp. St. 1913, § 6327), provides 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. Long prior to the enactment of the Income Tax Act, plaintiff railroad company leased its line to a second company, which agreed to pay the interest upon and discharge the bonds issued by plaintiff, to maintain the right of way and buildings, and to pay direct to each stockholder dividends at the rate of 8 per cent. per annum on each share of stock. Plaintiff received the sum of $1,000 per annum from the lessee company to enable it to maintain its corporate existence. *Held* that, as directors and officers of plaintiff corporation possessed its property for the benefit of the stockholders, and it, as a corporation, was the legal owner thereof, and as all rents received in the first instance from corporate property belonged to the corporation, shareholders not having legal title to any of the corporate property, the dividends paid direct to the stockholders as rent must be treated as corporate income, income being defined as the gain and receipts from property, labor, or business, and hence income taxes must be paid by the corporation thereupon, notwithstanding the corporation was not actively engaged in business, and the conveyance was not fraudulent in fact.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28.

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

2. INTERNAL REVENUE ⟸9—INCOME TAXES—SCOPE OF ACT.

In such case, the corporation could not defeat liability on the ground that it had no income out of which to pay the taxes imposed, for it could borrow, and it could not, by providing for the payment of its income direct to its stockholders, in that way evade the provisions of the act.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28.]

3. CORPORATIONS ⟸174, 182—SHAREHOLDERS—RIGHTS OF.

A stockholder is not an agent of the corporation in which he holds a share, and he has no legal title to any of its property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 649–652, 686–690.]

4. PLEADING ⟸8(2)—COMPLAINT—CONCLUSION OF LAW.

Where, in an action to recover income taxes paid under protest, the facts were stated showing the financial condition of plaintiff corporation

and the disposition of rents received under a lease of its property, the allegation that the corporation had no income was a mere conclusion of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 13.]

5. PLEADING ⊂=214(5)—DEMURRER—EFFECT OF.
While a demurrer admits all facts well pleaded, it does not admit conclusions.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 527.]

6. INTERNAL REVENUE ⊂=9—INCOME TAXES—RIGHT TO.
Where a corporation, before the enactment of the Income Tax Act leased its property, the lease providing for payment of rents direct to the stockholders, taxes based on such income cannot be defeated on the theory of a novation; the corporation, notwithstanding payment to its shareholders, receiving the income.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28.]

At Law. Complaint by the Rensselaer & Saratoga Railroad Company against Roscoe Irwin, United States Collector of Internal Revenue, Fourteenth District, State of New York. On demurrer to the complaint, on the ground that it did not allege facts sufficient to constitute a cause of action. Demurrer sustained.

G. B. Wellington, of Troy, N. Y., for plaintiff.
D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y., for defendant.

RAY, District Judge. The plaintiff is a railroad corporation, which owned and operated a railroad in the state of New York, and which leased and operated other railroad lines all in the Fourteenth internal revenue district. The defendant is the collector of United States internal revenue for said district. The capital stock of the plaintiff is $10,000,000, of which $9,200,000 is outstanding in the hands of the owners thereof. Its bonded and other indebtedness is $2,000,000.

[1] In 1913 the plaintiff was notified it was to make a return of annual net income for 1913, under the Act of Congress of October 3, 1913, c. 16, § 2, G (a), known as the Income Tax Act, which provides:

"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, joint stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships. * * *"

It made a return which showed:

"That its capital amounted to $10,000,000, and that there was outstanding in the hands of the public $9,200,000; that its total amount of bonded and other indebtedness was $2,000,000; that its gross income for the year was $0."

With respect to the last item an explanatory memorandum was attached to said return, which was as follows:

"Explanatory Memorandum.

"The Rensselaer & Saratoga Railroad Company, during the calendar year ending December 31, 1913, derived no revenue from the operation and management of its business and properties. During said year it was not in business.

This has been determined by the court in the action in the District Court of the United States, Northern District of New York, entitled 'Rensselaer & Saratoga Railroad Company v. Cyrus Durey, Collector.' By an instrument in writing dated May 1, 1871, the Rensselaer & Saratoga Railroad Company leased all its properties and franchises (excepting its cash on hand, which did not exceed $75,000) to the Delaware & Hudson Company. The lease is perpetual. The Delaware & Hudson Company has continuously since that time operated the railroad formerly operated by the Rensselaer & Saratoga Railroad Company. Under said lease the Delaware & Hudson Company agreed to pay to the Rensselaer & Saratoga Company $1,000 a year to enable it to keep up its corporate existence. This is the only payment that the Delaware & Hudson Company makes into the treasury of the Rensselaer & Saratoga Railroad Company. The Delaware & Hudson Company also pays direct to stockholders $8 a year on each and every share of the capital stock of the Rensselaer & Saratoga Railroad Company outstanding, amounting to 92,000 shares owned outright by stockholders and 8,000 shares held in the treasury of the Delaware & Hudson Company. The Delaware & Hudson Company also pays 7 per cent. per annum direct to bondholders holding the bonds issued by Rensselaer & Saratoga Railroad Company, of the par value of $2,000,000. The total income of the Rensselaer & Saratoga Railroad Company as a corporation, and which has come into its treasury during the calendar year ending December 31, 1913, was $4,600, made up as follows:

| | |
|---|---|
| From Delaware & Hudson Company under the lease | $1,000 00 |
| From Albany & Vermont Railroad Company under the lease from the Rensselaer & Saratoga Railroad Company to the Albany & Vermont Railroad Company | 800 00 |
| Interest on $70,000 investments of Rensselaer & Saratoga Company | 2,800 00 |
| Cash on hand December 31, 1913, which produced no revenue, amounted to | 2,436 87." |

Said return further showed that the plaintiff was entitled to certain deductions which were allowed. An income tax for five-sixths of the year 1913—that is, from March 1, 1913, through December 31, 1913—was assessed against the plaintiff, which amounted to $6,659.77, and was arrived at as follows:

| | | |
|---|---|---|
| Dividends on $10,000,000 capital stock at the rate of 8 per cent. per annum | | $800,000 00 |
| Amount received under lease from Delaware & Hudson Company for organization purposes | 1,000 00 | |
| Amount of income from investments | 3,600 00 | |
| | $804,600 00 | |
| Five-sixths of this amount is | | $670,500 00 |
| Deduct therefrom disbursements made from March 1, 1913, through December 31, 1913 | 4,523 40 | |
| Leaving net alleged income from March 1, 1913, through December 31, 1913 | | $665,976 60 |
| One per cent. of this amounts to | | $ 6,659 77 |

There was an error and a refund made of $533.33. The tax was paid under protest and due proceedings, so far as form is concerned, taken to obtain a repayment of this tax and enable the plaintiff to bring suit for a recovery thereof and maintain same, if erroneously or illegally assessed and collected.

In 1871, the plaintiff company by a written lease, a copy of which forms a part of the complaint, leased to the Delaware & Hudson Canal

Company, a railroad corporation of the state of New York, all its railroads, railroad property, etc., perpetually, or during the life of the charters of the lessor and any and all renewals of same, and in consideration thereof the lessee agreed to pay as follows:

"Yielding and paying therefor unto the party of the first part, its successors or assigns, *an annual rent* to be paid as follows:

* * * * * * * * * *

"10. And the said party of the second part, in consideration of the demise, covenants, and agreements herein contained and to be performed, fulfilled, and kept on the part of the party of the first part, its successors and assigns, hereby covenants and agrees that it will pay, as and for the annual rents aforesaid, semiannually, the interest accruing and to become due and payable from and after the date of these presents, upon $1,625,000 of mortgage bonds made, guaranteed, or assumed by the party of the first part, embracing the following bonds:

| | |
|---|---|
| Saratoga & Whitehall first mortgage bonds, due 1886; interest, March and September 1st, in New York | $400,000 00 |
| Troy, Salem & Rutland first mortgage bonds, due 1890; coupons, May and November 1st, in New York | 500,000 00 |
| Glens Falls Railroad bonds, due 1894; coupons, January and July 1st | 125,000 00 |
| Rensselaer & Saratoga first bonds, due in installments July 1st up to 1873 | 150,000 00 |
| Rensselaer & Saratoga second, due July 1, 1880 | 300,000 00 |
| Rensselaer & Saratoga second, due July 1, 1887 | 150,000 00 |

"11. Also the interest and $5,000 annually on the principal of the bond of the party of the first part to the city of Troy, on account of the Troy Union Railroad Company, the balance of the principal remaining unpaid thereon, not exceeding the sum of $65,000.

"12. Also the interest on $375,000 of 7 per cent. bonds to be issued by the party of the first part, and the interest guaranteed by the party of the second part as hereinafter provided. The payments of interest on bonds to cease with the payment of the principal.

"13. And the said party of the second part will also, upon the 1st day of January, 1872, pay a semiannual dividend of 3½ per cent. upon the capital stock of the party of the first part, not exceeding 60,000 shares of $100 each; a like dividend of 3½ per cent. upon said stock on the 1st day of July, 1872; and will also pay a semiannual dividend of 4 per cent. on such capital stock upon each 1st day of January and the 1st day of July thereafter, it being understood, however, that the interest and dividends to be paid as aforesaid shall and may be paid directly to the respective bondholders and stockholders.

"14. And the said party of the second part will also pay the rents accruing and to become due and payable from and after the date of these presents, on the following named leases, to which the party of the first part is a party, and observe and fulfill the terms and conditions thereof:

| | Rent Per Annum |
|---|---|
| Lease of the Saratoga & Schenectady Railroad | $31,750 00 |
| Lease of Albany & Vermont Railroad | 20,000 00 |
| Lease of Rutland & Whitehall Railroad | 15,492 00 |
| Lease from New York Central Railroad Company | 2,500 00 |
| Lease of Green Island lots | 3,091 50 |
| Joint lease with Troy & Boston Railroad Company of the Troy & Bennington Railroad Company, half rent | 7,700 00 |

"It is understood, however, that the party of the first part is to pay to the party of the second part two-thirds of the amount of all accrued interest on the bonds of the party of the first part up to and including the 30th day of June, 1871, and two-thirds of the amount of rents on leases which are due or accrued on that day.

"15. And the said party of the second part hereby further covenants and agrees, in manner aforesaid, that on presentation of the respective bonds, and of the scrip, certificate of stock respectively, the interest and dividends upon which are to be paid as herein provided by the party of the second part, it will, by a proper instrument in writing, to be indorsed or stamped thereon respectively, and duly executed, guarantee to the owner and holders thereof payment of the interest and dividends thereon, as aforesaid, the dividends to be payable semiannually on the 1st days of January and July, as aforesaid, and the interest to be payable according to the terms and conditions of the said bonds; and in case the party of the first part, at any time, shall desire to use new bonds, either in renewal of or to obtain means with which to pay bonds now outstanding, or any portion of them that the party of the second part will indorse or stamp such new bonds in the manner aforesaid and deliver the same to the party of the first part: Provided that the new bonds so indorsed or stamped shall be for the same amount as the bonds then surrendered to the party of the second part for cancellation.

"16. And in case the aforesaid bonds, or any of them, shall at any time be converted into stock, that thenceforth the party of the second part will pay, in lieu of the aforesaid interest on said bonds, semiannual dividends on said stock, at the rate of 3½ per cent., and upon due presentation of such new stock will indorse or stamp upon the same a guaranty of the payment of such semiannual dividends according to this agreement; and in all cases of new certificates being issued on the return of guaranteed certificates, or transfer of guaranteed shares, or new bonds having been issued in place of guaranteed bonds, the said party of the second part shall indorse or stamp the like guaranty on such new certificates and bonds: Provided, however, and it is hereby understood and agreed that in case the party of the first part shall fail to keep and perform these presents upon its part, that thereupon such guaranty, and each and every of them, shall become and be null and void.

"17. And the said party of the second part further covenants and agrees, in manner aforesaid, that during the term hereby granted it will, at its own cost, risk, and expense, maintain, preserve, and keep the aforesaid railroads in good working condition and repair and suitable for the transaction of all the business that can be reasonably done thereon, and will also maintain, preserve, and keep the side tracks, station houses, machine shops, fixtures, appurtenances, tools, machinery, rolling stock, and equipments belonging and appertaining to the said railroads in good repair, order, and condition, and will maintain and keep in order all fences, cattle guards, and warning boards which are or shall be necessary or required by law, and will operate, employ, and use the said railroads, their fixtures and appurtenances, in such manner as to do and perform, in a proper manner, all the business offered to and which can be reasonably done upon the same, and will perform all and every duty and obligation towards the public which the party of the first part would be legally bound to do and perform under its aforesaid charter if these presents had not been executed.

"18. And the said party of the second part further covenants and agrees, in manner aforesaid, that during the time of this demise it will pay, bear, and discharge all taxes and assessments of every description, assessed, imposed, levied, and accruing upon the railroad's property and effects hereby demised, and upon the business done upon the said railroads from the day of the date hereof, in the same manner and to the same extent as the party of the first part would be liable to pay if these presents had not been executed. And if by any change of the law the present tax or duty required of the said party of the first part shall be required of the said stockholders, then the said party of the second part shall pay the same.

"19. But the party of the second part shall not be required to pay the present income tax upon the aforesaid interest and dividends, or any tax thereon imposed, or hereafter to be imposed, by whatever name the same may be called. And if the law under which the tax is or may be levied requires the party of the second part to pay the same, then the amount of tax so paid may be deducted and kept back from and out of the aforesaid interest and dividends.

"20. And, further, that the party of the second part will pay all expenses for operating, construction, repairs, pay rolls, salaries, and otherwise incurred on account of the railroad and demised premises, from the day of the date hereof, and will also pay and discharge all damages which may be recovered against the said party of the first part for injuries to persons or property, or for negligence or breach of duty as carriers or warehousemen, and in all respects save the said party of the first part harmless and indemnified from all damages, losses, and penalties which may be incurred or arise in or by the conduct, use, or operation of the said railroad, from and after the 1st day of May, 1871.

"21. And it is hereby further mutually covenanted and agreed that in case of default in the payment of the rents herein reserved and agreed to be paid, or of the rents, dividends, or interest as herein provided, and if the same or any part thereof shall remain unpaid for the space of 60 days from and after the time when the same shall become due and payable, then the said party of the first part shall have the right to enter upon and take possession of all the property hereby leased, and all depots, shops, buildings, tracks, and other permanent property or rolling stock added thereto, and that the party of the second part will not hinder or prevent such entry nor the taking possession and using of all of the said property by the party of the first part for its own benefit and use, and that this lease shall terminate upon the party of the first part so taking possession of the demised premises.

"22. And, further, that this lease shall not be assigned by the party of the second part without the consent, in writing, of the party of the first part first had and obtained.

"23. It is mutually agreed that the monthly assessments for current expenses of the Troy Union Railroad Company, from and after the 1st day of May instant, are to be borne and paid by the party of the second part.

"24. It is further mutually agreed, by and between the parties hereto, that there shall be kept at the office of the party of the second part a book or register containing a record, in proper form, of the aforesaid stock, and of each and every of the aforesaid bonds, and of the bonds which may be issued in substitution therefor, which register shall be open, at all reasonable and proper times, to the inspection of the party of the first part, its successors or assigns, and that there shall be a transfer agency and office at the city of New York, the expenses of which shall be borne by the party of the second part."

It is seen that the property, etc., of the plaintiff is turned over to the Delaware & Hudson Company, which is to operate same, pay all expenses of operating and keeping in repair, etc., and also pay the interest on its bonded indebtedness and 8 per cent. dividend on its outstanding capital stock, but which dividends are to be paid not to the plaintiff company, the owner of the leased property, but directly to the stockholders, the lessee keeping books showing the owners of such stock and all transfers thereof.

Here the contention arises. The plaintiff contends that, having leased and turned over to the Delaware & Hudson Company all its property, with a provision that the dividend of 8 per cent. on the stock is to be paid directly to the stockholders by the lessee, and not to the lessor, such lessor, Rensselaer & Saratoga Railroad Company, does not receive, within the meaning of said Income Tax Law, any net income; while the collector contends that this provision for the payment of this dividend on the stock (by whatever name it may be called) to the stockholders direct, instead of through the medium of the lessor company, does not deprive the amount so paid of its quality and character as income received within the meaning of said statute. The collector contends that this sum, or these sums, to be paid the stockholders, is

rent paid for the use of the property, and so denominated in the lease, and is income, and net income, inasmuch as it is by the terms of the lease discharged from all deductions for expenses, etc., which are otherwise paid in operating the road, and constitutes a net sum for distribution to stockholders.

The directors and officers of the plaintiff corporation hold or held this railroad property for the benefit of the stockholders, and it, as a corporation, was and is the legal owner thereof. Consequently all rents received in the first instance belong to the plaintiff corporation. Moneys derived from rents and surplus earnings would be held by it, and owned by it, and dividends from surplus earnings should be declared and paid by it. If this money paid by the Delaware & Hudson Company going to stockholders under the agreement had been paid to the plaintiff corporation, and the lease had so provided, it could not be successfully contended that it was not income, and income received by the corporation. By agreement between lessor and lessee, assented to and acquiesced in by the stockholders, it is paid directly to them. Until so paid into the hands of the stockholders, is it or is it not the property of the corporation itself? Is rent or compensation for the use of corporate property owned by the corporation the property of the corporation, or of the stockholders, prior to the declaration of a dividend and payment thereof?

Suppose the Delaware & Hudson Company should not keep its agreement, but should make default in paying these dividends, who would sue to recover the sums ("rents") agreed to be paid? The agreement or lease referred to is between the "Rensselaer & Saratoga Railroad Company by Geo. H. Cramer, President; Attest, H. C. Lockwood, Treasurer Rensselaer & Saratoga R. R. Co.," and "The President, Managers and Company of the Delaware & Hudson Canal Company, by Thomas Dickson, President; Attest, Charles P. Hart, Treasurer Delaware & Hudson Canal Company." The stockholders are not a party to the agreement.

It seems to me very clear that these moneys agreed to be paid to the stockholders are rents received in legal effect by the plaintiff corporation, and are net income of the corporation, subject to any legal deductions under the law in question, and that the provision for payment direct to the stockholders is a convenient mode and manner of making distribution to the stockholders. I do not think this plaintiff corporation, by making such an agreement, could or did divest itself of its corporate rights, powers, and liabilities in regard to the money to be paid for the use of the property, and subject to taxation, state and national, if paid directly to the corporation. If by such agreement the money agreed to be paid the stockholders became theirs before paid and while in the hands of the lessee, and remained theirs, it was not, of course, subject to this income tax as income of the corporation. The corporation would have no income, and no tax could be imposed as against it. As income of the several stockholders it would, if sufficient in amount (after making all proper deductions from the income of the individual), pay a tax, not as income of the corporation, but as income of the individuals owning the stock. I think these sums of

money agreed to be paid the stockholders by the lessee was rent, money to be paid for the use of the property of the corporation, and was the property of the corporation. Ultimately it would belong to the stockholders, after payment of the debts and liabilities of the corporation, but is subject to any tax, state or national, the state or nation lawfully imposes on such income.

[2] This agreement was made prior to the enactment of the present Income Tax Law, and hence there was no fraud on the law intended. However, if a corporation may escape the payment of an income tax on its net income by leasing its property and providing for the payment of its surplus earnings direct to its stockholders by the lessee, few corporations will hereafter pay this income tax, unless it is held such agreements are fraudulent and void, as made to evade the tax. As to income taxes imposed by laws hereafter enacted, there may be an avoidance of the tax by leasing the property of the corporation and providing for the payment of the surplus earnings direct to the stockholders.

It seems to me that this whole question centers about the proposition: Does this lease operate to divest the plaintiff corporation of ownership of the *rents* to be paid before they accrue and become payable, and of which rents the sums to be paid the stockholders form a part? The legal ownership of rents for corporate property is in the corporation, notwithstanding its agreement that the lessee shall pay same directly to the stockholders. It seems to me clear that all sums of money and considerations agreed to be paid for the use, possession, and occupation of the corporate property belongs to the corporation, the legal owner of such corporate property. It is by way of dividends that the stockholders are entitled to the earnings of the road or any part thereof. That the sums agreed to be paid by the lessee for the use of the lessor's property are earnings cannot be questioned. Such sums are the consideration paid for the use of the property.

There are many cases holding that where dividends are actually declared to stockholders, and the stockholders are indebted to the corporation, the corporation may withhold the dividend or enough thereof to satisfy its claim. If this railroad corporation owes this income tax to the government and it is compelled to pay it, and this lease, as it does by its terms, provides that the only revenues or income of the corporation is to be paid to the stockholders direct, it seems to me that by notice to the lessee and by an equity action, if necessary, provision may be made for the retention by the lessee and payment to the lessor of a sufficient amount to satisfy the tax. This may not be the remedy, but there must be a way to protect the corporation. I do not think the fact that this lessor corporation has no available funds or money in its possession with which to pay the tax has anything whatever to do with the question whether or not it has a taxable income under the federal law referred to.

[3] The attorney for the plaintiff here says, and correctly says:

"A stockholder is not an agent of the corporation in which he owns a share. *He has no legal title to any* of its property. The functions of stockholders are exceedingly limited. Stockholders cannot enter into contracts with third per-

sons for they do not represent the corporation"—citing Victor, etc., Co. v. American Co. (C. C.) 189 Fed. 359.

Then how could these stockholders contract with the Delaware & Hudson Company with reference to the "rents" for the use of the corporate property of this lessor corporation, and how do they obtain any title to the rents, or any part of same, prior to payment over to them?

In Anderson v. Morris & E. R. Co., 216 Fed. 83, 85, 90, 132 C. C. A. 327, the case arose under the Corporation Tax Act of August 5, 1909 (36 Stat. 112, c. 6) which provided:

"That every corporation * * * organized for profit and having a capital stock represented by shares * * * and engaged in business in any state * * * 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."

The question to be decided and actually decided in that case was whether the corporation "was engaged in business," was "carrying on or doing business," and the court held it was not, having leased all its property, etc., and turned it over to the lessee, which was managing and operating it, and which paid interest on its debts and fixed sums to its stockholders on their stock as compensation or rents to the lessor for the use of such corporate property. The lease in that case was very similar to the one now under consideration in the instant case. On the question of "entire net income" on which the tax was assessed for the privilege of doing business the Circuit Court of Appeals (this, the Second circuit) said:

"But to make the act applicable, the lessor company must not alone exist 'under the laws' of the state which created it. It must, in addition, have a net income over and above $5,000, etc. It is said the lessor company does not meet that requirement of the law, as no money was paid to it; the rentals having been paid, not to it, but to its stockholders and bondholders. The notion that a corporation is an artificial entity distinct from the members who compose it is a fiction of the law, which the courts recognize for some purposes and disregard for others. Without going into the matter at length, it suffices to say that the fact that the lessee paid the rent, not to the corporate entity, but to the stockholders and bondholders, cannot prevent the act from applying to the money so paid if the other conditions of the act make its terms applicable. The fiction referred to cannot be permitted to accomplish a fraud upon the statute and an evasion of its obligations."

While the case was decided on the proposition that the corporation was not "carrying on or doing business" within the meaning of the statute, the question was more or less necessarily involved whether it had "a net income over and above five thousand dollars," and the court decided that it did have "a net income," made up, in part at least, of the sums paid to the stockholders direct and paid for the use of the property as rent.

As the language of the Circuit Court of Appeals in Anderson v. Morris & E. R. Co., supra, just quoted, accords with my views of the law and was a decision rendered in this, the Second, circuit, I regard it as controlling in this case, even if not binding on me.

[4, 5] This complaint, demurred to, says or alleges as a fact that the plaintiff corporation had and has no income; but as all the facts are stated, and the lease is a part of the complaint, this allegation is a mere conclusion. On the facts stated it appears that the plaintiff did have an income, consisting of the sums paid to the stockholders as dividends by the lessee. A demurrer admits all facts well pleaded, but not mere conclusions. I have not taken time to point out the differences between the lease in the Morris & Essex Case and the lease in the instant case, as I do not regard them at all material, so far as the question involved here is concerned. The real question is: Did the lessor have and derive a net income from its leased property? The question is, not what disposition did it make of that income, or by what mode or at what time, but did the corporation have a net income? Bouvier (14th Ed.) defines "income" as:

"The gain which proceeds from property, labor or business; it is applicable particularly to individuals. The income of the government is usually called revenue."

Is it not clear that these rents, including the sums paid the stockholders under the agreement to pay them a dividend, are gains which proceed from the property of the corporation? See, also, "Income," 22 Cyc. 63–67. The stockholders have no power to lease these railroad properties, and do not. The lessee expressly agrees to pay *"a dividend"* to the stockholders. In other words, the corporation in the lease provides for rents sufficient to pay a substantial "dividend" semiannually to the stockholders; but, instead of taking these rents and paying them to the stockholders, it provides for payment direct to the stockholders by the lessee. It is immaterial, in my judgment, that the plaintiff corporation was not itself actually doing business by operating the railroads. In Anderson v. Morris & Essex Co., supra, where the court held as stated and quoted, it expressly held and said (216 Fed. 91, 132 C. C. A. 335):

"The lessor company was not an actively operating concern. Under the terms of this lease the lessor corporation had practically gone out of business and was disqualified from any activity respecting the operation and management of the railroad business which it had been incorporated to carry on."

In short, I cannot assent to the proposition that a railroad corporation, which prior to the enactment of the act of October 3, 1913, had leased its properties during its charter life and any extension thereof for a fixed rent or compensation, payable mainly directly to those holding bonds secured by mortgage on such properties, and by keeping the road in repair, etc., and by paying a per cent. or dividend each year to the stockholders—in this case 8 per cent. after the first year—because of that fact is outside the operation of such Income Tax Law. I think it must be held that a taxable "net income, not only arose, but accrued," to the plaintiff corporation, and that the tax sought to be recovered of the defendant was properly levied and assessed.

[6] I do not see that the doctrine of novation has anything to do with this case. If A. owes B. $10,000 as rent for his property, to be paid annually, January 1st, and B. owes C. $10,000 falling due January 1st, and B. says to A., "You pay the money you owe me to C., as

I owe him," and this is done, the debt of A. to B. is discharged. He has paid the money to C. pursuant to the authority and direction of B., and C. has accepted it. But when B. comes to make out his income tax return, can he say that the $10,000 is not to be taken into account as income, inasmuch as he never received the money, but had it paid to C. and applied in payment of his debt to C.? Is it any the less income derived from the leasing of his property for the reason he directs and consents to the application of it in payment of his just debt? He, of course, would be entitled to all just deductions. Here the United States is concerned and its revenues are affected. The United States has never assented to a payment of the dividends to stockholders derived and payable from the rents of this railroad property directly to such stockholders, freed and discharged from the tax imposed by law on the net income of the corporation.

It seems to me clear:

1. That the moneys to be paid by the Delaware & Hudson Canal Company to the creditors and stockholders of the Rensselaer & Saratoga Railroad Company are rents or compensation to the Rensselaer & Saratoga Railroad Company for the use and occupation of its property, and, as the plaintiff corporation pays no operating or repair expenses, constitutes, aside from the interest paid, net income within the meaning of the law in question.

2. It is immaterial, so far as that question is concerned, that such dividends are fixed as to amount by the lease, and by its terms paid directly to such stockholders.

3. It is also immaterial that the plaintiff corporation is not possessed of money or other cash revenues with which to pay the tax. It has power to borrow.

4. The corporation could not exonerate itself from liability for this tax subsequently imposed under a law thereafter enacted by making a lease of its property which provides for the payment of all its surplus revenues directly to its stockholders.

On the face of the complaint a cause of action is not stated, and the demurrer is sustained. There will be an order and judgment accordingly.

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STURM et al. v. STUMP et al.

(District Court, N. D. West Virginia. January 29, 1917.)

1. DEEDS ⟸72(1)—"UNDUE INFLUENCE."

What constitutes "undue influence" as a determining factor must depend upon the peculiar facts and conditions of each case, where it becomes pertinent; but the term carries with it the fundamental idea of an influence which acts to the injury of the person affected by it, or of those whom he would, if left to himself, have benefited, and also, that the influence is sufficiently effective to destroy his free agency.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 190, 199.

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

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2. RELIGIOUS SOCIETIES ⟸16—GIFT TO CHURCH CORPORATION—VALIDITY.
In view of the settled policy of West Virginia, as expressed since the earliest times, by constitutional and statutory enactments adopted from Virginia and continued in force, to restrain the accumulation of property by church organizations, the presumption is against the validity of large gifts to church corporations, to the exclusion of members of the donor's family, and all things relating to them should be closely scrutinized, and they should be set aside, if any appreciable degree of outside undue influence is shown.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 103–108.]

3. DEEDS ⟸72(2)—VALIDITY—GIFT TO CHURCH CORPORATION—UNDUE INFLUENCE.
A grantor, when 85 years old, made a voluntary conveyance of the larger part of his property, consisting of several hundred acres of land in West Virginia, to the American Baptist Home Mission Society, a New York corporation, the deed to become effective on his death. He had for many years been a Baptist minister, and, while having little education, was a man of strong will and opinions, and an ardent advocate of missions, about which he often preached, and to which he had previously contributed liberally in cash. He had been solicited for a number of years by the state agent of the society to make such a donation by deed or will, and it was suggested that, as the laws of the state did not permit the incorporation of church societies, it be made to the New York corporation, with a request that a share be used locally. The grantor left a daughter, not in very good health or circumstances, and the children of another daughter. *Held* that, if not void as an indirect violation of the laws of the state, the conveyance should be set aside at suit of the heirs as having been obtained through undue influence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 197, 198.]

In Equity. Suit by Drusa Sturm and others against John S. Stump and others. Decree for complainants.

Daniel Huffman died in Gilmer county in March, 1916, in his ninety-fourth year of age. He married prior to 1846, and his wife died in 1902. The children of his marriage were two daughters, one of whom, Drusa, married Charles Sturm and is still living; the other married Cary Mollohan, and both she and her husband are dead, leaving children surviving them, Camden D. Mollohan, Josephene Mollohan, Losie Stump, and Darlie Bush. Daniel Huffman was an industrious, frugal farmer and minister of the gospel of the Baptist Church, and accumulated estate, mostly realty, admitted to be worth anywhere from $20,000 to $50,000. In November, 1910, the county court of Gilmer county adjudged him incompetent and appointed a committee to control his person and estate.

On November 11, 1907, Huffman, by deed, conveyed to the American Baptist Home Mission Society 384 acres, 532 acres, 100 acres, 100 acres, and an undivided interest in 10 acres, all lying in Gilmer county; all his interest in all of the oil and gas in and underlying 351 acres in Gilmer county, in and underlying 147 acres and 55 poles, and 175 acres, in Calhoun county, and in and underlying 92½ acres in Braxton county; and all his interest in and to the coal, oil, and gas in, upon, and underlying 92 acres and 48 acres in Gilmer county. By the terms of this deed he reserved the use, possession, and control of these properties, to take and have all rentals for oil and gas accruing from existing leases, to make other leases therefor, and receive all rentals and profits therefrom, for and during his life; and it is set forth that "this deed shall not take effect until after the death of said Huffman." The consideration for this conveyance, set forth on its face, is $1 in hand paid; but in its closing paragraphs it sets forth a purpose on the part of Huffman, by will, to make specific legacies to certain natural persons, and stipulates that,

If the other estate of which he died seised proved insufficient to pay such legacies, then the grantee Society should make good all such specific bequests or legacies, to the extent of not exceeding a maximum sum of $4,500, and to secure the fulfillment of this obligation a vendor's lien is retained.

On September 20, 1909, by deed reciting the execution of this former deed to the Mission Society, and setting forth that "a doubt has arisen whether or not the grantee in the deed aforesaid can take and hold real estate in the manner contemplated by the said deed," Huffman conveys the same land and oil, gas, and coal interests to John S. Stump (who was and is the state agent of the Mission Society), in consideration of $1 in hand paid "and other valuable considerations," to be by Stump "held, used, and disposed of by him according to his own will and discretion, without right on the part of any one to call him to account for the said lands, or interests in lands, or any part thereof, except so far as necessary to make good the charges hereby created." The charges thereby created are then set forth to be the reservation of a life estate in the lands and interests, to receive the rents, issues, and profits thereof for life, and to have any specific legacies bequeathed by the grantor in his will made good to the extent that other property of which he may die seised fails to accomplish that purpose, up to a maximum sum of $4,500, to be paid by grantor's personal representative so soon as the deficit should be ascertained, and to secure such provision a vendor's lien is retained. This deed then closes with this clause: "It is expressly understood between the parties hereto that this deed is not intended as a repudiation of the deed so made to the American Baptist Home Mission Society, and is only intended to pass title to the grantee herein in the event the first-mentioned shall be held to be void and to pass no title."

On June 25, 1912, the Mission Society, by deed, conveyed to said John S. Stump all its right, title, and interest in and to these lands, and coal, oil, and gas interests, in consideration of $1 in hand paid and his note for $10,000, upon conditions that the grantee, Stump, should assume all the obligations, stipulations, and agreements contained in Huffman's deed to the Society; that interest on the $10,000 note should not begin to run until Huffman's death, after which the vendor's lien retained to secure it, upon default in payment, might be enforced by sale of the lands, but such proceeds of sale, whatever amounting to, should release and discharge the note in full. It is further stipulated in this deed that, if the deed of November 11, 1907, to the Society "shall, for any cause, be declared null and void by a court of the state of West Virginia or of the United States, then and in that event "Stump shall "be released from any payment on account of the debt herein incurred, and said debt shall be deemed to be fully paid and discharged."

On April 11, 1916, after Huffman's death, Stump and wife, in consideration of the sum of $1 in hand paid, other valuable consideration acknowledged to have been received, and the assumption of payment of Stump's $10,000 note to the Mission Society, conveyed all these lands and interests in coal, oil, and gas to the Latin-American Improvement Association, Incorporated, a corporation formed under the provisions of the Business Corporations Law of New York by certificate filed and recorded in the office of the secretary of state, in that state, on August 20, 1915. Its certificate of incorporation sets forth the purpose of the corporation to be to acquire and improve real property, to sell and lease the same in any state in the United States, in Mexico or elsewhere. Its capital stock is limited to $1,000, of 10 shares each, of the par value of $100, 5 of which are subscribed for by the five incorporators, one share each. On the same 11th day of April, 1916, this Latin-American Improvement Association executed to Stump a power of attorney authorizing him to sell these lands and interests and collect the proceeds of sale, proceed at law and equity, employ counsel, and do all things necessary to be done in the premises. For the purpose of assaiing and having annulled these several conveyances and this power of attorney, the surviving daughter and the children of Huffman's deceased daughter instituted this suit on May 13, 1916, in the circuit court of Gilmer county. It has been removed to this court upon petitions of the Mission Society and the Improvement Association. Answers have been filed by Stump and the Society, the evidence taken in open court, arguments made, and briefs presented, and the cause submitted for final hearing.

W. E. Haymond and Alex Dulin, both of Sutton, W. Va., and C. M. Bennett and R. F. Kidd, both of Glenville, W. Va., for plaintiffs.

Osman E. Swartz, of Clarksburg, W. Va., W. E. R. Byrne, of Charleston, W. Va., and L. H. Barnett, of Glenville, W. Va., for defendants.

DAYTON, District Judge (after stating the facts as above). The plaintiffs assail these conveyances on several different grounds, based upon both law and fact. It is not denied that their sole design and purpose were to vest in the American Baptist Home Mission Society these lands, or the proceeds that may arise from their sale, and that defendants John S. Stump and the Latin-American Improvement Association have no other interest in the matter, save and except to see this purpose accomplished. Stump is, and has been all the while, a minister of the Baptist Church and the state agent of this Mission Society. The Improvement Association is officered, in part at least, by officers of the Mission Society.

The American Baptist Home Mission Society was organized in New York in 1832. It was first incorporated by act of the Legislature of that state, approved April 12, 1843. Laws N. Y. 1843, c. 117. This original act was subsequently amended by acts approved February 9, 1849 (Laws 1849, c. 35), April 30, 1877 (Laws 1877, c. 196), May 3, 1895 (Laws 1895, c. 528), March 31, 1900 (Laws 1900, c. 260), and April 5, 1902 (Laws 1902, c. 358). The purpose of its incorporation, as set forth in the original act, was that "of promoting the preaching of the gospel in North America." By the amended act of 1849, it was enacted that it should have power to take, by devise or bequest, real or personal property, the clear annual income from which did not exceed $10,000, "provided, no person leaving a wife or child or parent shall devise or bequeath said corporation more than one-fourth of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of such one-fourth, and no such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator." By the last amendment, that of 1902, the power to take real and personal property is enlarged, so that the taking may be by devise, bequest, gift, grant, or purchase, either absolutely or in trust, "subject, however, in respect to the amount of property it may take and hold, to the restrictions and limitations of existing laws, and in respect to devises or bequests from residents of the state of New York, to the provisions of chapter three hundred and sixty of the Laws of eighteen hundred and sixty, entitled 'An act in relation to wills.'" At the time of this amendment, in 1902, the "existing law" of New York, pertinent in the premises, was contained in section 6, chapter 319, of the Act of April 12, 1848, as follows:

"Sec. 6. Any corporation formed under this act shall be capable of taking, holding or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will or testament of any person whatsoever, the clear annual income of which devise or bequest shall not exceed the sum of ten thousand dollars; provided, no person leaving a wife or child or parent, shall devise or bequeath to such institution or corporation more than one-

fourth of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of such one-fourth, and no such devise or bequest shall be valid, in any will which shall not have been made and executed at least two months before the death of the testator."

However, by Act May 15, 1903 (chapter 623, Laws 1903), this section 6 of the act of 1848 was amended by section 19, so as to allow one leaving a wife, child, or parent to devise or bequeath one-half of his estate, after payment of his debts, to such corporations, and this last provision is now incorporated in the 1909 consolidation of Laws, made in New York that year, and appears as section 17, chapter 18, of the Laws of 1909, known as the "Decedent Estate Law." See 1 Birdseye's Consolidated Laws, 945; also see Lefevre v. Lefevre, 59 N. Y. 434, for a discussion of the scope and effect of these general laws upon such corporations, chartered by special legislative act (as was this Mission Society) before their passage.

One of counsel for plaintiffs very ably argues that these conveyances are absolutely void, as contravening article 6, § 47, of the Constitution of the state, forbidding the incorporation of churches or religious denominations. His line of reasoning is to the effect that, if this Mission Society could not be incorporated in the state, then it is not in the power of this state to permit it, as a foreign corporation, to do business and take and hold real estate in this state; that it is in fact a nonentity in this state, and a grant of real estate to it in this state is absolutely void, not voidable; and he cites Runyan v. Coster's Lessee, 14 Pet. 122, 10 L. Ed. 382; United States v. Fox, 94 U. S. 315, 24 L. Ed. 192; Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317; Bank v. Niles, 1 Doug. (Mich.) 401, 41 Am. Dec. 575; Beach on Corporations, vol. 2, § 411; Id., vol. 1, §§ 164, 335.

To the statement in West Va. Pulp & Paper Co. v. Miller, 176 Fed. 293, 100 C. C. A. 176, that complaint of the devise of land to a foreign church could only be made by the state, he insists (a) that such statement is obiter dictum, as the case did not involve that question, because it was determined there that the land had been converted into personalty; (b) that a clear distinction seems to exist between devises or conveyances of land and bequests or gifts of personalty; and (c) such cases as Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401, are not applicable, because arising in states where religious corporations are not absolutely prohibited, but limited in the extent of their right to take; and to assail an excessive amount taken is only a collateral, and not a direct, attack. Here in this state, he insists, where no power to take at all exists, any conveyance to such church organization, under foreign incorporation, is absolutely void, and constitutes a cloud only upon the title of the heirs which the state, by its laws of descent, has vested in them. If the case was such that the lands, unlawfully taken by a corporation would escheat to the state then he insists the estate alone could complain, but here the conveyances are absolutely void and the lands, by the state's law, has vested in these heirs. In support of this reasoning of counsel, the fact may be cited that the Supreme Court, speaking through Chief Justice Marshall, in Baptist Association v. Hart, 4 Wheat. 1, 4 L. Ed. 499, de-

clared a devise of this kind void at the instance of executors; in Kain v. Gibboney, 101 U. S. 362, 25 L. Ed. 813, speaking through Mr. Justice Strong, it held void a bequest of like character at the instance of a trustee; and in Russel v. Allen, 107 U. S. 167, 2 Sup. Ct. 327, 27 L. Ed. 397, it has in effect said, while it has not taken such action in cases arising from other states, it has done so in Virginia cases, because of its peculiar laws on the subject of such devises and bequests, which laws, it may be said, have been adopted by this state.

Personally, my views have been in accord with those of counsel in this line of reasoning, as shown by the two opinions filed in Miller v. Ahrens (C. C.) 150 Fed. 644, and (C. C.) 163 Fed. 870; but I hesitate, in view of the opinion rendered in Pulp & Paper Co. v. Miller, supra, by the Circuit Court of Appeals for this circuit, to rely upon them in the decision of this case. But putting aside all other contentions, these plaintiffs assail these conveyances upon another ground—that of undue influence—which merits most careful and thorough consideration.

[1] A discussion of this contention requires consideration (a) of the character and effect of the assailed transactions, (b) of the actors therein, (c) of the source and extent of the influence exerted, and (d) the effect thereof. The term "undue influence" has been variously defined, and still no definition is entirely satisfactory; for, after all has been written and said, its application, as a determining factor, must depend upon the peculiar facts and conditions of each case where it becomes pertinent. 29 Am. & Eng. Encyc.-Law (2d Ed.) p. 102. The word "undue" carries with it the fundamental idea that the influence, if effective, has been injurious. In Re Coleman's Estate, 185 Pa. 437, 40 Atl. 69, it is said:

> The term undue influence "means an influence which acts to the injury of the person who is swayed by it, or of those whom he would, if left to himself, have benefited."

In Words and Phrases, vol. 8, p. 7166, more than 50 cases are cited in support of the definition: "Undue influence" is the exercise of sufficient control over the person, the validity of whose act is brought in question, to destroy his free agency and constrain him to do what he would not have done if such control had not been exercised.

These two definitions, taken together, may be adopted as fairly warranting a consideration in detail of the elements I have above set forth. What, then, should be said of the character and effect of these conveyances, or, expressed in other words, in what light are conveyances to a religious corporation by a husband or parent of substantially all his property, for nominally no consideration, leaving wife and children in an impoverished condition to be viewed in law and morals?

[2] In Miller v. Ahrens (C. C.) 150 Fed. 644, I reviewed to a limited extent the fixed determined policy of this state, antagonistic to such conveyances and devises generally to church organizations, expressed in constitutional and legislative enactment, derived from similar ones of the mother state, Virginia, whose people in turn from the start were very sensitive to the evils endured by their ancestors in England from such church aggression, requiring there, as it did, the

enactment of 20 distinct mortmain statutes to correct and stay it. It is true that in West Virginia Pulp & Paper Co. v. Miller, 176 Fed. 284, 100 C. C. A. 176, the result reached in the Ahrens Case, touching Fickey's devise, was reversed on the ground that it was not direct to the church, but to a trustee for its benefit, and the trustee having by sale converted the land into personalty, before suit brought, the remedy was to pursue the sale proceeds. The fixed public policy of the state, as above indicated, however, was not, and cannot be, controverted. It remains perpetuated in the present Constitution of the state, article 6, § 47, absolutely forbidding the granting of a corporation charter to any church or religious denomination, and in sections 1 and 7, chapter 57, of the Code of 1906 (sections 3292 and 3299, Hogg's Code 1913), expressly limiting the holding by churches of real estate for the sole purposes of a place of public worship, a burial place, and a residence for a minister, and restricting such holding for these purposes, to a maximum of 4 acres in any incorporated city, town, or village, and to 60 acres outside thereof.

It is significant in this connection to note, also, that the act of the Legislature of New York, passed in 1849, amending the charter of this Mission Society, expressly limited its power to take, by way of devise or bequest, either real or personal property yielding a net income in excess of $10,000, and forbade any one leaving a wife, child, or parent to devise or bequeath to it property in excess of one-fourth of his estate after payment of his debts, and, as I have shown above, that the general law existing in New York limits the amount to one-half of the estate after payment of debts. Thus it will be seen that sweeping conveyances to church organizations of the kind and character here assailed are against the public policy of the common law, of this state, and, to a degree, of the state of New York, the one granting this society its corporate existence.

But I am constrained to think we may even go a step farther and say they are condemned by the divine law. Upon one occasion, when the Pharisees and Scribes, finding fault with His disciples for their failure to conform in their habits to the traditions of the elders, came to the Savior of the World and asked him, "Why walk not Thy disciples according to the tradition of the elders?" He answered:

"Well hath Esaias prophesied of you hypocrites, as it is written, This people honourth me with their lips but their heart is far from me.

"Howbeit in vain do they worship me, teaching for doctrines the commandments of men.

"For laying aside the commandment of God, ye hold the tradition of men, as the washing of pots and cups: and many other such like things ye do.

"And he said unto them, Full well ye reject the commandment of God, that ye may keep your own tradition.

"For Moses said, Honour thy father and thy mother; and, Whoso curseth father or mother let him die the death:

"But ye say, If a man shall say to his father or mother, It is Corban, that is to say, a gift, by whatsoever thou mightest be profited by me; he shall be free.

"And ye suffer him no more to do aught for his father or his mother;

"Making the word of God of none effect through your tradition, which ye have delivered: and many such like things do ye."

Mark, chapter 7, verses 7 to 13, inclusive; Matthew, chapter 15, verses 3 to 9, inclusive.

Whereby it seems clearly to appear that, if one seeks to discharge the debt of nature, due from him to his parents, by making a gift of his substance to God and religious associations, so as to be unable to support and maintain them, if required, he violates the law of both the Old and New Testament. The inspired Apostle Paul has extended the same doctrine to all family relations when he says:

"But if any provide not for his own, and specially for those of his own house, he hath denied the faith, and is worse than an infidel." 1 Timothy, chapter 5, verse 8.

What conclusions are to be drawn from all this? I think at least these two:

First—That in considering such conveyances and the conditions and circumstances of their execution, no presumptions arise in their favor, but precisely the contrary; that all things relating to them and the causes of their execution should be closely scrutinized, and they should be set aside if any appreciable degree of outside undue influence is shown to have brought about their execution. It must go without saying that courts of equity should never violate the direct precept of the law, nor directly or indirectly attempt to sustain contracts that violate its well settled and defined policy, except in extraordinary and exceptional cases, where great injustice and injury would otherwise result.

Second—That it is distinctly wrong for those who manage and control the operations and efforts of these religious organizations to use any effort or influence to induce the execution of such sweeping conveyances, so condemned by the policy of the law, but, on the contrary, in my judgment, it is their clear moral duty to advise against them and refuse to accept them, where the grantor thereby leaves a wife, child, or parent in an impoverished condition. We may rightly expect Christian men and women to be strict in their observance of both the letter and the policy of the law.

[3] Considering next the actors in these transactions, the evidence clearly shows Huffman to have been a man above the average of his community in both his physical force and mental faculties. In a certain sense he was a fair example of the "warring members" within, the worldly and the spiritual. He was a money maker, able and successful in accumulating much greater property than the average citizen of his community, and very quick to maintain its possession. In the last years of his long life, when memory was failing, he could easily forget his sale contract of timber, but was quick to discover that the timber was being cut, and prompt in seeking to prevent it; he could readily forget his indorsement of the small note for his granddaughter, but prompt in denouncing it as a forgery, when he felt he might have it to pay, regardless of what the consequences to her would have been, if his charge had been true. Other similar incidents in the record evidence could be cited, but these are sufficient. Clearly he was a man of good, hard, business sense and strong of will; at the same time he was a man of no breadth of education or culture.

Many years ago, in his youth, a missionary minister of the Baptist Church "came over the mountains" to preach in Huffman's community,

and Huffman was converted. It is a matter of church history that this Baptist denomination had split largely over this question of missions and missionary work. The Primitive or "Old Side" branch, carrying its Calvinistic creed to the limits of fatalism, denounced it as unnecessary, if not unscriptural, to employ or pay its ministers or to send out missionaries, for "what is to be will be"—those predestined to be saved will be saved, and those predestined to be lost will be lost, regardless of any human effort to the contrary. On the other hand, the adherents of the other branch bitterly repudiated this doctrine, and to accentuate their dissent thereto named themselves the "Missionary" Baptist Church, and, true to their belief in this regard, have always been very active and earnest in missionary effort.

In the days of Huffman's youth, 75 or more years ago, in this section of country, this Baptist denomination was not very particular as to either the secular or theological educational qualifications of its ministers. Under its very democratic form of church government, each particular congregation was a law unto itself, and did very much as it pleased as regards who should or should not preach. Huffman, illiterate as he was, became a minister, and it would seem, from the beginning, was particularly impressed with the importance and necessity of missionary effort. It is testified that it was a continuing practice of his to preach upon this subject particularly, and to refer to himself as "a child of missions," and during his long life he was conspicuous, in his community, for his comparatively large contributions to this cause. As the years went by, he became more and more subject to the compelling force of this influence, until, as the clerk of the county court of his county for 24 years testifies, he became regarded by him as a religious monomaniac, and he drove attorneys out of their office to avoid his discourses on the missionary subject. He stated to different parties, at different times, his fixed purpose to convey or devise his property to this Mission Society.

The evidence is full and complete as to these facts, largely produced by defendants to establish two contentions: First, that of his mental capacity to convey; and, second, that his mental faculties and force of will were too strong to be subject to undue influence. I think the evidence does rebut the contention of senile dementia or incapacity to convey. While he was 85 years old in 1907, and his memory was failing, I do not doubt his ability then to understand to the full degree required by the law, as enunciated in Buckey v. Buckey, 38 W. Va. 168, 18 S. E. 383, and similar cases, the nature and effect of a contract of sale. I cannot agree with the second contention, however, that this evidence proves him to have been too vigorous in mental capacity and too strong of will to be the subject of undue influence. It may be paradoxical, nevertheless it is true, that many men of the highest intellectual powers and the strongest wills are peculiarly subject to just such influence, and become far more dominated and controlled by it than those less mentally strong—men, for example, like Savonarola, Peter the Hermit, and John Brown. It is to be borne in mind that the character and source of the undue influence is immaterial; that it may be exerted by a single individual, or, collectively,

by many. The essential element is that it should be of such power as to control the will and induce a resulting act injurious to the victim himself, or to those whom he would in its absence have benefited.

It seems to me that Huffman from the time he was converted was peculiarly subject to this particular influence. The cause of its inception, whether by the preaching of the pioneers or otherwise, is not disclosed. The first positive evidence of personal effort to induce its consummation is disclosed in the letter written to Huffman on September 12, 1893, by W. E. Powell, who preceded Stump as state agent of this Mission Society. In this letter he says:

"Your kind letter containing two checks, one for $102.93 for State and Home Missions and the other for $2 for your J. and M., has come to hand. Please accept my sincere thanks for your kindness in this. Sorry to see such a falling off. In 1891 your Association gave $130.33, 1892 $99.49, now only $89.38, a loss to our Board of over $40 in two years. The indications now are that we are to have a debt of $800 to $1,000, as against $850 last year. If it is possible for you and Mrs. Huffman to do so, I hope you will send me a good personal gift any time before Oct. 5. A good Baptist made his will last week. Has about $15,000 worth of property and remembered the Home Mission Society. I should be glad if you would deed a good farm to the American Baptist Home Mission Society. You keep and manage it as long as you live, and turn over the rents each year, if you wished to do so. My dear Bro., I hope you will remember both State and Home Missions, but as you cannot convey property by will for State Missions, but can for Home Missions, allow me to urge that you will not put this matter off. It will be too late soon. Please do soon what you wish to do along this line, and let me know about it. Will come up to see you about it, if necessary. Hope to see you at Charleston Oct. 10–13."

This was followed by another letter, under date of January 6, 1894, in which he receipts for $10 sent by Mrs. Huffman, and expresses the belief that Huffman and his wife, "after providing for your children, will want to do a liberal part for the work of our dear Savior by leaving money or property by will," and incloses an exact form of bequest, as prepared by the Home Mission Society, and then says:

"Since our State Mission Board cannot receive and hold legacies under our W. Va. laws, you can will all to the Home Mission Society, with the request that say one-half be for State Mission work in W. Va. Since life is so uncertain, and as making a will does not in any way interfere with the use and control of your property, allow me to urge upon your prayerful attention that you and Mrs. Huffman ask the Lord to direct you in this matter, and that you make your will at the earliest day you can, and that you remember liberally the American Baptist Home Mission Society that has done so much for our beloved country and also for West Virginia Baptists. As soon as you decide about this matter, I shall be glad to hear from you both."

And by still a third, under date of December 6, 1895, in which he says:

"If I should come up to see you about the 20th, will you be ready to close up your will and arrange for the legacy? Would it suit you to deed to the American Baptist Home Mission Society a farm or two? This might be better than to have it in a will that might be contested. Please let me hear from you."

An analysis of these letters shows that the writer fully understood that, under the law of this state, the State Mission Society was not capable of being incorporated, could not take property, and, under be-

lief that the New York Society could do so, was seeking to evade the law by a devise of all to the one, with suggestion that half be for the use of the other; that he wanted the matter closed up very soon by will or deed, but preferred the latter, as being less liable to be contested (did he fear that the influence might at last fail—Huffman change his mind and revoke the will?); that while he (Huffman) should make provision for his family, he urged him to provide very liberally for the Home Mission Society; and that such provision should embrace "a farm or two." Huffman could not resist these appeals and this influence. On July 10, 1896, he and his wife, for the consideration of $1, by deed conveyed to this Home Mission Society the tract of 532 acres embraced in his home farm and comprising more than half of it, reserving, however, two lots devoted to burial purposes, three other specific acres absolutely, and the timber, coal, oil, and other minerals for their lives, with right to cut the timber and remove the coal, oil, and other minerals. However willingly Mrs. Huffman may have joined in *this* conveyance, it appears from the testimony, that, his contributions continuing, she thought he was going too far, and her mother heart became solicitous for the children. In the fall of 1901, as he was starting to the State Association, she said to him: "Daniel, don't go down and give all we have." On his return she asked him how much he had given, and, when he answered $1,000, she said she did not want him to give it all away—wanted some for the children. He said the reason he gave the $1,000 was because they led him to believe that he was better able to give than any one else at the Association.

Mrs. Huffman died January 3, 1902. Her death and her anxiety about the children seems to have caused, to some extent at least, a weakening of this "missionary" influence over him. The children very naturally were dissatisfied with the conveyance away of the better part of the home farm. In a pathetic letter to John S. Stump, under date of June 16, 1902, he says:

"I am sad and lonely my business is not in bad shape I do not owe but a few dollars I have a good deal due me I am making arrangement with the Home Mishion Bord to by the farm back that I deeded to them if we can get the paper fiset up I will pay them down for it I do not know what I will do in the futer some times think I will try to sell every thing I hav I can tell what would be the best thing is and seteled here I can not tell what time what time may bring fourth. I have not been preaching much since my wife died. I want strate all my bisness up that I can and colleck all I can and against that I can know what I beter do."

He did buy the farm back. On July 1, 1902, by deed, the Society reconveyed it to him, for $1,600 cash. In the deed, assailed here, of November 11, 1907, this farm is a second time conveyed to the Society. Meanwhile Powell had died, and John S. Stump, Huffman's nephew, had been selected his successor as state agent of this Society. He was a minister of the church, able, of strong personality, and very earnest, active, sincere, and zealous in his work for this Society. This is disclosed in his letters adduced in evidence. It is not long until the old influence fully controls Huffman again. He attends State Associations. It is to be remembered that the leading purpose of this

Mission Society is to raise funds with which to pay ministers such parts of their salaries as were not provided for by the localities where they were stationed. In these Associations foregathered many thus provided for. Stump, as agent for the Society, had a hard time to raise funds. The cause was in debt. Huffman could not resist the calls made upon him. He first made a will that has never been probated. Afterwards he adds codicils. Stump aids him in the preparation of these, or some of them. He took custody of the will for about a year. He was working hard to raise funds to pay off the Society's debt and seeking pledges payable upon condition that the whole amount be pledged. He appeals to Huffman by letter to go and see old men in that section, likely to die soon, and get them to pledge contributions, to encourage them to do so by telling them what he (Huffman) had done. Then, realizing that Huffman's provision by will was not available, he says to him:

"Here is another proposition I would like you to think about: If we could get within $700 or $800 of enough pledges to pay that debt, could we not make a change in your gift, so that we could realize enough money on it now to finish up the debt and secure these pledges?"

And he suggests a method of borrowing by which it could be done. Little more need be said. It is undisputed that Stump arranged for the meeting and was present when the deed of November 11, 1907, to the Society, herein assailed, was executed. He secured counsel to prepare it. When Judge Linn, an able lawyer, expressed doubt as to its validity under the laws of this state, he, on behalf of the Society, employed him to prepare and secure from Huffman the deed to himself of September 20, 1909, meant, not for his personal profit, but solely as a device to hold the property for the Society's benefit. He had meanwhile taken from Huffman a broad power of attorney to control his estate. What about the other interested parties, the surviving daughter and the grandchildren? The extent of Huffman's contributions to the Society, independent of these lands conveyed, is not fully disclosed. Checks for $1,600 for the farm bought back, and for $558.80, are exhibited; Huffman stated to his wife he gave $1,000 at the Association, and mention in one of Stump's letters is made of two notes, for $500 each, which it would seem he had borrowed, was ready to pay, and Stump was informing him to whom he could send the checks for such payment. If all these sums were paid to this cause, they aggregate a sum nearly, if not quite, equal to all he has given to these heirs of his. He conveyed to his daughter a tract of land which she sold for $2,000. This was 22 years ago, and some 15 years ago he gave her a check for $720. She is now 60 years of age, living in Alabama on a $1,300 farm, compelled to live in the South, because her health will not allow her to live in this climate.

The earnestness, zeal and marked ability manifested by counsel upon both sides in the conduct of this case, the elaborate arguments made, and the exhaustive briefs filed by them have caused me to give much time and study to the matters involved. To discuss them has to a degree been embarrassing, because of the danger of false impressions arising therefrom. Let it not, for a moment, be assumed that in this

discussion I have meant to reflect upon the honesty, integrity, or sincerity of this church, its ministers, its Mission Society, or its agents. I yield to none in my admiration and affection for this church, its ministers, and its agents for the good they have done and are doing. In their zeal I think they went too far in this matter; as to their integrity and sincerity of purpose, I have no question.

The conclusions I reach are these: I think these conveyances are direct violations of the statute of West Virginia limiting the amount and the purposes for which church organizations may take real estate. If, however, the ruling in West Va. Pulp & Paper Co. v. Miller, supra, is held decisive that only the state can complain of this, I am fully convinced that they should be set aside, at the instance of these heirs, because of the undue influence that caused their execution, and decree to that effect may be entered.

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## UNITED STATES v. PENNSYLVANIA CO.

(District Court, W. D. Pennsylvania. February 9, 1917.)

No. 1574.

1. MASTER AND SERVANT ⟸13—HOURS OF SERVICE ACT—CONSTRUCTION—LOCAL CONDITIONS.

   Hours of Service Act March 4, 1907, c. 2939, 34 Stat. 1415 (Comp. St. 1913, §§ 8677–8680), was intended to apply in every part of the United States, without regard to difference between local conditions, and must be given a construction which would be sound in every other judicial district.

   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14.]

2. MASTER AND SERVANT ⟸13—HOURS OF SERVICE ACT—CONSTRUCTION—LIBERALITY.

   The Hours of Service Act is so manifestly in the interests of humanity that it should be liberally construed, but because of the penalties imposed its provisions should not be extended beyond their plain meaning.

   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14.]

3. MASTER AND SERVANT ⟸13—HOURS OF SERVICE ACT—EXCEPTIONS—"CASUALTY"—"UNAVOIDABLE ACCIDENT"—"ACT OF GOD."

   In the proviso of the Hours of Service Act, excepting from its operation any case of casualty or unavoidable accident or act of God, or where the delay was the result of a cause not known to the carrier or its officers when the employé left the terminal, and which could not have been foreseen, none of those terms are synonymous; but "casualty" means a fortuitous happening caused by some human agency which the carrier could not control, "unavoidable accident" means a fortuitous happening caused by some human agency over which the carrier may have some control, yet which could not have been prevented by the exercise of due care, and "act of God" is an accident not occasioned by human agency, but by physical causes alone, and in the fourth exception it is the cause, and not the delay, which could not have been foreseen, and this last exception should not be construed to include the others, which would require the immediate suspension of all traffic in the affected division on learning of a wreck, and therefore the act does not apply where the delay resulted from the derailing of another train by the breaking of an axle, which was a casualty, though before the employés in question left the terminal the

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

dispatcher knew of the derailment, but had been informed by the conductor that the track could be cleared within an hour.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14.

For other definitions, see Words and Phrases, First and Second Series, Act of God; Casualty; Unavoidable Accident.]

4. MASTER AND SERVANT ⊂⊃13—HOURS OF SERVICE—CASUALTY—RELIEVING EMPLOYÉ.

Where employés of an interstate carrier are delayed by casualty, so as not to be able to reach their terminal in time, the Hours of Service Act does not require the carrier to relieve them before they reach the terminal, but as to them the limitation of hours of service does not apply.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14.]

5. MASTER AND SERVANT ⊂⊃13—HOURS OF SERVICE—CONSTRUCTION BY COMMISSION.

A ruling by the Interstate Commerce Commission, which by Hours of Service Act, § 4, is given the duty of executing and enforcing the act, construing a provision of the act, is entitled to great weight, if there is any doubt as to the meaning of the act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14.]

At Law. Action by the United States against the Pennsylvania Company to recover penalties for alleged violations of the Hours of Service Act. Judgment rendered for defendant.

E. Lowry Humes, of Pittsburgh, Pa., for the United States.

Wm. S. Dalzell, Gordon Fisher, and R. H. Hawkins, all of Pittsburgh, Pa., for defendant.

ORR, District Judge. This action has been brought by the United States to recover from the Pennsylvania Company penalties for alleged violations of the act of Congress entitled "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon," approved March 4, 1907 (34 Statutes at Large, 1415), and commonly called "the Hours of Service Act." The case was tried by the court without a jury, in pursuance of a stipulation in writing, signed by the representatives of both parties. The court finds the facts to be as follows:

On July 3, 1915, five employés of the defendant, which is a common carrier engaged in interstate commerce, were required to remain on duty for a longer period than 16 hours. At the time they were engaged jointly in the operation of a freight train which was being moved by locomotive engine No. 7460. Said train (which may be designated as extra No. 7460), for the purpose of moving interstate commerce, left the terminal at Cleveland at about 4:35 a. m. for Conway, within the jurisdiction of this court, at which place the men were not relieved until about 9:43 or 9:45 p. m. Two of the men had been called for this service at 4:05 a. m. and three at 4:20 a. m. The hours of service of all the men engaged in that train movement were not, therefore, exactly alike, but in each case they exceed 16 hours.

Before extra 7460 left the Cleveland terminal, at about 3:45 a. m., the train dispatcher at that place had received a telephone message from the conductor of a train designated as extra 9981 that his train had been wrecked near Earlville. The information was to the effect

that the east-bound track was badly blocked by three cars; that one car blocked the west-bound track, but that the west-bound track could be cleared within a half an hour or an hour after the wreck train got there. The wreck train arrived at the wreck at 6:50 a. m., but did not have the west-bound track ready for service until 10 o'clock a. m. The east-bound track was not ready for service until late the same evening. The limitation of service to one track during the day congested the traffic. Extra 7460 was the first freight train going east to pass by the scene of the wreck and proceed on its way to its destination. The delay at Earlville was the cause of the excess time of service in which the crew of 7460 were engaged. Had that wreck not occurred, the employés would have reached the end of their run within the time limit. The cause of the wreck of extra 9981 could not have been foreseen or avoided. That train had been inspected before it left the terminal at Cleveland. A wheel upon one of the cars broke by reason of some unknown cause, which derailed three cars of the train. The conductor of that train was qualified by experience with wrecks to express an opinion as to the time which would be required to clear the tracks. Immediately after the wreck he was of opinion that the track could be cleared of the wreck in an hour. He was the man who informed the train dispatcher of the wreck and the conditions existing at the place of the wreck. The train dispatcher relied upon the information given him by said conductor and permitted extra 7460 to leave the terminal.

The contention on the part of the defendant is that by reason of the foregoing facts, the act of Congress does not apply, because of the following provision therein:

"Provided that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officers or agent in charge of such employé at the time said employé left a terminal and which could not have been foreseen."

The contention on the part of the government is that, although the derailment of extra 9981 may have been an unavoidable accident, yet, because the same was known to the train dispatcher before the employés engaged in the movement of extra 7460 had left the terminal, the defendant is still liable. The government further contends that, although the accident to extra 9981 may have been unavoidable, and may have been an excuse for the delay at Earlville, yet the defendant is liable to the penalties imposed by the act, because the crew of extra 7460 were not relieved before they reached their terminal within the period of 16 hours.

[1] The purpose of this act has been well expressed in its title to be:

"To promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon."

It is unnecessary to dwell either upon the economic or other value of such legislation. It was intended to be applicable in every part of the United States, without regard to density of population, difference

between local conditions, or transportation facilities. In the Northern district of Ohio, or in the Western district of Pennsylvania, which together, according to the last census, as gathered from the last report of the Attorney General, had a greater population than all the districts which comprise the Ninth circuit, exclusive of Alaska, the act should not receive a construction which would not be sound in every other judicial district within the United States. The fact that there may be a million people between terminals dependent upon railroad service should not induce a construction of the act which would be unwarrantable in cases where there may be few, if any, people between the terminals who depend upon railroad service. It is necessary, therefore, to avoid the natural tendency to allow the immediate background to control the view of the statute.

[2] The act is so manifestly in the interests of humanity that it should be liberally construed, and yet, because of the penalties impose for violations of the act, its provisions should not be extended beyond their plain meaning. It is highly important that those who may be subjected to penalties for violations of the act should know what acts or omissions may subject them to penalties. The act does not operate against carriers alone, but against officers and agents of carriers as well. Its terms apply to both equally, and should be read at all times in the same light.

[3] The act itself provides that it shall not apply in certain cases, as appears by the proviso hereinabove mentioned. The exceptions found in that proviso are four: First; casualty; second, unavoidable accident; third, act of God; and, fourth, "Where the delay was the result of a cause not known to the carrier * * * at the time said employé left a terminal and which could not have been foreseen." These four exceptions may be more easily illustrated than defined. First, a large fire and fallen buildings in a city along the right of way of the railroad may illustrate what is meant by casualty; second, a derailment of a train caused by the breaking of an axle having a concealed defect not discoverable by inspection may illustrate unavoidable accident; third, the washing away of bridges by a great flood may illustrate an act of God; and, fourth, a diminution of power by reason of engine trouble not ordinarily expected and not discovered upon previous inspection may illustrate a cause of delay not known to the carrier at the time the employé left a terminal and which could not have been foreseen.

It should not be assumed that any of the terms used by Congress in the proviso are synonymous. All words of an act have a proper place and meaning therein, unless the contrary plainly appears. In the proviso under consideration, "casualty" means a fortuitous happening caused by some human agency which the carrier cannot control; "unavoidable accident" means a fortuitous happening caused by some human agency over which the carrier may have some control, yet which could not have been prevented by the exercise of due care; "act of God" is an accident which could not have been occasioned by human agency, but proceeds from physical causes alone. Because the first three exceptions were not broad enough to cover all the cases which

Congress desired to except from the operation of the act, they added the fourth exception to cover all other cases:

"Where delay was a result of a cause not known to the carrier * * * at the time said employé left a terminal and which could not have been foreseen."

A grammatical analysis of that exception shows that it is not the "delay," but "a cause * * * which could not have been foreseen." This interpretation is necessary to give the word "which" proper meaning. All of the three preceding exceptions do not embrace all causes of delay "which could not have been foreseen." But, by adding the last exception, all were intended to be embraced. To foresee a cause, one could or should know the event before it happens. That delay must follow the cause in every one of the cases excepted by the act must have been known to Congress, yet punishment for *excessive* delay following the cause thereof was not provided.

We are not unmindful of the tendency of some of the courts to make the fourth exception embrace the other three; that is to say, that although there may be a casualty, an unavoidable accident, or an act of God which interrupts the transportation of commerce at one point only upon the railroad, yet, if it be known to the carrier, all transportation should be suspended between terminals and the point where such interruption occurred, unless the carrier, its officers, or agents assume the risk of liability for excess service. We do not believe that such was the intention of Congress. The words of the proviso do not plainly express such intention. If thus intended, Congress would have expressed such meaning in no uncertain terms, because the effect would be to impair the duty and obligation of the railroad company to continue its service for the benefit of those people living between the terminals and the point where the passage of trains has been prevented. Indeed, the very terms of the proviso indicate that commerce was not to be stopped, and that there might be excessive hours of service. It is not unlikely that Congress had in mind conditions such as existed by reason of the Johnstown flood in this district, where operations over the main line of the Pennsylvania Railroad were suspended for days, due to the washing out of bridges. If such a flood should again occur, it could not be imagined that a train dispatcher would be subject to the penalties of this act if, after having knowledge of the flood, he would send out a train for Johnstown and intermediate places, where the crew of said train were required to be on duty longer than 16 hours.

In the present case we have reached the conclusions, fairly deducible from the evidence, that the train dispatcher permitted extra 7460 to proceed, after having knowledge of the unavoidable accident which befell extra 9981, because of his reliance upon the information received from the conductor of the latter train. Apart from that, however, his employer should not be held liable, because the case was one to which the act, by the very terms of its proviso, did not apply.

[4] With respect to the government's contention that the crew of extra 7460 should have been relieved before they reached their terminal, and within the period of 16 hours from the time their service

began, little need be said. To construe the act as one intended to operate upon those who do not shorten the excess service therein denounced, although such excess service arises in any one of the cases excepted from the provisions of the act, would be reading into the act something which Congress has not placed there. In the appendix to Kent's Digest of Decisions under the Federal Safety Appliance and Hours of Service Acts, page 253, we find an administrative ruling of the Interstate Commerce Commission under date of June 25, 1908, which, after quoting the proviso of the act, is in these words:

"Any employé so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

[5] As the fourth section of the act imposes upon the Interstate Commerce Commission the duty of executing and enforcing the provisions of the act, such ruling is entitled to great weight, if there be any doubt as to its meaning. We are satisfied that the act should not be strained in order to punish carriers and their officers and agents for not diminishing excess service in those cases which are within the proviso.

From what precedes, therefore, the conclusion must be reached that the accident to extra 9981 was an unavoidable accident, that the excess service required of those in charge of extra 7460 was the result of such unavoidable accident, and that the present case is one to which, by the terms of said proviso, the Hours of Service Act did not apply.

Judgment, therefore, must be rendered in favor of the defendant.

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## In re LANDERSMAN.

(District Court, D. New Jersey. February 21, 1917.)

1. BANKRUPTCY ⟸409(1)—DISCHARGE—GROUNDS FOR REFUSAL—"BOOKS OF ACCOUNT OR RECORDS."

Where the only books which had been kept by a bankrupt were one in which money due certain merchandise creditors and certain payments made to them, and one or more check books and bank passbooks, from which it would have been impossible to ascertain anything regarding the bankrupt's financial condition without making a complete inventory of the assets, such books were not "books of account or records" from which the financial condition of the bankrupt might be ascertained, and the bankrupt will be denied discharge under Bankr. Act July 1, 1898, c. 541, § 14b (2), 30 Stat. 550 (Comp. St. 1913, § 9598).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 752–757.]

2. BANKRUPTCY ⟸414(1)—DISCHARGE—GROUNDS FOR REFUSAL—FAILURE TO KEEP BOOKS—INTENTION—PRESUMPTION.

The failure of a bankrupt to keep proper books and records will be presumed to have been with intent to conceal her financial condition, which was the natural and probable consequence of such failure.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 720.]

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

3. BANKRUPTCY ⊂⊃414(3)—DISCHARGE—GROUNDS FOR REFUSAL—INTENTION—EVIDENCE.

Where the evidence showed that during the six months the bankrupt was in business the assets had shrunk approximately $13,000, so that any explanation which could have been shown by books would have exhibited a deplorable financial condition, and would have aroused suspicion as to the correctness of the entries, the conclusion is irresistible that the failure to keep such books was with intent to conceal financial condition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 722.]

4. BANKRUPTCY ⊂⊃409(1)—DISCHARGE—GROUNDS FOR REFUSAL—FAILURE TO KEEP BOOKS—OMISSION OF AGENT.

The omission of the agent, to whom the bankrupt had intrusted entire control and management of the business, to keep proper account books, with intent to conceal financial condition, can be attributed to the bankrupt, so as to bar discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 752–757.]

5. BANKRUPTCY ⊂⊃407(5)—DISCHARGE—GROUNDS FOR REFUSAL—ACTS OF AGENT.

Quære, whether a bankrupt proprietor of a large dry goods store may be visited with the consequences of the acts of her husband in making materially false statements in writing for the purpose of obtaining, and upon which he did obtain, property for her on credit, where he was in full and complete control of the business with her full consent, even though such statements were made without the bankrupt's knowledge or consent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 760, 761.]

In Bankruptcy. In the matter of Frances Landersman, bankrupt. On exceptions and motion to confirm the report of the special master recommending that the bankrupt be denied a discharge. Discharge denied.

Julius Henry Cohen, of New York City, for objecting creditors.
Otto A. Stiefel, of Newark, N. J., for bankrupt.

HAIGHT, District Judge. The special master, to whom was referred the objections to the bankrupt's discharge, has recommended that the discharge be denied for two reasons, viz.: (1) Because he finds that the bankrupt, with intent to conceal her financial condition, failed to keep books of account or records from which such condition might be ascertained; and (2) because she obtained property on credit upon two materially false statements in writing, made by her for that purpose. Bankruptcy Act, § 14b, cls. 2 and 3. He has also found that the objection, based on the alleged concealment of assets, has not been sustained by the evidence. I have not felt called upon to consider the correctness of the latter conclusion, both because no exception has been filed to it, and because I think it clear that the bankrupt must be refused a discharge on the first ground upon which the special master's recommendation is based.

In the early part of November, 1909, the bankrupt purchased from a concern, by which both she and her husband had been theretofore employed, the stock and good will of a dry goods store in the city of Newark, and, as part of the purchase price, gave certain promissory notes, amounting in the aggregate to $8,000, signed by her and in-

dorsed by her father. In the following May she filed a voluntary petition, showing unsecured claims to the amount of about $23,000, and assets, at her own valuation, of about $22,000. According to her testimony, the value of the stock which she acquired when she purchased the business was from $12,000 to $14,000. During the six months that she was in business she purchased merchandise on credit, at the cost value, of approximately $27,000, and during the same time paid on account thereof only a little over $5,000. From the beginning the business was, with the bankrupt's full knowledge and consent, under the sole management and in the active control of her husband; he purchased all merchandise, opened bank accounts in her name, disbursed all moneys, signed all checks in her name, and in every respect, and ostensibly so, conducted the business as if he were the sole proprietor thereof. He was given, according to her testimony, power to do whatever he thought best in respect to the conduct of the business. She attended at the store only a few hours in the afternoons.

[1] Her only books of account were kept exclusively by her husband; she disclaiming any knowledge whatever of what they were or how they were kept. They consisted of what may be called, in the absence of a better name, a "ledger," in which was entered the moneys due to certain merchandise creditors and certain payments made to them, and one or more check books and bank passbooks. No record whatever was made of moneys disbursed for salary or other expenses incident to the conducting of the business, nor of the moneys that were taken in from day to day. Although it appears that an inventory was made at the time the store was purchased, and another one shortly before the petition in bankruptcy was filed, both were destroyed shortly after the times they were made, respectively. The moneys expended for salaries and other expenses, as well as those drawn by the bankrupt for living expenses, were taken from the cash received at the store from day to day. Nor was any record made, in any book or otherwise, of the bankrupt's liability on the notes which were given for the purchase price of the business, or of other moneys alleged to have been borrowed and partially or wholly repaid from time to time. There can be no doubt that the books and records which were kept would not have enabled one to ascertain the bankrupt's financial condition at any time. The only possible way in which they would have thrown any light on it was in connection with an inventory of the goods which she had on hand; and then the result would, at the best, not have been even approximate, because one or more of her large liabilities were not mentioned in the books at all. But I do not think it can be said that one, conducting a business of the size and character of this, has kept such books or records as are intended by section 14b (2), if it is necessary, in order to ascertain anything regarding her financial condition, to make a complete inventory of her assets.

[2] That her failure to keep books and records was with the intent to conceal her financial condition, in the absence of any reasonable explanation (of which there is none in this case), will be presumed, on the theory that she is chargeable with intending the natural and probable consequences of her own acts and omissions. In re Janavitz, 219

Fed. 876, 135 C. C. A. 546 (C. C. A. 3d Cir.); In re Newbury & Dunham, 209 Fed. 195, 126 C. C. A. 207 (C. C. A. 2d Cir.); In re Weston, 206 Fed. 281, 124 C. C. A. 345 (C. C. A. 2d Cir.); In re Arnold, 228 Fed. 75 (D. C. N. J.).

[3] But, in addition to this presumption, the conclusion is quite irresistible, as the special master has pointed out, that the failure to keep proper books and records was in fact for the purpose of concealing the bankrupt's financial condition. There was, in the short period during which the bankrupt was in business, a shrinkage in assets of approximately $13,000. Any explanation, which could have been shown by books or records, for such a rapid and extensive disappearance of assets, would, at the same time, have exhibited a deplorable financial condition, to say nothing of the suspicions which would have been aroused as to the correctness of the entries.

[4] It is urged, however, that, as the books were not kept by the bankrupt herself, or under her supervision or direction, and because the testimony is that she knew nothing about them, her husband's failure to keep proper books and records cannot be attributed to her, so as to bar her discharge. But the question thus presented has been authoritatively decided in this circuit adversely to the bankrupt's contention. In re Janavitz, supra. The present case cannot be distinguished from that. Here, as there, "the agent was in full and complete control of the principal's business with his [her] full consent." It follows, therefore, that the special master's report in this respect should be confirmed.

This conclusion makes it unnecessary for me to decide the interesting question whether, under the circumstances of this case, the bankrupt can be visited with the consequences of the acts of her husband in making materially false statements in writing for the purpose of obtaining, and upon which he did obtain, property for her on credit. Unquestionably, if he were the bankrupt, he should be denied a discharge. He not only made such statements, in which he omitted altogether the indebtedness of $8,000 incurred in the purchase of the business, but it admits of no doubt that he did so intentionally, knowing that they were untrue. Gilpin v. Merchants' National Bank, 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023 (C. C. A. 3d Cir.). If the special master's conclusion—that the bankrupt should also be denied a discharge because of those false statements—is based on the theory that the evidence shows that they were made with her actual knowledge and consent, I would have great difficulty in agreeing with him. While the suspicion that such was the fact is strong, there is no sufficient evidence to establish it. If, however, that was not the fact, it may be that a denial of a discharge to her simply on the ground that her husband, who was in sole and complete control of her business with her full consent, intentionally made the false statements, knowing them to be such, cannot be easily reconciled with the decisions of the Circuit Court of Appeals of this circuit in Gilpin v. Merchants' National Bank, supra, and the Circuit Court of Appeals of the Fourth and Fifth Circuits, respectively, in Frank v. Michigan Paper Co., 179 Fed. 776, 103 C. C. A. 268, 30 L. R. A. (N. S.) 623, Peck Co. v. Lowen-

bein, 178 Fed. 178, 101 C. C. A. 498, and Hardie v. Swafford Bros. Dry Goods Co., 165 Fed. 588, 91 C. C. A. 426, 20 L. R. A. (N. S.) 785.

[5] It may be, however, when Gilpin v. Merchants' National Bank is considered in connection with the later decision of the same court in the Janavitz Case, supra (which, however, dealt with a failure to keep books), that, in a case such as this, where the whole management and conduct of the business has been committed to an agent with the full consent of the bankrupt, the obtaining of property on credit for the bankrupt upon the agent's materially false statement, intentionally made for the purpose of obtaining such credit, would prevent the bankrupt's discharge, even though the statements were made without the bankrupt's actual knowledge or consent. This seems to have been the decision of the District Court for the Southern District of New York. In re Schwartz & Co., 201 Fed. 166. In that case a discharge was denied to one of the partners, who took no active part in the management of the business, but intrusted her interests to a son, who made the false statement, but who was not a partner. It seems to be difficult to conceive of any reason why the statute should be construed to bar a bankrupt's discharge because of the failure of the person whom the bankrupt had placed in complete control of his business to keep books and records (when such failure was for the purpose of concealing the bankrupt's financial condition), and at the same time to deny a like effect to the same agent's acts in intentionally making false statements for the purpose of securing property on credit for the bankrupt. In the Gilpin Case, the statement was actually signed by the principal, and it does not appear that it was known to the bookkeeper who made it up to have been false. The question considered there was as to the meaning of the word "false"—whether a statement which was simply untrue was within the statute, irrespective of the knowledge and intent of the person making it. May not a different result follow when the person who made the statement, and to whom it was known to be false, was, to all intents and purposes, the bankrupt? However, for the reason above stated, I do not attempt to decide the question.

The bankrupt will be denied a discharge, because of the failure to keep proper books and records.

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JONES et al. v. BANKERS' TRUST CO.

(District Court, D. New Mexico. November 8, 1916.)

No. 442.

1. CORPORATIONS ⟸80(1)—STOCK SUBSCRIPTIONS—CONTRACTS—CONSTRUCTION—"WARRANTY."

A provision in a contract of subscription to the stock of a corporation that no statement, representation, or agreement of warranty made by the agent taking the subscription should in any way operate to cancel or annul the contract, unless reduced to writing and incorporated therein, should be strictly construed, because intended to work an estoppel, and does not apply to oral fraudulent representations by the agent not amounting to warranties; a "warranty" being an undertaking or stipulation that a certain fact in relation to the subject of a contract is or shall be as it

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

is stated or promised to be, and so the contract may be set aside for oral fraudulent representations by the agent, not amounting to warranties.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 244.

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

2. CORPORATIONS ⊂⊃80(1)—STOCK SUBSCRIPTIONS—FRAUDULENT REPRESENTATIONS—EFFECT OF.

A contract induced through fraud, deceit, and misrepresentations of the other party is not binding, and, as it is of no force, a stock subscription contract obtained by oral fraudulent representations may be set aside, notwithstanding it provided that no statement or representation of warranty by the agent taking the same should operate to cancel the contract, unless reduced to writing and incorporated therein.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 244.]

On petition for rehearing. Rehearing granted, and answer dismissed.

For former opinion, see 235 Fed. 649.

Powell & Neblett, of Silver City, N. M., for plaintiffs.

Towne Young, of Dallas, Tex., James Royall, of Silver City, N. M., and Barnes & Nicholas, of Socorro, N. M., for defendant.

POLLOCK, District Judge. The facts necessary to decision are as follows:

On May 12, 1914, plaintiffs subscribed for 2,000 shares of the capital stock of defendant corporation, agreeing to pay therefor $23,500. Five hundred dollars of the purchase price was presently paid in cash; the remainder evidenced by a promissory note for $18,000, due one year from date. In the sale of the shares defendant was represented by its duly created agents, W. T. Coleman and A. Murck. After the sale of the shares on September 8, 1915, this suit was instituted for the purpose of procuring a decree canceling and annulling the entire transaction on the ground of fraud, deceit, and misrepresentation practiced, made, and committed by the agents of defendant, as the result of which plaintiffs were induced to make the purchase of the shares from the defendant company. After motion of defendant to dismiss the petition for want of equity was denied by this court, and after the filing of an amended petition detailing the fraud and deceit practiced by the defendant's agents, which induced plaintiffs to purchase the shares, defendant answered, among other matters of defense, as follows:

"That on the said 12th day of May, 1914, defendant made and entered into a contract with plaintiffs which on the face of it is in words and figures, as follows:

" 'No. 1095

" 'Amount $23,000.00

" 'This is to certify that I hereby purchase 2,000 shares of the capital stock of the Bankers' Trust Company, for which I agree to pay twenty-three thousand and no/100 dollars.

" 'I further agree that no statement, representation or agreement of warranty made to me by the person taking this contract shall in any way oper-

ate to cancel or annul this contract unless the same be reduced to writing and filled in on the following line:

"'A copy of the certificate of said stock is shown on the back hereof, and forms and constitutes a part of this contract as fully as if incorporated in the body hereof.

"'The further consideration is that I will extend to Bankers' Trust Company the option to purchase above described stock should my stock be for sale.

"'[Signed] R. L. Jones.

"'J. T. Jones.'"

Defendant having thus pleaded this certificate or instrument of plaintiffs in hæc verba, and also a copy of the certificate of shares issued by defendant company, made a part of said instrument or certificate of plaintiffs by reference, further pleads in bar of this suit as follows:

"Defendant avers that said contract was read over to the plaintiffs and was fully understood and agreed to before and at the time the same was executed by the plaintiffs, and the said contract among other provisions contains the following expressed stipulation: 'I further agree that no statement, representation or agreement of warranty made to me by the person taking this contract shall in any way operate to cancel or annul this contract unless the same be reduced to writing and filled in on the following line.' Defendant further avers that no statement, representation, or agreement of warranty whatsoever was written in said contract, and particularly avers and alleges that none of the statements, representations, or agreements of warranty pleaded or relied upon by plaintiffs in this action were written into said contract or made a part thereof, and avers and alleges that plaintiff by the terms and provisions of said contract is estopped from pleading or relying upon any of the matters and things pleaded and relied upon by him as a defense to an action on said contract, or as statements, representations, agreements, or warranties to avoid said contract or change the provisions and terms of same," etc.

Plaintiffs, deeming this plea of estoppel in bar insufficient in point of law, in order to test its sufficiency, have moved to dismiss. This motion was presented to and denied by the presiding judge of this court in his lifetime, as shown by a written opinion found in the record. However, as the record further shows, on application of plaintiffs for a rehearing of this motion, the court, being in doubt as to the correctness of the ruling made, ordered the application filed and submitted on written briefs. In this manner and for this reason the matter stands again submitted for decision.

[1] As provisions in writing such as that here relied upon by defendant to work an estoppel and close the door to an inquiry into the very truth of the matter are contrary to natural justice, they are strictly construed as to their terms against the party pleading the estoppel. Looking, therefore, first at the language of the provision in this light, it is seen by its very terms to be limited to statements, representations, and agreements of *warranty* alone. That is to say, construing the certificate of purchase executed by plaintiffs above set forth as though it were either a contract to purchase the shares in view of a contract of purchase itself, it does not provide in broad general terms that no statement, representation, declaration, or agreement made by the agent of defendant company negotiating the sale shall be relied upon by the purchaser to work a cancellation of the contract of sale unless it be set forth in the writing signed. On the contrary, according to the very terms of the provision in question, it

is only such statements, representations, and agreements made by the agents negotiating the sale for the defendant company as are in their effect and true legal intent matters of *warranty* which will not avail plaintiffs to cancel or annul the writing unless written therein.

Now, the word "warranty" has a well-defined legal meaning. Thus Black, in the second edition of his Dictionary, defined the word "warranty" in a contract as follows:

"An undertaking or stipulation, in writing or verbally, that a certain fact in relation to the subject of a contract is or shall be as it is stated or promised to be."

Browne, in his work on Fraud, says:

"A warranty differs from a representation, in that a warranty must always be given contemporaneously with, and as part of, the contract; whereas a representation precedes and induces to the contract. And, while that is their difference in nature, their difference in consequence or effect is this: That upon breach of warranty (or false warranty) the contract remains binding, and damages only are recoverable for the breach; whereas, upon a false representation, the defrauded party may elect to avoid the contract, and recover the entire price paid."

In Rose v. Hurley, 39 Ind. 81, it is said:

"The same transaction cannot be characterized as a warranty and a fraud at the same time. A warranty rests upon contract, while fraud or fraudulent representations have no element of contract in them, but are essentially a tort. When judges or law writers speak of a fraudulent warranty, the language is neither accurate nor perspicuous. If there is a breach of warranty, it cannot be said that the warranty was fraudulent, with any more propriety than any other contract can be said to have been fraudulent because there has been a breach of it. On the other hand, to speak of a false representation as a contract or warranty, or as tending to prove a contract or warranty, is a perversion of language and of correct ideas."

So construed, an examination of the petition will disclose the alleged fraudulent misrepresentations of defendant's agents making the sale of the shares of the plaintiffs are not in any sense warranties or statements of warranty, but are merely statements and representations of material existing facts made by the agents for the purpose of inducing plaintiffs to purchase the shares, which statements, representations of material existing facts, plaintiffs now plead and insist were false and untrue when made, and known to be so by the defendant and its agents making them.

Again, the provision of the certificate relied upon by defendant to work out the estoppel or bar pleaded to the further prosecution of this suit apparently has been heretofore regarded, and is now relied on, by defendant to be a mere limitation upon the power or authority of the agents of defendant to bind defendant by the representations and statements made inducing the contract, and on such ground is highly eulogized and commended by solicitors for defendant company in their briefs and argument. However a simple statement of the matter will disclose such is not the true intent nor the purpose to be subserved by the provision in question, for the provision is not to the effect that agents of the defendant company have no power to bind it to the truth of any statement, declaration, or representation of fact by them

made to induce a purchase of the shares, or to the effect that said agents have no power or authority to bind defendant company by any material statement or representation of fact stated or represented as a fact, or which may in the future prove to be untrue; but the provision is to the effect that only such statements, representations and agreements of warranty as the agent may make, as are written in the certificate, may be relied upon by the purchaser to cancel or annul the trade certified. Thus, impliedly, the agent of defendant company had full and complete power and authority to bind defendant by any statement or representation made within the scope, or apparent scope, of the business transacted, only that such representations, statements, and agreements made by the agents to induce the contract which were written in the certificate could be relied upon to cancel or annul the trade; if not so written therein, to be inoperative for such purpose. Thus viewed, it is apparent the unmistakable intent and purpose of the provision under consideration was to close the doors of inquiry by the courts into the fraudulent conduct of defendant's agents, unless the purchaser should, being of a suspicious nature, insist upon all the matters and things by the defendant's agents stated or done to induce the making of the contract being written into the certificate before the falsity thereof could be shown. Such holding would operate to place on the fraudulent conduct of agents such a handsome reward as has not to this day been sustained by the law.

[2] Again, where one party to a trade has been induced to enter into it through the fraud, deceit, and misrepresentations of the other party, in material matters, no binding trade results, and the defrauded party does not become bound by its terms. As to him the apparently completed transaction remains as though it had never existed. Such party is bound neither to its provisions nor by the principles of the law applicable to valid transactions of such nature. I am therefore of the opinion plaintiffs must in this suit be permitted to plead, and, if capable, to show, in so far as they are concerned, the trade for the shares sought to be repudiated, having been induced by defendant company through the fraud of its agents, does not as a whole or in any part or provision thereof bind plaintiffs to its performance. As having a bearing upon the conclusion reached, see Hofflin v. Moss (Circuit Court of Appeals for this Circuit) 67 Fed. 440, 14 C. C. A. 459, and cases therein cited; Bridger v. Goldsmith, 143 N. Y. 424, 38 N. E. 458; Pratt v. Darling, 125 Wis. 93, 103 N. W. 229; Shepard v. Pabst, 149 Wis. 35, 135 N. W. 159; Bonewell v. Jacobson, 130 Iowa, 170, 106 N. W. 614, 5 L. R. A. (N. S.) 436; and many other cases.

It follows the application for a rehearing must be, and is, granted, and those paragraphs of the defendant's answer to the amended petition relied upon to work an estoppel, or in bar of the further prosecution of this suit must be, and are, held insufficient for such purpose, and, in so far as relied upon to constitute an estoppel or any bar to the further prosecution of this suit, is dismissed therefrom, as contrary to good conscience and fair dealing between man and man.

It is so ordered.

## In re IMPERIAL TEXTILE CO.

(District Court, N. D. New York. March 1, 1917.)

1. EQUITY ⟸57—EQUITABLE MAXIMS.
Equity regards as done that which ought to be done.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 179.]

2. LIENS ⟸7—CREATION—FUTURE LIENS.
While equity will enforce an agreement to give a lien upon property to be produced or acquired in the future, no such lien can be established, unless the property is clearly designated.
[Ed. Note.—For other cases, see Liens, Cent. Dig. §§ 26–28.]

3. BANKRUPTCY ⟸188(3)—EQUITABLE LIENS.
A manufacturing company, finding itself unable to purchase and pay for material or labor to continue its business, entered into an oral agreement with claimant that, if he would furnish money for the continuation of the business, the company would, as goods were made up and sold on credit, assign to claimant the accounts therefor as security for payment of his advances. A list of accounts was made out and signed by an officer of the company, but the actual written assignment was not made, owing to differences between the parties as to some of its minor terms. *Held* that, while no corporate action was taken setting aside such particular accounts, and while liens cannot be created by reason of a mere sense of justice in a particular case, nevertheless, as the accounts to be assigned were practically designated, and as claimant's advances enabled the company to manufacture the goods, claimant will, on bankruptcy of the company, be treated as having an equitable lien, enforceable against such accounts or the proceeds derived therefrom.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 295.]

In Bankruptcy. In the matter of the bankruptcy of the Imperial Textile Company. Application for the review of an order of the special master granting claimant, William E. Nelson, a lien upon certain accounts of the bankrupt and priority as to the amounts collected. Order affirmed.

This is a review of an order made by F. J. De La Fleur, special master, holding that the claimant, William E. Nelson, was entitled to a lien upon certain accounts, and is entitled to a lien upon the money collected thereon, and now in the hands of the trustee in bankruptcy, to the extent of $585.50, and directing the trustee to pay that sum to said Nelson.

Senior & Sisson, of Utica, N. Y., for claimant.
Martin & Jones, of Utica, N. Y., for certain creditors.
James H. Merwin, of Utica, N. Y., for trustee.

RAY, District Judge. The petition in involuntary bankruptcy was filed March 1, 1915, and adjudication was had March 20, 1915. April 13, 1915, the trustee was duly appointed. About October or November, 1913, certain oral transactions were had between the claimant, William E. Nelson, and the officers and directors of the bankrupt, as a result of which the said officers and directors orally agreed, in be-

half of the bankrupt, Imperial Textile Company, with said Nelson, that Nelson would furnish funds to the company for use in its business as the same should be called for by its officers, and that as security for such funds so advanced the company would assign accounts receivable for goods sold, such accounts to repay said loans as the accounts were collected in course of business. This agreement was to be reduced to writing and was to be similar in its terms to a certain agreement theretofore in operation between the company and the Traders' Commercial Company, except that Nelson was to receive 6 per cent. on his advances only.

Thereafter on various dates between and including November 1, 1913, and May 25, 1914, Nelson advanced various sums of money to the company, which advances aggregated $4,420. These advances were made upon the request of the company, and were used by it in the ordinary course of its business. Proposed contracts were prepared and submitted by Nelson to the bankrupt, and others were prepared and submitted by the bankrupt's officers to Nelson; but, owing to disputes in regard to certain minor details thereof, such proposed contracts were never signed by both parties prior to the bankruptcy of the corporation. These negotiations were going on during the time the advances were made by Nelson to the company, and which advances were made at the request of the officers of said company. No accounts or other property were ever assigned to Nelson by written assignment as security for his said advances, and no payments of principal or interest had been made to him on such advances. During the time when such advances were being made by Nelson the said bankrupt owned various accounts receivable, such as the oral contract contemplated as security. Such of these accounts as were uncollected at the time of the bankruptcy passed into the hands of the trustee in bankruptcy and are set forth in a schedule attached to the trustee's report. The face value of such accounts was the sum of $709.70. The amount actually collected on the same and in the hands of the trustee is the sum of $585.50.

The special master finds that this was a valid contract, and that Nelson was entitled under said agreement to receive of the bankrupt's accounts receivable sufficient thereof to secure the repayment of his advances amounting to $4,420. Inasmuch as no assignment of accounts was made, and the only available accounts were those collected by the trustee and above referred to, Nelson is limited here by the special master to a lien upon the moneys collected on such accounts, viz., $585.50. The special master made an order directing the trustee to pay over to Nelson said sum of $585.50, and that is the order under review.

[1-3] One question of law involved here seems to be this: When a manufacturing company, finding itself for want of funds unable to purchase and pay for material and pay labor for carrying on and continuing its business, in order to continue and carry on its business and for the purpose of enabling it to do so, orally agrees with a person that he will furnish money to the company for such purposes, and that from

time to time, as goods are made up and sold on credit, he shall have an assignment of the accounts due the company so created as security for the payment of the money so advanced and as payment on account, and under such agreement such person actually makes advances of money to the company, which is used by it in the purchase of material and in payment for labor which goes into the manufacture and production of merchandise which is sold by the company on credit, but such accounts are not actually assigned or transferred, and the company is forced into bankruptcy, and a trustee of its estate and property is appointed, and it has a considerable number of other general creditors, and it also appears that it was understood that the agreement for such advance of money and the assignment of such accounts was to be reduced to writing and signed by the parties, and writings were drawn, but not signed or executed, because of differences as to some minor details of the agreement, and as to the amount of the advances, is such person who made such advances of money entitled to and does he have an equitable lien or claim on such accounts to the amount of his advances, which the court in bankruptcy should enforce as against such trustee?

The following cases and authorities would seem to indicate that in such a case there would be an equitable lien in favor of the person making the advances, which the bankruptcy court should declare and enforce. P. & O. Implement Co. et al. v. Moulden, as Trustee, 228 Fed. 111, 142 C. C. A. 517, 35 Am. Bankr. Rep. 782; Gage Lumber Co. v. McEldowney, 207 Fed. 255, 124 C. C. A. 641, 30 Am. Bankr. Rep. 251; Goodnough M. & S. Co. v. Galloway (D. C.) 22 Am. Bankr. Rep. 803, 171 Fed. 940; Fourth St. Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855; Walker v. Brown, 165 U. S. 654, 664, 17 Sup. Ct. 453, 41 L. Ed. 865 (written agreement); 3 Pom. Eq. Jur. (3d Ed.) § 1235; 25 Cyc. 668, 670. Equity regards that as done which ought to be done. The agreement to assign must relate to specific and designated funds, property, or accounts, and the agreement must be definite and certain. In re Stiger, 209 Fed. 148, 126 C. C. A. 96.

In the instant case the accounts referred to due the company would not have come into existence, but for the advances made, and it does not appear that either the labor or property of other creditors aided in their creation. In Coats v. Donnell, 94 N. Y. 168, it was held that a contract for a lien on property not in esse may be effectual in equity to give a lien as between the parties when the property comes into existence, and where there are no intervening rights of creditors or third persons. This was applied in Deposit Nat. Bank v. Rogers, 166 N. Y. 390, 59 N. E. 924, where the case related to an agreement to pledge goods not at the time in the possession of the pledgor, and where money was advanced by the bank to pay duties on goods on an agreement that it should have a lien on the goods when obtained for the amount so advanced. The lien was sustained. The court also said, citing cases:

"A party cannot mortgage property which he does not have, but he can agree to mortgage it or give a lien upon it as soon as he gets it, and equity will enforce the agreement and establish the lien."

Also, citing Sprague v. Cochran, 144 N. Y. 104, 38 N. E. 1000:

"So, where the intent is to give a lien, and what is done to that end is too defective to create it, but is consistent with its creation, and not a contract for something else, equity will treat as done what was intended to be done, and the lien may be established and foreclosed in the same action."

In the instant case the agreement related, not only to an assignment of accounts to come into existence after the agreement was made, and after the advances were made, and produced in whole or in part by the money advanced, but accounts *then* in existence, and which arose out of goods manufactured and sold prior to the making of the agreement and advances, and with the creation of which the advances had nothing to do. In short, for an advance of money to be made to the company to carry on its business it agreed to assign as security, and to apply as payment on account, accounts then due the firm; and the question is: Did this agreement, followed by an advance of money to the company, in fact made, create an equitable lien on such then existing accounts as against the trustee representing then existing creditors of such company thereafter bankrupt?

The company is not shown to have been actually insolvent at the time the agreement referred to was made, but its financial embarrassments were obvious. I think that, within some of the cases cited, the last-mentioned agreement, followed by advances of money under it, was sufficient to create an equitable lien on the accounts then in existence. The money was advanced on the agreement that such accounts would be assigned. The main difficulty is that the parties never agreed on *all* the terms of the contract. Care in such cases must be exercised that a lien is not given by judicial action, when none was created by act or agreement of the parties themselves.

Here, then, is a question of fact whether the claimant was to finance the company sufficiently to keep it running; that is, furnish all the money it might require, or only certain sums, or limited sums, and whether the claimant kept his agreement. On this question the special master or referee has found in favor of the claimant, and this court cannot say the finding is not supported by a fair preponderance of the evidence. But the question still remains: Were any particular existing accounts specified or pointed out? Liens cannot be created by reason of or from a mere sense of justice in a particular case. People's Electric R. Co. v. McKeen Motor Car Co., 214 Fed. 73, 130 C. C. A. 513. Here a list of accounts was made out and signed by an officer of the company indicating a purpose to appropriate those particular accounts or their proceeds to the payment of advances made by the claimant. It is true there was no corporate action by the directors setting aside these particular accounts, but in view of all the facts I think the setting aside and specification of these accounts was an act done by one having authority and binding on the corporation.

The trustee, after bankruptcy, went on and collected them, and the referee has ordered that the money in the hands of the trustee derived therefrom belongs to or should be paid to the claimant, who made the advances, and not to the trustee. The advances were $4,420, far in

excess of the money derived from the accounts to which the referee attached a lien, viz., $585.50. It would operate as a fraud on the claimant, who advanced his money under promise of an assignment of these accounts, to award this money to the trustee for the benefit of the general creditors, on the ground the written agreement was not completed and signed prior to the bankruptcy.

The agreement was made not in contemplation of the bankruptcy of the corporation, nor was it made to cheat and defraud creditors, or effect a preference. The other creditors had the benefit of this claimant's money, advanced under the circumstances stated, and justice demands that, to the extent this money in dispute will pay him, he should receive it. The claimant would not have loaned his money to the corporation, but for the agreement and understanding.

The order of the referee is affirmed.

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## In re WARNOCK.

(District Court, W. D. Tennessee, W. D. March 2, 1917.)

No. 4348.

1. BANKRUPTCY ⟸404(2)—DISCHARGE—RIGHT TO.

Where a bankrupt fails to apply in due time for a discharge, or is denied the discharge from debts provable in one proceeding, he cannot be discharged from such debts in a subsequent proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 690.]

2. BANKRUPTCY ⟸391(1)—DISCHARGE—RIGHTS OF CREDITORS.

Bankr. Act July 1, 1898, c. 541, §§ 14, 65b, 30 Stat. 550, 563 (Comp. St. 1913, §§ 9598, 9649), while providing that a bankrupt shall not be granted more than one discharge in a voluntary proceeding within a period of six years, do not limit the number of petitions a debtor may file, nor their frequency. Section 17 (section 9601) declares that a discharge in bankruptcy shall relieve a bankrupt of all his provable debts. A bankrupt listed a debt not dischargeable in bankruptcy, and the creditor, instead of intervening in the bankruptcy court, proceeded by action at law in the state court. *Held* that, as the debtor might indefinitely prevent recovery on such claim, the creditor was not bound to go into the bankruptcy court and prove his claim, with a view to having it excluded from the order of discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637–642, 644–648.]

In Bankruptcy. In the matter of the bankruptcy of A. G. Warnock. Petition by the bankrupt to restrain a creditor from proceeding in the state court. Application for injunction denied, and petition dismissed.

Dan F. Elliotte, of Memphis, Tenn., for petitioner.

Rhea P. Cary and John Vorder-Bruegge, both of Memphis, Tenn., for respondent.

McCALL, District Judge. On November 10, 1916, A. G. Warnock filed a voluntary petition in bankruptcy in this court, and was on that

date adjudicated a bankrupt. Among other debts against him, which he scheduled, was one in favor of Mrs. Frankie for $114. No assets were scheduled. It appears that just prior to the filing of the petition in bankruptcy, Mrs. Frankie, through her attorney, had brought suit on this claim before W. A. Taylor, a justice of the peace of Shelby county, Tenn. On February 17, 1917, the bankrupt presented a petition to this court, in which, among other things, it is alleged that Mrs. Frankie, "for the purpose of harassing, annoying, and working great injury to your petitioner, has, through her agents and employés, persisted in continuing the prosecution for collection of the aforesaid indebtedness, in the court of W. A. Taylor, a justice of the peace of Shelby county, Tenn., which has been placed in judgment for the sum of $127, and that said justice has upon said judgment issued a writ of garnishment, and the same has been levied upon the wages earned by your petitioner during the past 30 days, for the purpose of applying the same towards satisfying the judgment so rendered," in disregard of the pending proceedings in bankruptcy, and the bankruptcy law relating thereto, and prays that an order restraining Mrs. Frankie, her agents, and employés, from seeking to enforce the judgment by writ of garnishment or otherwise, against any property belonging to your petitioner, acquired since the date of the adjudication, and that they be required to release and withdraw the writ of garnishment.

The restraining order was issued in accordance with the prayer of the petitioner, and notice thereof served upon Mrs. Frankie, her agents, and employés, commanding them to appear before this court on the 1st day of March, 1917, and show cause, if any, why the injunction should not be made permanent. On March 1, 1917, Mrs. Frankie filed an answer, which admits practically all the allegations in the petition that are necessary to be noticed here, and sets up as a defense that on January 9, 1915, the bankrupt filed a voluntary petition in bankruptcy in this court, and scheduled as one of the debts against him this same debt of Mrs. Frankie that is scheduled in the petition filed November 10, 1916; that he did not apply for, nor did he obtain, a discharge in said proceedings begun January 9, 1915, and pleads said former petition in bankruptcy, the schedule of the debt now in question, and the failure to obtain a discharge, as a bar to the right of the petitioner to stay the proceedings in the justice of the peace court, upon the ground that, having failed to obtain a discharge in the former proceedings, the debt now in question is not dischargeable in bankruptcy, that question being res adjudicata, and insists that the respondent is at liberty to prosecute the same to judgment and collection, notwithstanding the pendency of the present proceeding in bankruptcy.

[1] The law is, as I understand it, that where a bankrupt fails to apply in due time for a discharge, or is denied a discharge, from debts provable in one proceeding, he cannot be granted a discharge from such debts in a subsequent proceeding. Collier on Bankruptcy (9th Ed.) 318; In re Loughran (D. C.) 215 Fed. 271; Siebert v. Dahlberg, 218 Fed. 793, 134 C. C. A. 460; Pollet v. Cosel, 179 Fed. 488, 103 C. C. A. 68, 30 L. R. A. (N. S.) 1164; In re Bacon, 193 Fed. 34, 113

C. C. A. 358. In Kuntz v. Young, 131 Fed. 719, 65 C. C. A. 477 (Eighth Circuit) the court said:

"A failure of the bankrupt to apply in due time for, or a refusal by the court to grant, a discharge from debts provable * * * under one petition in bankruptcy, renders the question of the right * * * to a discharge from those debts in a proceeding under a subsequent petition res adjudicata."

[2] From the facts stated it would follow that the debt now in question is not dischargeable in bankruptcy. Not being a debt dischargeable in bankruptcy, the creditor is not required to come into a bankruptcy court and prove his claim, with a view of having it excluded from the order of discharge, if and when it is made, as the only method by which he may save it from going up in smoke.

It is stated in the petition for the restraining order that the indebtedness due Mrs. Frankie was included in the schedule of debts filed by the bankrupt, and the creditor duly notified of the meeting of creditors, but that she declined and refused to enter an appearance in the bankruptcy proceedings, but proceeded with the prosecution of the suit begun against the bankrupt before the justice of the peace of Shelby county, Tenn., and prosecuted it to judgment, from which execution was issued and levied by garnishment upon the bankrupt's wages. I think that the creditor, under the facts in this case, may have gone either into the bankruptcy proceedings and proven her claim, with a view of having it excluded from an order of discharge, as she might have done, or since her claim was not a dischargeable one, she may have proceeded to collect it by suit at law, which she did, notwithstanding the pendency of the bankruptcy proceedings. In re Loughran, supra.

It is insisted by counsel for the bankrupt that the only course left open to the respondent was to have proven her claim in the bankruptcy proceedings, and then, when application was made for a discharge, objected upon the ground that her debt was not dischargeable in bankruptcy, for the reasons hereinbefore stated, and had the discharge limited, thus saving her debt therefrom. Assuming this to be correct, the effect of it would be to postpone the respondent in the collection of her debt for at least 12 months from the filing of the petition in bankruptcy, and probably 18; or it might happen that the bankrupt, as he did in his former proceeding, fail or decline to make an application for a discharge, and at the expiration of the time within which to file his application for a discharge, file a third petition in bankruptcy, and again postpone the plaintiff in the collection of her indebtedness, and thus ad infinitum, although it has not been a debt dischargeable in bankruptcy, since the filing of the first petition, or since the expiration of the 18 months thereafter. In such circumstance, a holder of a nondischargeable debt could make no progress in its collection, if he had no remedy other than to file and prove his claim in each succeeding proceedings in bankruptcy, which his debtor might choose to institute, for the purpose of being in a position to insist on a limited discharge; there being no limit to the number of petitions a debtor may file in bankruptcy, nor of their frequency,

except he may not be granted more than one discharge in a voluntary proceeding within a period of 6 years. Bankruptcy Act 1898, §§ 14, 65b.

And again section 17 of said act provides that "a discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as," etc., and then is set out specifically the character of debts not dischargeable. It could not with reason be insisted that the holder of a debt, exempted by section 17 from a discharge, would be estopped from proceeding at law to collect it, on the ground that the debtor had filed a voluntary petition in bankruptcy, and had been adjudicated a bankrupt, in which proceeding said debt was scheduled. If this be true, it would seem to follow that any other character of debt, which had become nondischargeable, because of some act on the part of the debtor, might be prosecuted to judgment in a forum other than that of a court of bankruptcy, and independent of it, notwithstanding the pendency of a bankruptcy proceeding, in which said debt had been scheduled by the bankrupt. The contention of counsel for the bankrupt I do not think is sound.

A decree will be entered, vacating the stay order issued in this case, denying the application for an injunction, and dismissing the petition, with costs to the petitioner.

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## In re COOK.

(District Court, D. New Jersey. February 14, 1917.)

1. ALIENS ⟸62—NATURALIZATION—"RESIDED CONTINUOUSLY WITHIN THE UNITED STATES."

An alien who had been for several years employed on a pleasure yacht belonging to a citizen, and had been in the United States occasionally on the yacht prior to the outbreak of the war, but had never lived ashore in the United States, and had never brought his family to this country, and who had not been in the country during the last three years, except to file a petition for naturalization and to attend the hearing, has not "resided continuously within the United States" for five years, or within the state for one year, as required by Act June 29, 1906, c. 3592, 34 Stat. 596.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 324–327, 329–332, 340.

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

2. ALIENS ⟸62—NATURALIZATION—CONTINUOUS RESIDENCE—TEMPORARY ABSENCE.

Merely temporary absence from the United States or a state within the period prescribed for continuous residence will not prevent an alien who has actually resided here from securing naturalization; but the absence in each case must be examined, to determine whether it has broken the continuity of the residence.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 324–327, 329–332, 340.]

Petition by James Cook for admission to United States citizenship. Petition dismissed.

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

John M. Russell, of New York City, for petitioner.
Thomas B. Shoemaker, Chief Naturalization Examiner, of Washington, D. C., opposed.

HAIGHT, District Judge. The petitioner, who is a sailor and a native of Scotland, filed his declaration of intention to become a citizen of the United States on February 13, 1906. He was then, and for some time prior thereto had been, employed, as he has been since, on a yacht belonging to a citizen of the United States. On March 16, 1916, he filed his petition for naturalization.

[1] He first came to the United States in the year 1902 as an officer on the yacht before mentioned. When the latter was in New York Harbor, as it has been for a comparatively short part of nearly every year since then, except as hereinafter set forth, it was tied up to a dock in Hoboken, in this state. The petitioner has never lived ashore in this country. His family, consisting of a wife and five children, all of whom were born in Scotland, have never been in the United States. While, as before mentioned, he has been in American waters aboard the yacht for parts of each year from 1907 to 1913, inclusive, he was not here during the years 1914, 1915, and 1916, except when he came here expressly for the purpose of filing his petition for naturalization, after which he returned immediately to Scotland, and again when he came to attend the hearing upon his petition. At the outbreak of the present European war the yacht was taken possession of by the British government, and since that time the petitioner has been in Scotland, with the exception of the two trips to the United States before mentioned, taking care of certain fittings of the yacht, which were removed when she was chartered by the British government. As the vessel upon which the petitioner has served was in no sense a merchant vessel of the United States, but merely a private yacht, the petitioner does not come within the provisions of section 2174 of the Revised Statutes (Comp. St. 1913, § 4357). I am called upon to decide, therefore, whether, under the circumstances before detailed, the petitioner has, within the meaning of Act June 29, 1906 (34 Stat. 596), immediately preceding the date of his application, resided continuously within the United States for five years and within the state of New Jersey one year. I entertained no doubt at the hearing that the petitioner's alleged "residence" in either was not sufficient to entitle him to be admitted to citizenship, but at the urgent request of his attorney took the matter under advisement, for the purpose of examining certain cases which he desired to submit. I have since examined all of them, and my original opinion is in no respect shaken.

[2] It is unquestionably true, as I have never doubted, that a mere temporary absence from the United States, or a state, within the respective periods prescribed by the statute, will not prevent an alien, who has actually resided here, from securing naturalization; but the character and extent of the absence in each case must be examined, to determine whether the residence has been continuous, or the continuity thereof has been broken. United States v. Cantini, 212 Fed. 925, 129

C. C. A. 445 (C. C. A. 3d Cir.); United States v. Rockteschell, 208 Fed. 530, 125 C. C. A. 532 (C. C. A. 9th Cir.); United States v. Mulvey, 232 Fed. 513, 146 C. C. A. 471 (C. C. A. 2d Cir.). If, however, it be assumed that the petitioner in this case acquired a residence in this country, it seems entirely clear that the circumstances and extent of his absences, under the Cantini and Mulvey Cases, supra, have been such as to break the continuity of his residence and to disentitle him to admission as a citizen of the United States. As was said by Judge Rogers in the Mulvey Case, 232 Fed. 516, 146 C. C. A. 474:

"The purpose of requiring aliens applying for citizenship to reside continuously within the country for five years is not only to satisfy the government as to the good faith of the applicant and as to his good character, but it is also to afford the alien *a sufficient opportunity to understand and familiarize himself with our institutions and mode of government.* In the opinion of Congress five years is none too long a period for this purpose."

How can it be said, in view of the limitation which Congress has prescribed, even though the petitioner has, at all times, had every intention of eventually residing in this country, that the length of time which he has spent in this country during the last five years is sufficient to comply with the latter purposes? For two years before he filed his petition he had not been in the country at all, and during the preceding years which intervened since the filing of his declaration of intention he has only been here for short periods of time and then on board a vessel. The facts of this case readily distinguish it from In re Schneider (C. C.) 164 Fed. 335. In that case the alien actually resided in this country for some time. He then enlisted in the United States Navy and served for four years. He never returned to the country of his birth. He had no other domicile or residence.

Without attempting to decide whether the witnesses produced by the petitioner were competent, I conclude, for the reasons before stated, that the petitioner has not continuously resided either within the United States for five years immediately preceding the date of his application, or within the state of New Jersey for one year, within the meaning of the acts of Congress, and hence that his petition must be dismissed.

BATES COUNTY, MO., v. WILLS et al.

(Circuit Court of Appeals, Eighth Circuit. February 1, 1917.)

No. 4650.

1. DRAINS ⟸13—DRAINAGE DISTRICT CONTRACT—LIABILITY OF COUNTY—REORGANIZATION.

Under Act Mo. March 24, 1913 (Laws 1913, p. 263) § 52, authorizing a drainage district organized under Rev. St. Mo. 1909, §§ 5578–5635, to reorganize under Act Mo. March 24, 1913, § 56, requiring the county officers to turn over the papers of such district to the district officers on completion of the reorganization, section 57, providing that no reorganization shall invalidate any indebtedness, liability, or contract incurred by a district under its former organization, section 58, providing that proceedings begun under a former act may be completed under the new act, and that all liens, remedies, and processes for collection of taxes provided for in the new act shall be available for collection of taxes levied and bonds issued under the repealed sections, and that no rights or obligations incurred by a district or individual shall be nullified or invalidated, and Act Mo. March 27, 1913 (Laws 1913, p. 281), repealing Rev. St. Mo. 1909, §§ 5578–5635, and providing that the repeal and the enacting of new sections in lieu of those repealed, or in addition thereto, shall not invalidate any drainage district theretofore organized, and that all contracts, liens, and obligations issued by such districts shall be valid, and the reorganization of a district under Act Mo. March 24, 1913, does not relieve the county from its liability under the former act on the contracts of the district.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 4.]

2. DRAINS ⟸49—PUBLIC IMPROVEMENTS—LIABILITY—PARTICULAR FUND.

If a municipal or a quasi municipal corporation, which has power to make a contract for improvements, contracts for them and stipulates that the contractor shall be paid out of funds realized from special assessments or bonds, and the corporation though it has power fails to make the assessments or issue the bonds, or misapplies the funds to other purposes, it becomes primarily liable to pay the contract price, even though the contract expressly provides that the contractor shall accept the assessments in payment, and that the municipality shall not be otherwise liable.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 59.]

3. DRAINS ⟸68—PUBLIC IMPROVEMENTS—LIABILITY—AUTHORITY TO CONTRACT.

If a municipal or quasi municipal corporation makes a contract for internal improvements which it has power to make and does not specify the source of the fund from which it will pay therefor, and there is no statutory prohibition of a general levy, the grant of power to make the contract includes also the power to levy, collect, and pay to the contractor the contract price.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 72.]

4. DRAINS ⟸49—DRAINAGE DISTRICTS—LIABILITY OF COUNTY—FAILURE TO MAKE SUFFICIENT ASSESSMENT.

Under Rev. St. Mo. 1909, §§ 5578, 5580–5584, 5588, 5595–5597, 5601–5603, empowering the county court, which is the governing body of the county, to organize drainage districts, to require estimates of the work to be made, and to confirm or amend those estimates, to cause the engineer to make contracts for the work, to approve or reject all contracts, which must be let in sections, and no bids shall be received which exceeds the estimate, and to issue bonds to meet the expenses of locating and constructing the

ditches which are to be paid for from special assessments, the contractors who constructed a drainage ditch can rely on the contract, and, if the work is completed, the county is estopped to deny liability therefor on the ground that the funds received from the sale of the bonds have become exhausted, and that it has no power to levy additional assessments, since the county had the power to make its estimates and its bond issue large enough to meet the contracts, and if it failed to exercise that power, and has received the benefits from the contract, it cannot be permitted to take advantage of its own failure to perform its duty.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 59.]

5. DRAINS ⟸83—DRAINAGE DISTRICTS—ADDITIONAL ASSESSMENTS—STATUTE.

Under those sections and section 5592, providing that the work shall not be stayed pending appeals from the award of damages, and section 5599, providing that the county shall pay the damages awarded out of its general fund, and that it shall be refunded to the county out of the assessments, the county has the power to levy additional assessments when the first assessment is insufficient to meet the contracts, since the estimates and assessments are made at a time when it is humanly impossible to estimate even approximately the cost, and the Legislature will not be held to have limited the power to levy assessments to a single levy based on a preliminary estimate in the absence of the statutory prohibition against an additional assessment.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76–81.]

6. DRAINS ⟸49—ACTIONS ON CONTRACTS—REQUESTED INSTRUCTIONS—BURDEN OF PROOF.

In a suit against a county for the balance due on a contract for the construction of a drainage district ditch, where the county relied as one defense on the failure of the contractors to procure the estimates of the engineer as to the quantity of work done, to which the contractors replied that the engineer had withheld the estimates through fraud or such gross mistake as implies fraud or failure to exercise honest judgment, and the only instruction as to the burden of proof was that the burden rested on plaintiffs to establish their claim by a preponderance of credible evidence, and that the same burden rested on defendant to establish its counterclaim, it was reversible error to refuse an instruction requested by defendant that the burden of proving fraud on the part of the engineer in refusing estimates, or his failure to exercise an honest judgment, rested on the plaintiff, and that plaintiffs were required to establish such fraud or failure by a preponderance or greater weight of credible evidence.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 59.]

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

Action by A. V. Wills and others against Bates County, Missouri. Judgment for the plaintiffs, and defendant brings error. Reversed and remanded, with instructions to grant a new trial.

See, also, 190 Fed. 522, 111 C. C. A. 354.

Frank Hagerman, of Kansas City, Mo. (Thomas J. Smith, of Butler, Mo., on the brief), for plaintiff in error.

John F. Green, of St. Louis, Mo. (William Mumford, of Pittsfield, Ill., Frank M. Lowe, of Kansas City, Mo., and Frederick N. Judson, of St. Louis, Mo., on the brief), for defendants in error.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

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

PER CURIAM. A. B. Wills, W. V. Wills, and Emmett S. Wills, the plaintiffs below, brought an action against Bates county, Mo., to recover the amount which they alleged that that county owed them for excavating a part of the third section of a certain drainage ditch in that county under a contract between the county and Timothy Foohey & Sons, dated May 2, 1906, which, so far as it concerned the third section of the ditch, Foohey & Sons had assigned to the plaintiffs. In the course of the performance of the contract the plaintiffs encountered stone which they claimed that they were not required to remove under its terms, but the county denied this claim and on August 6, 1908, the plaintiffs and the county made an agreement that the plaintiffs should proceed to remove from the ditch all the material which they conceded they were required to take out under the contract without prejudice to the rights and claims of either party. Under this agreement the plaintiffs removed a large amount of material, but the county declined to pay them for its removal on the ground, among other things, that the original contract provided that the engineer should make estimates of the work done monthly and that 90 per cent. of his estimates should be paid when made respectively, but that no payment should be made until such estimates were made, and that the engineer had never made any estimates of the work done by the plaintiffs under the second agreement subsequent to August 6, 1908. Thereupon, on April 3, 1909, the plaintiffs commenced this action for $58,000, which they alleged that the county owed them for their work in excavating this ditch, and by an amendment to their complaint made before the last trial they alleged in substance that the engineer by a failure to exercise his honest judgment, or by fraud, or such gross mistake as implied bad faith, withheld the estimates of their work to which they were entitled. The county denied liability and the averments of the complaint charging it, upon various grounds, and also pleaded a counterclaim of $40,000 on account of excavation it alleged that it was compelled to make to complete the ditch and on account of expenses it incurred and damages it sustained by reason of the plaintiffs' failure to complete it. At the close of the trial the jury found for the plaintiffs in the sum of $42,609.08, and for the county on its counterclaim in the sum of $11,610.70. A judgment was thereupon rendered against the county for $30,998.31. This case has been twice tried, and a more exhaustive account of its earlier course may be found in the opinion of this court on a review of the first trial in Bates County v. Wills et al., 190 Fed. 522, 111 C. C. A. 354.

[1] Counsel for the county originally maintained that the county was in no manner liable on the contract, that the agreement was that of the drainage district, and that the drainage district alone was liable upon it. But upon consideration this court was of the opinion that the contract was that of the county, that it differed from the general contracts of the county only in the fact that the funds to pay for its performance were to be collected by the county from the property in the drainage district for which the drain was excavated, while those to pay for the performance of its general contracts were to be collected

by the county from all the property in the county. 190 Fed. 526, 111 C. C. A. 354. It is now contended that, although when this contract was made and when this action was brought the county was liable upon the contract and was the only proper defendant to this action, yet the county has been relieved from its contractual relation, or at least from its liability on the contract, and rendered exempt from action and judgment thereon, and the reorganized district has become the only party liable and the only proper defendant here, because the drainage district in which the ditch here in question was excavated was permitted to and did reorganize under the act of the Legislature of Missouri of March 24, 1913. Laws of Missouri 1913, pp. 232 to 267, §§ 52, 56, 57, 58. See, also, Laws of Missouri 1913, pp. 271, 281, § 2, and the act to repeal certain sections of article 4, c. 41, of the Revised Statutes of Missouri 1909, approved March 27, 1913, § 2, p. 281.

But these statutes fail to convince of the soundness of this contention. The drainage district was originally organized under article 4 of chapter 41, which was repealed by the act of March 27, 1913, and since that act it has been reorganized under the act of March 24, 1913. The sections of the act of March 24, 1913, material to this question, provide that any drainage district in Missouri theretofore organized under any laws of that state may be reorganized under that act (section 52), that immediately after such reorganization the county clerk shall turn over to the secretary of the drainage district the papers and records belonging to the district and the county treasurer shall transfer the funds of the district to him (section 56), that no reorganization shall invalidate any indebtedness, liability, or contract of any nature incurred by a district under its former organization, but all such indebtedness, liability, or contract shall attach to and become the debt or liability of the new organization (section 57), and that when proceedings have been begun under the provisions of the sections repealed by the act of April 8, 1905 (Laws 1905, p. 190), they may be proceeded with and completed under the new act, that all liens, remedies, and processes for the collection of taxes provided for in the new act shall, so far as applicable, be available for the collection of taxes levied and bonds issued under the sections repealed, and when drainage districts have been incorporated under sections repealed, and the work of drainage has been commenced or completed in whole or in part, no rights or obligations incurred by district or individual shall be nullified, invalidated, or for naught held (section 58). The act of March 27, 1913, which repeals certain sections of article 4 of chapter 41 of the Revised Statutes of Missouri 1909, under which this drainage district was originally organized, provides that the repeal of sections specified in section 1 of that act and the re-enacting of other sections in lieu of the sections repealed, and the enacting of new sections in addition thereto, shall not have the effect of invalidating, suspending, or vitiating any drainage district heretofore organized, or any proceedings now pending in any of the courts of the state for the organization of any drainage district under article 4 of chapter 41, and that all contracts entered into, all liens established, and other obliga-

tions created, including warrants and bonds issued by drainage districts heretofore organized under the provisions of said article 4 of chapter 41, are hereby declared to be valid, and the county courts shall levy sufficient tax to pay all such forms of indebtedness. Section 2, Act of March 27, 1913, Laws of Missouri 1913, p. 281.

When these acts were passed, the county of Bates was liable to the plaintiffs under the contract here in suit, the plaintiffs had a right of action upon this contract, and this action had been brought against the county to enforce that liability. Unless there was some constitutional enactment in these laws which deprived the plaintiffs thereof, that liability and their right of action against the county thereon still exist. A careful reading of the entire acts has disclosed no such enactment. The portions of them which have been stated and the entire laws when read and considered in their entirety have convinced us that they did not take away or diminish that liability or the plaintiffs' right of action to enforce it, but that the Legislature of Missouri intended to, and did thereby, preserve the liability of the county to the plaintiffs upon this contract, the liability of the persons and property in the drainage district to pay the necessary taxes to discharge that liability, and the power and duty of the county to levy, collect, and pay over to the plaintiffs such necessary taxes for that purpose.

[2] Counsel for the county, however, insist that it has become exempt from liability on this contract and has exhausted its power to levy and collect assessments upon the property in the drainage district to pay the amount it owes the plaintiffs because it has already expended all the moneys, some $370,000, which it derived from the sale of the issue of bonds equal in amount to the aggregate of the assessments to pay for the ditch which it levied on the property of the drainage district before the work was done or the damages for taking of property were fixed. A deliberate consideration of the arguments and authorities in support of this position has failed to convince that it is tenable: (1) Because the county is not prohibited from making, but is in our opinion empowered by the statutes of Missouri to make, the assessments necessary to pay for the ditch whether the funds derived from the sale of the issue of bonds have been exhausted or not. Revised Statutes of Missouri 1909, §§ 5579–5583, 5596, 5598, 5599, 5603; State ex rel. v. Bates, 235 Mo. 262, 283, 284, 285, 286, 138 S. W. 482; State ex rel. v. Holt County Court, 135 Mo. 533, 545, 546, 547, 37 S. W. 521; Sheridan v. Fleming, 93 Mo. 321, 324, 325, 5 S. W. 813. (2) Because the statutes of Missouri gave the county the absolute control of all the proceedings for the excavation of and the payment for the ditch, the levy and collection of the money to pay for it, imposed upon the county the duty and invested it with plenary power lawfully to do all these things so that if it has failed, or shall fail, to levy and collect from the property in the drainage district the requisite funds to pay for the ditch, that failure has resulted, or will result, not from a lack of authority or power in the county to do so, but from the failure of the county lawfully to exercise the power granted to it. Any municipal or quasi municipal corporation which has the corporate power to make

and to perform a contract, which makes it and receives and keeps the benefits of its performance by the other party to it, is thereby estopped from defeating performance on its own part on the ground that it either negligently or fraudulently failed to exercise in a lawful manner the powers it had fully to perform its part of the agreement. Simpson v. Stoddard County, 173 Mo. 421, 466, 73 S. W. 700; Speer v. Board of County Com'rs, 88 Fed. 749, 758, 32 C. C. A. 101, and cases there cited; Wilson v. Drainage District, 257 Mo. 266, 289, 290, 165 S. W. 734; Illinois Trust & Sav. Bank v. City of Arkansas City, 76 Fed. 271, 293, 294, 295, 22 C. C. A. 171, 193, 194, 195, 34 L. R. A. 518; Union Pacific Ry. Co. v. Chicago, Rock Island & Pac. Ry. Co., 51 Fed. 309, 326, 328, 2 C. C. A. 174, 186; Sioux City Terminal Railroad & Warehouse Co. v. Trust Company of N. A., 82 Fed. 124, 137, 27 C. C. A. 73, 86. (3) Because if a municipal or quasi municipal corporation which has the power to make a contract for internal improvements contracts for them and stipulates that the agreed price of the improvements shall be paid to the contractor out of funds to be realized out of special assessments, or, out of the proceeds of bonds it has the power to issue, and the corporation has power to make the assessments or to issue the necessary bonds but fails to make sufficient valid assessments, or to issue sufficient bonds to provide the necessary funds to pay the contractor the contract price of his material and labor, or if it misappropriates such funds to other purposes, the corporation becomes primarily liable to pay the contract price itself. Barber Asphalt Paving Co. v. City of Denver, 72 Fed. 336, 340, 19 C. C. A. 139, 143; Bill v. City of Denver (C. C.) 29 Fed. 344; Argenti v. City of San Francisco, 16 Cal. 256, 281, 283; Beard v. City of Brooklyn, 31 Barb. (N. Y.) 142, 150; Commercial National Bank v. City of Portland, 24 Or. 188, 33 Pac. 532, 41 Am. St. Rep. 854; City of Louisville v. Hyatt, 5 B. Mon. (Ky.) 199, 201; City of Leavenworth v. Mills, 6 Kan. 288, 297; Reilly v. City of Albany, 112 N. Y. 30, 42, 19 N. E. 508; Michel v. Police Jury, 9 La. Ann. 67.

[3] In cases of this character the municipality or quasi municipality becomes primarily liable even when the contract expressly provides that the contractor shall accept the assessments in payment of the contract price and that the municipality shall not be otherwise liable, whether the assessments are collected or not. Barber Asphalt Pav. Co. v. City of Harrisburg, 64 Fed. 283, 12 C. C. A. 100, 29 L. R. A. 401; City of Chicago v. People, 56 Ill. 327, 334;. Commercial National Bank v. City of Portland, 24 Or. 188, 33 Pac. 532, 41 Am. St. Rep. 854. And if a municipal or quasi municipal corporation which has the power to make a contract for internal improvements contracts for them and stipulates that the agreed price thereof shall be paid to the contractor without any specification of the source from which it will derive its fund to do so, and there is no statutory prohibition of a general levy upon the property within its borders, the legal inference is that the grant of the power to make the contract also granted to it the power to levy, collect, and pay over to the contractor the funds necessary to pay the agreed price of the labor and material the contractor furnished.

United States v. Saunders, 124 Fed. 124, 128–131, 59 C. C. A. 394; Loan Ass'n v. Topeka, 20 Wall. 655, 660, 22 L. Ed. 455; United States v. New Orleans, 98 U. S. 381, 393, 25 L. Ed. 225; Ralls County Court v. United States, 105 U. S. 733, 735, 736, 26 L. Ed. 1220; United States v. Clark Co., 96 U. S. 211, 24 L. Ed. 628; Commonwealth v. Commissioners of Allegheny Co., 37 Pa. 277, 290; Lowell v. Boston, 111 Mass. 454, 460, 15 Am. Rep. 39; State ex rel. Hasbrouck v. Milwaukee, 25 Wis. 122.

[4] The county court was the body which governed the county, and the county had all the corporate power which the Legislature vested in the county court. The county court was empowered (see Statutes of Missouri 1909) to cause to be constructed any ditch within its county "when the same shall be conducive to the public health, convenience or welfare, or where the same will be of public utility or benefit" (section 5578), to appoint, when a suitable petition for such a ditch was filed with it, three freeholders to ascertain and report to it, pursuant to its order, whether or not the proposed improvement was "necessary, practicable and would be of public utility or conducive to the public health, convenience or welfare" (section 5580), to hear, after notice to the parties interested, and to determine whether or not the improvement should be made, and if it decide that it should be made, then to determine the lands that would be benefited thereby, which by the fiat of the statute constitute a drainage district (sections 5581, 5582, 5583). If the county court decided to make the improvement, it had the power to appoint three freeholders to estimate the cost of the work, to make a schedule of the lots and lands benefited or damaged thereby, and to present a report thereof to the court (section 5584), to hear, after notice to parties interested, this report, and "if it appears to the court that the estimates of the cost of location and construction and of damages and benefits to each tract is fair and just, to confirm the report," otherwise to amend it (section 5588), if it confirms or amends the report, to proceed with the work, notwithstanding appeals have been taken and are pending in the district court as to the amount of damages awarded (section 5592), to fix the time and place of letting contracts for the work after public notice thereof, and to "cause the engineer * * * to attend the sale, offer the work and receive the bids, make contracts on behalf of the county with the lowest responsible bidder" (section 5595), and to "approve or reject all contracts." All contracts must, according to the statute, be let in sections not less than the number of lineal feet apportioned to each separate lot or tract of land, and "no bid shall be entertained which exceeds the estimated cost of location and construction of the work." Section 5596. It will be noticed here that this limitation on the amount of each bid does not limit the aggregate of the bids, and, even if it could be construed to have that effect, leaves the county court to permit bids as high as it chooses by making the estimates high enough to cover them. Upon the failure of the contractor to complete the work, the county court is empowered to relet the work not performed. Section 5597. It is also authorized

to determine in what number of installments the assessments and the interest thereon shall be paid, and the rate of interest the installments shall bear. Section 5601. It is authorized to apply the installments and the interest thereon to the payment of the bonds it issues (section 5602), and to issue bonds and sell the same to meet the expenses of locating and constructing any ditch or improvement under the provisions of this article, "which bonds shall mature, at annual intervals, commencing after a period of two years, for not exceeding twenty years, bear interest at not to exceed six per cent per annum and be payable semi-annually at the office of the county treasurer" (section 5603).

This brief review of the grant of authority to the county discloses the fact that plenary power was given to it to make the contract for the construction of this ditch, to control, conduct, and determine every preliminary step which led up to the contract and which, if properly performed, made it valid and enabled the county to raise the funds to discharge all liability under it, to decide whether or not the improvement should be made, to decide what the true estimate of the cost of the location and construction of the ditch was, what the amounts of the damages to be paid and of the assessments to be made and collected should be, and what amount of bonds should be issued. If the county had made its estimate of the cost of the work sufficiently large, its assessments sufficiently high, or if it had sold a sufficient amount of bonds and had applied the proceeds it could have lawfully obtained to the discharge of the contract here in suit, it would have had sufficient funds to pay its debt to the plaintiffs. The statute placed no limit upon the estimate of the cost of the improvement, and hence none upon the amount of bonds it could issue, none upon the amount of assessments it could levy and the duty and the responsibility to so estimate the cost, so fix the amount of the assessments, and so determine the amount of the bonds as to provide the funds to pay its contractors the amount lawfully due them under the contract it made with them, rested upon it alone, and as the contractors were charged with no notice, duty, or responsibility in these regards, but had the unquestioned right to rely upon the contract the county had tendered to and made with them, and the county has received and kept the benefits of plaintiffs' performance of the contract, the county is estopped from defeating the plaintiffs' claim and judgment against it on the ground that it failed to take the legal steps which it had the power and which it was its duty to take to provide the funds to pay it. On this ground the county is liable generally for this claim even if it now has no power to levy special assessments upon the property in the drainage district to pay it, and if a judgment is rendered against it at the next trial it should not be so limited as to be payable only from funds raised, or to be raised, by benefit assessments upon property in drainage district No. 1, Bates county, Mo.

[5] But in our opinion the county has the power to levy and collect assessments upon the property in that district sufficient to pay the debt it owes the plaintiffs on this contract. It is true that in Sheridan

v. Fleming, 93 Mo. 321, 324, 325, 5 S. W. 813, and in other cases of that special class, express power to make additional assessments, when the first was insufficient, was granted to the county. But the grant to the county of the power to make and collect the necessary assessments to raise the money to pay for the performance of a contract is, in the absence of statutory prohibition, necessarily inferred and legally presumed from the grant of the power to a quasi municipal corporation, or a municipal corporation, to make the contract for internal improvements. United States v. Saunders, 124 Fed. 124, 128–131, 59 C. C. A. 394, and cases cited. There is no express or implied prohibition of any such assessments in the statutes of Missouri, and those statutes, when carefully read, demonstrate the absolute necessity to the practical working of the plan they adopt of the power to make such assessments. The only criterion to determine, before the location and construction of the ditch, the necessary amount of the assessments, is the amount of the estimate of the cost of the work plus the estimate of the amount of the damage, both of which are required by this statute to be made before the contract for the work is let. The parties damaged had the right to appeal to the district court from the awards, and it was reasonably certain that some of them would increase their awards, and yet the statute provides that the work shall not be stayed but shall proceed pending the appeals. Section 5592. It provides that the county shall pay the damages out of its general fund and that this shall be refunded to the county out of the proceeds of the assessments (section 5599), and that the bonds issued shall be paid from the proceeds of the assessments and of the interest thereon (section 5602). It provides that the assessments shall be payable in such a number of installments as the county court shall determine and that the bonds shall draw interest at not exceeding 6 per cent. and shall mature at annual intervals, commencing after a period of 2 years, for not exceeding 20 years. And it provides that the county, in cases wherein the contractor fails completely to perform his contract, shall have power to relet the part unperformed to other contractors. Section 5597. It is obvious that finite minds could not make even an approximately correct estimate of the amount that would be required to pay the cost and expenses that would result from the location and construction of such a ditch as this before the contracts were let or the damages to lands determined, or the number of the installments of the assessments, the times when due, the rate of interest thereon, the amount of the bonds, the dates of their maturities, the rate of interest they were to bear, and the number and character of the failures of contractors to perform were known, and this court is convinced that the Legislature not only did not limit, but also that it did not intend to limit, the power of the county court to levy assessments on the property in this drainage district to a single assessment based on such a preliminary estimate made before the work was done or the damages fixed, or the amounts of interest to be paid and collected could be known. This action against this county cannot be defeated on the ground that it was or is without power to make and collect the necessary assessments up-

on the property in this drainage district to pay any judgment that may be recovered against it upon the contract here in suit.

[6] One of the defenses which were pleaded was that by the terms of the contract the plaintiffs were not entitled to recover until they received from the engineer his monthly estimates of the contract price of the work done and materials furnished by them after the second contract was made, and that they had never received any such estimates. The reply to this defense was that the engineer had withheld the estimates to which the plaintiffs were entitled by fraud, or by such a gross mistake as implies fraud, or arbitrarily by a failure to exercise an honest judgment. Upon this issue the evidence was conflicting, but there was substantial evidence that the engineer withheld the estimates arbitrarily through a failure to exercise an honest judgment. It is assigned as error that the court refused a request to charge the jury that:

"The burden of proving fraud on the part of Bell, the engineer, in refusing estimates to the plaintiffs, or that he in so doing did not exercise an honest judgment in so refusing, rests upon the plaintiff. To authorize a finding in plaintiffs' favor upon this question plaintiffs are required to establish such fraud or failure to exercise an honest judgment by a preponderance or greater weight of credible evidence."

The only reference to the burden of proof on the issue of the engineer's fraudulent or arbitrary refusal to allow estimates found in the charge of the court is this sentence:

"The burden of proof is upon the plaintiffs to establish their claim by a preponderance of the credible evidence in the case, and likewise the same burden is upon the defendant to establish the damages prayed for in its counterclaim."

The question whether the engineer withheld the monthly estimates of all work done and materials furnished by the plaintiffs after the second agreement, in the exercise of an honest judgment, or arbitrarily not through the exercise of an honest judgment, or fraudulently or through a mistake so gross as to imply fraud, was one of the most important issues, if it was not the most important, in the trial below. It is a general and salutary rule that where a charge states general rules of law governing the case, but fails to set forth a specific and crucial issue which the jury must determine, and to apply the law to that issue, either party, upon request, is entitled to additional instructions which tersely and clearly state such issue and the law applicable thereto. The refusal to submit the required instruction was in our opinion a violation of that rule and fatal to the trial of this case. Northern Central Coal Co. v. Hughes, 224 Fed. 57, 59, 139 C. C. A. 619, 621; Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, 419, 16 Am. St. Rep. 585; 11 Encycl. of Pl. & Pr. 298, 299; Cleveland, C., C. & St. L. Ry. Co. v. Baker, 91 Fed. 224, 227, 33 C. C. A. 468; Texas & Pac. Ry. Co. v. Short (Tex. Civ. App.) 58 S. W. 56, 58; Muldowney v. Illinois Central Ry. Co., 39 Iowa, 615, 619, 620; Parkhill v. Town of Brighton, 61 Iowa, 103, 108, 109, 15 N. W. 853; Lamar v. State, 64

Miss. 328, 1 South. 354, 355; Gerdine v. State, 64 Miss. 798, 2 South. 313, 314.

The judgment below must therefore be reversed, and the case must be remanded to the District Court, with instructions to grant a new trial, and it is so ordered.

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CALAF et al. v. FERNANDEZ.

(Circuit Court of Appeals, First Circuit. January 5, 1917.)

No. 1190.

1. MOTIONS ⊜36—CONTINUANCE OVER TERM.
A court has power by an order to carry over pending motions for determination at a subsequent term.

[Ed. Note.—For other cases, see Motions, Cent. Dig. §§ 45, 46.]

2. MOTIONS ⊜58—VACATING OR MODIFYING ORDERS.
A court has power, while a case and the parties are before it, upon proper hearing, to reconsider, modify, or enlarge its previous orders in respect to a pending controversy.

[Ed. Note.—For other cases, see Motions, Cent. Dig. § 72.]

3. NEW TRIAL ⊜9—ORDER GRANTING—LIMITATION TO CERTAIN ISSUES.
A court may order a new trial upon a particular branch of a controversy, whether a new trial is granted upon the whole case or only as to certain issues being largely discretionary.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 12.]

4. TRIAL ⊜389—TRIAL TO COURT—FINDINGS.
Where, in an action at law, the cause is submitted to the court without a jury under Rev. St. § 649 (Comp. St. 1913, § 1587), and the court makes a general finding on the issues involving questions of both law and fact, and judgment is entered thereon, a party cannot thereafter demand as of right that special findings be made.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 912.]

5. APPEAL AND ERROR ⊜219(2)—REVIEW—TRIAL TO COURT.
Where, in such case, no request was made during the trial for special findings, nor any motion for a general finding in favor of the adverse party, there is no question in respect to the general finding that can be reviewed by an appellate court under Rev. St. § 700 (Comp. St. 1915, § 1668), which provides for a review in such case only of "the rulings of the court in the progress of the trial."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1322, 1323.]

6. VENDOR AND PURCHASER ⊜133—CONSTRUCTION OF CONTRACT—ACTION BY VENDOR FOR BREACH.
A contract in the Spanish language for the sale and purchase of lands to be thereafter acquired by the vendor, construed in an action by the vendor for its breach in respect to the titles which the vendor was bound to furnish, and the decision of the trial court affirmed, which found that the titles tendered by plaintiff were sufficient to comply with the contract and to sustain the action, it further appearing that the refusal of defendants to carry out the contract was not based on any objection to the titles

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

offered but upon other grounds and that defendants refused to examine the titles.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 234–237.]

7. TRIAL ⟸51—TRIAL BY COURT—RECEPTION OF EVIDENCE.

It is not unusual nor improper, especially in a trial before the court without a jury, in cases which involve directly or collaterally questions as to title to real estate, to admit disconnected documentary or oral proofs in respect to links in the chain of title with the understanding, expressed or implied, that if connected they will be competent and material and will be considered, and if not connected they will become immaterial and harmless.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 125.]

In Error to the District Court of the United States for the District of Porto Rico; Hamilton, Judge.

Action at law by José Romero Fernandez against Jaime Calaf and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Francis H. Dexter and Charles Hartzell, of San Juan, Porto Rico (Jacobs & Jacobs, of Boston, Mass., and Nava & Dominguez, of San Juan, Porto Rico, on the brief), for plaintiffs in error.

E. B. Wilcox, of San Juan, Porto Rico, and N. B. K. Pettingill, of Tampa, Fla. (Ben A. Matthews, of New York City, on the brief), for defendant in error.

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

ALDRICH, District Judge. This case is one in which the plaintiff below sought to recover damages for alleged breach of a contract for the sale of something like 30,000 acres of land in the island of Santo Domingo, for $30,000, and for $5,000 in addition for expenses. The contract contemplated that one party should go out and buy lands, to be located at the places marked in the map of the Republic of San Domingo with the name of "Quemados," "Las Charcas," and "Payabo," and that the other party should take conveyances of the same under circumstances indicated by the provisions of the contract. It was clearly a contract in which the seller was not undertaking to sell what he at the time owned, but one under which the party contracting to sell was to go out and buy lands and convey them to the party contracting to take them.

The contract in question is in the Spanish language, and some of its provisions have been translated in the arguments and in the record in different ways, and particularly the words "ofrescan completa garantia," which appear in clause 4 of the contract. One version is that the Spanish words quoted mean that the deeds to the property are to be in good condition and safe; another that they mean, in the sense of the contract, that the titles be safe, and such is the version of Judge Hamilton; and another, which is the version of counsel for the plaintiffs in error, that the literal translation is, "shall offer complete war-

ranty." The latter, according to the recent Spanish-English Dictionary published by D. Appleton & Co., New York, 1916, would seem to be closer to a literal translation than any of the others, because the word "garantia" has reference to warranty, guaranty, and security. But, after all, the strict literal meaning would not necessarily be controlling, because, under reasonable interpretation, it would be the sense in which the parties used the word "garantia" in connection with the other words in clause 4 of the contract, and this question would be influenced by the situation of the property, the relations of the parties, and their intentions. It is important, however, to ascertain, through interpretation, or other proper means, whether the parties were making a contract with reference to deeds embodying the usual covenants of warranty, or whether they had in mind that the seller was obligating himself to show a strictly legal chain of title.

It will become necessary to refer again to clause 4 of the contract, and to the meaning of these words as used by the parties to convey intentions and establish obligations in respect to the lands about which the controversy arises.

The case was first tried by jury, and, if we are to accept the statement of counsel, the instructions were to the effect that the title to the land in controversy was good. There was a verdict for $21,080, and judgment thereon. Subsequently, and at the same term, the defendants below moved for a new trial; the principal contention being that the court erred in saying that the title was good, because there were no sufficient proofs to warrant it. Later, in the same term, the verdict and judgment were vacated and a new trial granted. These orders were admittedly general and for a new trial.

On March 5, 1914, and during the term, the plaintiff moved for a reconsideration of the previous order in respect to a new trial, which was not acted upon during the term, but was carried along, if at all, by virtue of a general order entered on the last day:

"That any and all matters not finally determined or settled, and rights which should, or may, be lost by the lapsing of the term, are hereby continued until the next term, to all intents and purposes as if the members and titles of the same were herein set out."

During the next term, and on May 16, 1914, an order was entered granting a motion to reconsider the order for a new trial, and on the same day it was further ordered—indeed, it was a part of the order granting the motion to reconsider—that:

"The order granting a new trial is modified by granting the same upon the condition that said new trial shall be limited to a retrial of titles of the land in question."

On December 15, 1915, the plaintiff moved for a modification of previous orders, to the end that the judgment should be stayed, instead of set aside, until the determination of questions at the present hearing. This motion was denied; the court saying in the course of an opinion, in explanation of such denial, that the previous action of the court setting aside the judgment and the verdict left in the case only the pleadings.

The plaintiffs in error now urge this statement in respect to the pleadings in favor of the proposition that the verdict was set aside generally. That proposition is perfectly correct so far as the original order was concerned, and, although the opinion was filed May 3, 1915, we must accept that observation as having reference to an earlier stage of the proceedings and to the status of the verdict under the general order setting aside the judgment and the verdict, and before the order modifying and limiting the scope of the new trial, because in the same opinion, in its concluding paragraph, Judge Hamilton says:

"My construction of the situation is that the verdict was set aside in part and still remains in force as to everything except the matter of title."

The opinion is otherwise explanatory of the action of the court in connection with the general order and its subsequent modification.

The plaintiffs in error seasonably, broadly, and particularly objected and excepted to the action of the court which involved the modification of the general order, and limited the new trial to that phase of the controversy which related to titles.

The point is taken by the defendants in error that the first assignment is in violation of rule 11 of this court, because it involves distinct propositions. While it may be literally true that the assignment does involve distinct propositions, we do not look with favor upon the point raised, because both propositions are directed against the authority of the court to modify the general order to reinstate the verdict in part and to limit the scope of the new trial to questions relating to title.

[1, 2] We have no doubt of the power of the court to carry along pending motions that they may be taken up and considered in a subsequent term. Nor have we any doubt of the power of a court, while a case and the parties are before it, upon proper hearing, to reconsider, modify, and enlarge its previous orders in respect to a pending controversy. Such power and such authority is so familiar and so well understood that we see no occasion for citing authorities in support of it. The recent Massachusetts case of Simmons v. Fish, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588, contains a careful review of authorities on this subject, and is valuable, not only because of the weight of the reasoning which it contains, but because of the note at page 565 of 210 Mass., 97 N. E. 102, Ann. Cas. 1912D, 588.

While the order limiting the issues of the new trial does not technically express its operation upon other branches of the case involved in the verdict, it is, nevertheless, unquestionable that the court clearly intended to rescind the general order vacating the judgment and the verdict, to restore the original status, and to open for retrial questions of title only, and we think the order should be accepted as sufficient to that end.

[3] Now, as to the propriety of modifying the general order and limiting the scope of the new trial: It is not an unusual thing to order a new trial upon a particular branch of a controversy. It often happens, where a defeated party is aggrieved by the phase of a trial

which had to do with the damages, that the verdict is set aside in that respect and a new trial ordered upon the question of damages only; and it sometimes happens, where the grievance has reference to the primary right—that of recovery—and where there is no substantial controversy as to the question of damages, if the right of recovery is established, that the verdict is set aside upon the question of right of recovery only, and the scope of the trial limited accordingly. The question as to what should be done in a given case under a motion for a new trial, in whole or in part, is always largely a question of discretion. The practice of not going over unnecessary grounds which at the end of the first trial and the verdict are found not to involve substantial dispute, and trying again questions that are not in substantial controversy through the instrumentality of a new trial, granted in the exercise of discretion, is a salutary one, and the authorities and the text-books sufficiently sustain it. The case in this circuit of Farrar v. Wheeler, 145 Fed. 482–490, 75 C. C. A. 386, is among the more recent cases.

In the case at bar the reasonableness of the limitation of the scope of the new trial to questions relating to title, though probably not reviewable here, is made obvious by reference to the motions for the new trial, and the affidavits in their support, because the only substantial grievance urged was that which relates to the state of the evidence in respect to title.

It is quite true that some of the defendants raised the point in their motion for a new trial that, according to the evidence, the plaintiff was entitled to recover as damages the sum of $14,120 only, and not the sum of $21,080, while other defendants did not raise that question at all upon their motion for a new trial. There was nothing in the affidavits in support of the motion showing the ground upon which the point in respect to damages was based. We cannot find from the record that it was much urged before Judge Hamilton as a ground for setting aside the verdict in that respect. The damages, presumably under instructions, were ascertained by the jury, and included in the verdict; and as the verdict in that regard was not opened, and as the record shows neither exceptions to instructions, nor the lines upon which the question of damages was submitted to the jury, we see no way open to us to review any question about that phase of the case.

On December 15, 1914, the parties stipulated that the retrial should be before the court without the intervention of a jury; and on May 3, 1915, which was the same day on which Judge Hamilton handed down his opinion explaining the status of the earlier orders and his reasons for limiting the scope of the trial, the parties stipulated into the retrial before him "such portions of the testimony already taken in this case, at any hearing thereof, as shall have been directed to the issues now under hearing, restricted by former order of this court to the form and sufficiency of the title offered by the plaintiff."

The point is taken by the defendants in error that these stipulations should be treated as a waiver of all questions raised against the or-

ders in respect to the scope of the new trial, but, not accepting this theory, we have considered the questions raised by the record, and as explained in argument, with the result that we see nothing to justify disturbing the orders limiting the issues.

The trial before Judge Hamilton, upon the lines which we have referred to, seems to have occupied several days, and was limited to issues in respect to title, and although the plaintiffs in error, as they claim here, offered evidence for the purpose of sustaining all the issues raised by the pleadings, an examination of the colloquy, at page 105 of the record, which is understood to be the foundation for 12 of the assignments of error, had reference to the boundaries of the land in question, and no reference whatever to any question of damages.

[4] As a result of this hearing, on November 6, 1915, Judge Hamilton handed down an elaborate opinion in which he said, by way of conclusion, that the hearing was restricted to the matter of title, and that full consideration had been given to the subject, and then finally, in conclusion, made a general finding in the words following:

"The court therefore finds the issue of title in favor of the plaintiff, and directs that judgment be entered for the plaintiff on the whole case."

Following this, and three days after the general finding had been made, and after judgment, there were requests for special findings, and upon this subject there were two opinions, with the result that the requests were denied, and, if we understand the case correctly, there were no requests for special findings during the course of the trial or before the general finding and judgment.

The motion for special findings is predicated upon section 649 and section 700 of the Revised Statutes of the United States (Comp. St. 1913, §§ 1587, 1668).

While it is quite likely within the discretion of a court to make special findings after it has rendered a general verdict in a case submitted to it without the intervention of the jury, it is not at all plain that a defeated party is entitled, as of right, to special findings upon requests filed subsequent to the general finding or decision. Section 649 provides that, when a cause is submitted to a court without a jury, the finding upon the facts may be either general or special, and that they shall have the same effect as the verdict of a jury. Section 700, in referring to section 649, provides that the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and that when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.

[5] The general question with which Judge Hamilton had to deal in respect to title was a mixed question of law and fact, into which there entered considerations with respect to the relations of the parties; the nature and meaning of the contract; instruments, and records bearing upon questions of title; facts of possession; presumptions

resulting from possession; questions whether, as between individuals, title had ripened by virtue of the local statutes of limitation; and various other things. Under such circumstances, we know of no statute, or of any settled practice, which entitles the aggrieved party to demand, as of right, special findings after a case has been submitted upon arguments and determined upon a general finding. It will be seen that under section 700 the right to review has reference to exceptions taken in the progress of a trial of the cause. If we understand the record correctly, there were no requests for special findings during the progress of the trial, nor were there any objections or exceptions directed against the idea of a general finding until after it was made. Under such circumstances, we cannot conceive that there is any question for us to review in respect to the general finding. Company v. Company, 139 U. S. 222, 11 Sup. Ct. 523, 35 L. Ed. 147; Grayson v. Lynch, 163 U. S. 468, 472, 16 Sup. Ct. 1064, 41 L. Ed. 230; St. Louis v. Company, 166 U. S. 388, 17 Sup. Ct. 608, 41 L. Ed. 1044.

We cannot pass this question without observing that the request for special findings, in the form it was, and made as it was, after the cause had been submitted, considered, and decided, was very near the point of impertinency, because the court was asked to make specific findings of fact as to how the plaintiff made out or provided the title. It should be borne in mind that this request was first precipitated after a lengthy opinion giving a full explanation as to how the conclusion was reached. It is perfectly plain that it would neither be reasonable nor orderly for a judge, after he had rendered a general verdict, founded upon considerations which he had explained as its foundation, to enter upon an argument as to how the prevailing party made out or proved his case.

If, at the close of the proofs, the claim of the aggrieved party was that the evidence did not warrant a general finding or a general verdict for the plaintiff upon the question of title, because there was no evidence, or sufficient evidence, to warrant such a finding or such a verdict, a motion or a request that the court should find for the defendants, upon the ground that there was no evidence to warrant a finding or a verdict for the plaintiff, would have been a plain, simple, and adequate remedy, because, in the event of the motion being denied, the aggrieved party might have brought up the entire evidence for review.

There would be no more decorum in asking a judge, after he had explained the case and rendered a general verdict, to make special findings as to how the result was reached than there would be in sending a jury back to the jury room, after rendering a general verdict, to make special findings as to the evidence in support of the verdict. Our conclusion on this branch of the case is that the court was right in not granting a motion for specific findings of fact as to how the plaintiff made out or provided the title.

[6] Now, as to the larger questions which are raised in respect to the contract, the doings of the parties, and the general merits of the

case; and in approaching their determination we feel bound to say that we have hesitation in doing it on a record so imperfect as the one presented. The troublesome question is that which relates to the meaning of clause 4 of the contract. Did the parties mean title reasonably safe, practically safe, legal title in the ordinary acceptation of the term, a warranty deed in strict legal form supplemented by a strictly legal chain of title running, unbroken, back to the Spanish Crown, or did they mean a deed with the usual covenants of warranty delivered in circumstances, and under conditions, not showing apparent weakness in antecedent's title, or suggesting hidden defects? The question as to what the parties intended must be determined as arising out of an executory contract, and in an action at law for damages because of an alleged breach.

It doubtless would not be seriously contended by any one that under a contract, like the one in question, the issues in respect to the contemplated title would be as strictly drawn, or that the requirements in respect to title would be as exacting, as under an issue in a common-law proceeding, by writ of entry, or of ejectment, where the party having the strict or better title prevails. From the very nature of the transaction, as a preliminary question, the issue of strict legal title could neither be framed nor determined by the parties under the contract in its execution as a business transaction, and it is not to be presumed that they contemplated that, because they provided no forum or other means for the determination of disputed questions as something preliminary to closing the trade; nor could the degree of strictness which might become the standard between adversary parties contesting title be ascertained in a situation like this between contracting parties.

There are three cases which counsel for the plaintiffs in error urged with considerable stress. They are Brown v. Lee, 192 Fed. 817, 113 C. C. A. 141; Washington & Turner v. Ogden, 66 U. S. 450, 17 L. Ed. 203; and Ankeny v. Clark, 148 U. S. 345, 13 Sup. Ct. 617, 37 L. Ed. 475. But, upon examination, it will be found that neither the facts, the issues, nor the principle of these cases are applicable to the situation here. It is true that these cases sustain the general principle that a contract of sale presupposes full title, and that if title fails as to part the buyer may rescind. As a general proposition that is quite true. It is unquestionable that under a contract in general terms to sell and buy, and without any express words as to title, the obligation to furnish full title results through implication of law. But in the case at bar there were express words in respect to title, and they either mean deeds of warranty, and such responsibility and security as go with them, or that the deeds or titles were to be in good condition and safe. In other words, the parties themselves created a standard less than that created by implication under a contract in general terms to sell and buy.

In the case of Ankeny v. Clark, 148 U. S. 345, 13 Sup. Ct. 617, 37 L. Ed. 475, where the general rule is stated, the provisions of the contract were general, the title was defective, and the seller refused to give anything more than a quitclaim deed, and, upon the claim of the

buyer that that was not what the contract called for, rescinded the contract and brought suit to recover for the value of wheat which had been advanced in payment of the purchase money. An issue was framed, and, upon proofs, the court directed a verdict for the plaintiff.

In Brown v. Lee, 192 Fed. 817, 113 C. C. A. 114, the contract was for a warranty deed, with further express words that the lands agreed to be deeded should be free from all rights for sale of timber made to other parties. It appeared that there were incumbrances in respect to timber, as well as other incumbrances. There were issues drawn as to the incumbrances which the seller had expressly agreed to discharge. There was conflicting evidence as to whether the incumbrances really existed, and there were questions as to whether the purchase money should be paid in advance in order that the incumbrances might be discharged. And thus the case upon its facts is plainly distinguishable from the one we are deciding.

In Washington & Turner v. Ogden, 66 U. S. 450, 17 L. Ed. 203, the agreement was general, and the interpretation of such a general provision, without limitation or qualification, would be that the parties intended a perfect title; and, moreover, the purchase was expressly made dependent on the surrender and cancelment of a former agreement of the vendor to sell the same land to another person.

In a situation like the one under consideration, and particularly upon a record like the one before us, there would seem to be no occasion for considering what definite and general rule should govern a trial where a party to a contract seeks to justify abandonment, or renunciation, upon the ground of defective title. Because, as has already been said, considerations of that kind in this case did not, at the time the supposed right was exercised, prompt the action of the parties who are now seeking to justify the rescission upon that ground. It is true there was slight evidence from Mr. Candina that certain private contracts did not suit him; but we do not look upon this single detail as sufficient to overcome the substantial force of the whole weight of causes promoting rescission, as shown by the answers, and by the paragraphs of Judge Hamilton's opinion, which, although, strictly speaking, not special findings of fact, convey the idea that the plaintiff was ready to furnish a good and safe title, or any kind of a title, which he was required to do under the contract, and was prevented from doing it by the action of the defendants in refusing to examine the title, and otherwise to carry out the contract.

The plaintiffs in error also urge certain provisions of the Civil Code of Porto Rico and certain principles of the Civil Law, as explained by Manresa in his commentaries, in respect to sales subject to approval or trial of things sold. They urge these provisions and commentaries in support of their contention in respect to clause 6 of the contract.

It is probable that such provisions and commentaries have reference to a situation in which the party has what he is selling subject to trial, examination, and approval; but, however that may be, the general rules as such have no application to a contract like the one under consideration, because the parties contemplated that one party should go out

and purchase lands, to be turned over to the other party upon conveyances answering the requirements of the express terms of a contract into which they had entered. This being so, the rights of the parties are to be ascertained and determined under an interpretation of the contract, rather than under general provisions of statutes or under general rules of law.

There would be considerable force in what the plaintiffs in error urge, in respect to clause 6, provided the exercise of the supposed right of rescission had been based upon an examination; but apparently they did not resort to the right of examination and approval. If we understand correctly the theory of the answers and the general theory of the findings of Judge Hamilton, the causes of rescission were other than, and independent of, causes based upon examination or weakness in antecedent titles, and the abandonment of the transaction was because the buyers had been informed in an amicable way, by the Secretary of State, of disturbed and revolutionary conditions in the island, and because they had been informed, by qualified counsel, of obstacles militating against personal inspection and examination, and that the lands were not what the seller represented them to be in respect to value and location.

There is nothing in the record that would justify us in disturbing the result reached by Judge Hamilton, upon the ground that the defendants so far sustained their contentions in these respects as to justify abandonment.

From the relations of the parties and the nature of the transaction it would be impossible, under reasonable rules, to interpret clause 4 as meaning that the parties understood that the seller on the day named for closing the deal should be there with a perfect legal chain of title. Such is not the reasonable view. The clause, as contemplated by the parties, undoubtedly had reference to the usual guaranties by a responsible grantor by way of security, and had no reference whatever to the point of a perfect and absolute legal chain of title as a thing preliminary to transferring the land.

We do not look upon the words "ofrescan completa garantia" as meaning an offer of a strictly legal and perfect title, because, according to the translation insisted upon by the plaintiffs in error—a translation which we accept as the correct one—they mean, offer complete warranty.. And translating the clause further, in order that the proper connection of these words with the preceding words shall be seen, "El Sr. José Romero binds himself that the title of property should be in good condition and should offer complete security."

In view of the nature of the transaction and the deal the parties were undertaking to make, we do not accept that part of the clause referring to title or deeds "in good condition" as meaning all and singular the antecedent deeds, documents, and records in the various chains of title, but as meaning that the lands were to be conveyed by deeds with covenants of warranty in the usual way in which lands are conveyed by warranty deed. The theory that section 4 had reference simply to the condition of the deeds to be passed from the seller to the buyer

finds very cogent support through the words used in section 7 of the contract, which are "that the total price of the purchase will be delivered on receiving the deeds duly registered."

If clause 4 is interpreted in the sense of a workable executory contract, as must have been contemplated in order that the transaction should be closed, it meant such title deeds of warranty, together with such abstracts and explanations as are usual in the ordinary course of such deals, while, if construed as requiring the seller to be on hand with a perfect chain of title, as something preliminary to closing the deal, it would not be a workable one, because, as already said, there were no apt means provided for determining whether all possible questions and cavils in respect to details and links in the chain of title could be definitely demonstrated one way or the other. If this were to be carried beyond the idea that the buyer had a right to demand, and the seller was bound to exhibit, titles and securities beyond a deed with the usual covenants of warranty, it would be difficult to lay down a rule as to what the measure of title should be. It is enough for us to say that clause 4 is not accepted as meaning that the seller was bound to exhibit in advance, and as a thing preliminary to his deeds, a chain of title which, in all of its links, should be beyond all possible cavil, and it is quite enough to say that the rule laid down by Judge Hamilton, that the contract "requires only that the title be safe," is sufficiently favorable to the plaintiffs in error.

Under such standard of legal requirement, which was sufficiently favorable to the defendants below, Judge Hamilton made a general finding in favor of the plaintiff upon the issue of title which involved mixed questions of law and fact.

But, after all, as will hereafter be seen, all questions under clause 4 which relate solely to the status of the title which Romero obligated himself to transfer are largely moot questions, except as they may bear upon the question of damages; because, if we are to judge the actions of the parties from what appears in the record, the state of the title was not the cogent cause for breaking up the deal.

We see no possible way of reviewing the general finding, upon the record before us, because the record does not contain the evidence, or any substantial part of the evidence, which that court had to weigh in order to reach the finding and decide the case. If, as already said, the plaintiffs in error had in advance of the decision moved for a verdict, or a general finding, and the way was open to them to file a motion to that end, in the event of its being denied they could have brought their case here with the full transcript of the evidence before Judge Hamilton, and in such a situation this court could have determined whether the findings were reasonably supported by the proofs.

Recurring again to the action of the parties, and to what was done in Santo Domingo, when Romero went there for the purpose of carrying out his part of the contract: On this point Judge Hamilton finds—at least we infer that he finds, from the plaintiffs' testimony—that Romero was there, with everything in readiness for conveyances to him, and for his conveyance to the defendants; that the defendants

below introduced no evidence to overcome this; and he further finds that the defendants did not live up to their part of the contract as to execution of deeds, and upon this it was ruled, or found, that they could not "depend on the theory that the plaintiff must do the impossible thing, under the civil law, of registering a deed they prevented him from making."

This again involves findings, if they are findings, which we are in no position to review, because the evidence is not before us. If the plaintiffs in error had expected a review in this respect, they should have made the necessary motions before that court and brought the case here with the evidence for and against, because, under such a condition, this court could determine whether these things should be accepted as findings, and, if so, how far they should be reviewed upon the evidence. The record presents no comprehensive statement in respect to the proofs, and there is nothing before us of substance, aside from what appears in the bill and answer and in the various opinions mixed with law and fact.

The bill, in apt words, does allege that Romero was in readiness to perform his part through executing and delivering the title deeds. The answer denies that, but fails to allege that the state of the title was the reason for not closing the trade. But, looking further, there are statements in the answer in the nature of admissions which are quite persuasive, and quite potential, in the direction of showing that the condition of the titles had nothing whatever to do with the renunciation and abandonment of the deal by the defendants. They say, as a reason for not examining the lands, that the country was in a revolutionary turmoil, which rendered travel unsafe, and that they were advised by the Secretary of State against going where the lands were located; that the lands were not properly located with reference to navigable streams; that they were unfit for cultivation and uses for which they were intended, and in the answer of Penagaricano and Candina that for these reasons the defendants declined and refused to purchase the same. In the general answer it is said by the defendants that they sought and obtained advice of the most expert and best qualified counsel in the capital of the Republic as to the actual situation, and as to the intrinsic and extrinsic value of the property or properties, and that they were informed by experts, who had personal knowledge of the location, and who were acquainted with the condition of the lands, that they were worth only about $8,000, and that they were situated too far away from Samana Bay; that they were unsatisfactory and inappropriate for, and unsuited to, the cultivation of cane, or of any other fruit or product, and that they were unapproachable.

While we are not in a position to review the findings of Judge Hamilton in respect to abandonment, for the reason that all the evidence is not before us, it can be said, and ought to be said, that the answers furnish strong proof that the conditions which prompted the defendants to adopt a course which operated to prevent the consummation of the deal and the delivery of the deeds, were conditions entirely independent of all considerations in respect to the state of the title. The

inquiries in respect to location, accessibility, quality, and value were made prior to the renunciation and abandonment found by Judge Hamilton, and there is no suggestion in the record, so far as we can see, that these parties sought to justify abandonment on the spot and at the time upon the ground of weakness or invalidity of title; and this is a case, if we are to judge the actions from the record, where the parties acting independently of title, were prompted and controlled by considerations in respect to locations, qualities, and values of the land, and where, through an answer, for the first time, and as an afterthought, they sought to attack the title, something which did not bear upon renunciation or abandonment at all.

It follows, of course—if the legal standard of title held by Judge Hamilton was sufficiently favorable to the defendants below, a view which we have sustained—from the general finding in favor of the plaintiff upon the issue of title, which involved considerations of mixed questions of law and fact, a finding which we cannot review upon this record, and there being no question of damages here, that the judgment will have to be sustained, unless there are errors in respect to the admissibility of evidence which should set the verdict aside.

We do not deem it necessary to examine categorically all the assignments based upon the admissibility of evidence. They are, generally speaking, of the same character. They are mostly technical, and none of sufficient substance in a trial like this to involve reversible error.

[7] It is not unusual, especially in a trial before a court without a jury, and particularly in cases which involve directly, or collaterally, questions as to titles to real estate, to admit documentary and oral proofs de bene, upon the theory—and in practice a theory of necessity—that if disconnected de bene documents, or instruments, or other disconnected proofs, in respect to links in the chain of title, are not connected, that they are not evidence at all, and become wholly irrelevant and altogether harmless. It is quite apparent that this was the theory which governed in the trial before Judge Hamilton. This is explained in his opinion in various places.

As has been observed, it is not an unusual thing—indeed, it is quite the common thing—in modern practice (where the purpose is to sustain titles of land, and where it must be done step by step, and by steps to be taken in order of time, and sometimes out of order of time under discretion), to admit documents bearing directly or collaterally upon the chain of alleged title, with the understanding, expressed or implied, that if they are connected they will become competent and material, and will be considered, and if not connected, that they become wholly immaterial and harmless. This rule results from necessity, and is a rule particularly and peculiarly adapted to investigations in respect to real estate titles. Under the circumstances, we see nothing in the assignments against the admissibility of evidence to justify disturbing the general finding of the court below.

The indefinite and unusual terms of the contract in this case, the peculiar circumstances of renunciation, and the fact that this is an action to recover damages for an alleged breach of an executory con-

tract, rather than an action to test title upon issues drawn to that end, taken altogether, present a situation so far sui generis as to make the task of finding authority directly in point, or broadly applicable, an impossible one. But we do not perceive that Judge Hamilton's decision offends any standard rule of either the common or civil law. It was the theory of the trial that the plaintiff below, in order to lay a foundation for damages, must show that he was in a position to furnish title sufficient to answer the requirements of clause 4, read in connection with clause 7 of the contract as interpreted and construed by the presiding judge, and in the circumstances of the record the general finding to that end must be accepted as a determination of that question in favor of the plaintiff.

It is evident that the court below deemed the proofs sufficient to establish such a condition of title, in fact, as the contract contemplated and required, and if that court's theory in that respect is to stand, together with its theory as to the fact of a breach, we see no way to reverse the result reached, that the plaintiff was entitled to recover damages; and as there is before us no proper question as to the measure of damages, and no question in respect to damages other than that raised against the action of the District Court in holding the verdict in part and limiting the scope of the trial, we see no justifiable ground for interference with the verdict for damages.

The judgment of the District Court is affirmed, with costs of this court.

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OHME et al. v. CLEVELAND, C., C. & ST. L. RY. CO.

(Circuit Court of Appeals, Seventh Circuit October 3, 1916. Rehearing Denied December 11, 1916.)

No. 2278.

QUIETING TITLE ⊂=44(5)—ACTION—POSSESSION—LIMITATION.

A bill to quiet title to property claimed by complainant under a deed, executed in 1855, conveying the property to its predecessor for railroad purposes, *held* not sustained by the evidence, which not only failed to show that complainant was in possession when the suit was commenced, or that it or its predecessors had ever been in possession, but showed, on the contrary, that defendants and their predecessors had been in possession for more than 30 years under a deed purporting to convey title in fee simple.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 92.]

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

Suit in equity by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company against Ernest A. Ohme, Frank Spitz, and Lena Ritter. Decree for complainant, and defendants appeal. Reversed.

In 1855 Ebenezer Noyes, being the owner of block 116 of the original town of Mattoon, in Coles county, Ill., executed a deed to the Terre Haute & Alton Railroad Company, appellee's predecessor in title, which recited as follows: "That the said party of the first part for and in consideration of the advan-

tages to be derived by the construction of the said T. & A. R. R'd and the construction of a depot and other works at the town of Mattoon, in the county of Coles and state aforesaid, have for railroad purposes and to enable said party of the second part to construct their said road, and the erection of other necessary incidental works, and for no other purpose whatever, granted, bargained, and sold, and by these presents, and for the uses and purposes aforesaid, do hereby grant, bargain, sell, and convey to the said party of the second part a certain piece, parcel, or lot of ground in the said town of Mattoon, in the county of Coles and state aforesaid, to wit: Beginning at a point where the western boundary line of the right of way of the Chicago Branch of the Illinois Central Railroad intersects the southern boundary line of the right of way of the said T. & A. R. R'd, and running thence fifty (50) feet southerly with the said western boundary line of the said C. B. Ills. C. R. R'd; thence due west until it intersects the s'd southern boundary line of the right of way of the said T. & A. R. R'd; thence easterly with said boundary line to the place of beginning. To have and to hold the same for the uses and purposes aforesaid and for no other." This deed was recorded in 1858.

In 1857 Noyes conveyed block 116 to one Radcliffe by a deed recorded in the same year. In proceedings brought by Noyes on May 31, 1859, against Radcliffe, the Terre Haute & Alton Railroad, and the Illinois Central Railroad, to set aside this deed, as well as another deed of block 116 charged to have been executed in 1857 by Noyes to the two railroads and delivered to Radcliffe, but never delivered by him to the grantees, a decree was rendered in 1865, which, after reciting that the bill had been dismissed as to the railroads without prejudice, granted the prayer as against Radcliffe. The Supreme Court of Illinois, in reversing this decree for lack of necessary parties to the suit, held that the railroads were not necessary parties and had properly been dismissed from the case. After the cause had been remanded, Noyes amended his bill and filed a bill of revivor against the heirs of Radcliffe. In his amendment, he recited that the bill had been dismissed against the railroads. In the decree rendered in 1871 the court again ordered a dismissal as to the railroad companies, adding thereto, "Said companies having disclaimed all title to or interest in said premises," and by this decree the court not only set aside the deed to Radcliffe, but also adjudged Noyes to be the legal owner and in the legal possession of the property. In 1876 a further and similar decree was rendered as against grantees of Radcliffe, and again the court recited that the railroads had disclaimed any interest in the premises.

By an instrument dated February 19, 1859, the Illinois Central Railroad Company and the Terre Haute, Alton & St. Louis Railroad Company leased to Noyes for a term of 40 years at an annual rental of $1 the following described property: "So much of the right of way of the Illinois Central R. Road Company as lies west of a line drawn west of and thirty feet distant from the central line of said railroad, measuring at right angles to said center line, and parallel thereto and extending from the north line of Broadway avenue in the town of Mattoon to the Terre Haute, Alton & St. Louis Railroad. Also all of the right of way of the Terre Haute, A. & St. L. R. Road Company lying south of a line drawn south of and twenty feet distant from the center line of said Terre Haute, Alton & St. Louis R. Road, measuring at right angles to center line, and parallel thereto, extending from a point thirty-six feet west of the center line of the Illinois Central Railroad southwesterly along said Terre Haute, Alton & St. Louis Railroad two hundred and twelve feet, measuring on the south line of said right of way."

The lessee covenanted inter alia: "That he will within three months from the date hereof finish the hotel upon the above-described premises, furnish it with all needful furniture and keep it as a respectable first-class railroad passenger and eating house during the continuance of this lease. The second party hereby further covenants that the first parties shall be entitled to the exclusive use of the ticket office and baggage room to be completed in said hotel as is marked in place thereof, and that the passenger room thereon

marked shall be kept and appropriated to the use of passengers in a manner becoming a first-class passenger station." The lease further provided: "That nothing in this lease shall be construed as binding the first parties to obtain possession for the second party of any portion of said hotel or the ground on which it stands, and that they the said first parties shall not be involved directly or indirectly in any suits or controversies now existing or which may hereafter arise between any of the original builders, lessees or proprietors of the hotel or in the adjustment of the liens upon the hotel."

The evidence establishes that Radcliffe began the hotel building in 1856 and that it was later completed by Noyes. The building stood partly on the original right of way of the railroads and partly on a portion of that part of block 116 described in the deed of 1855.

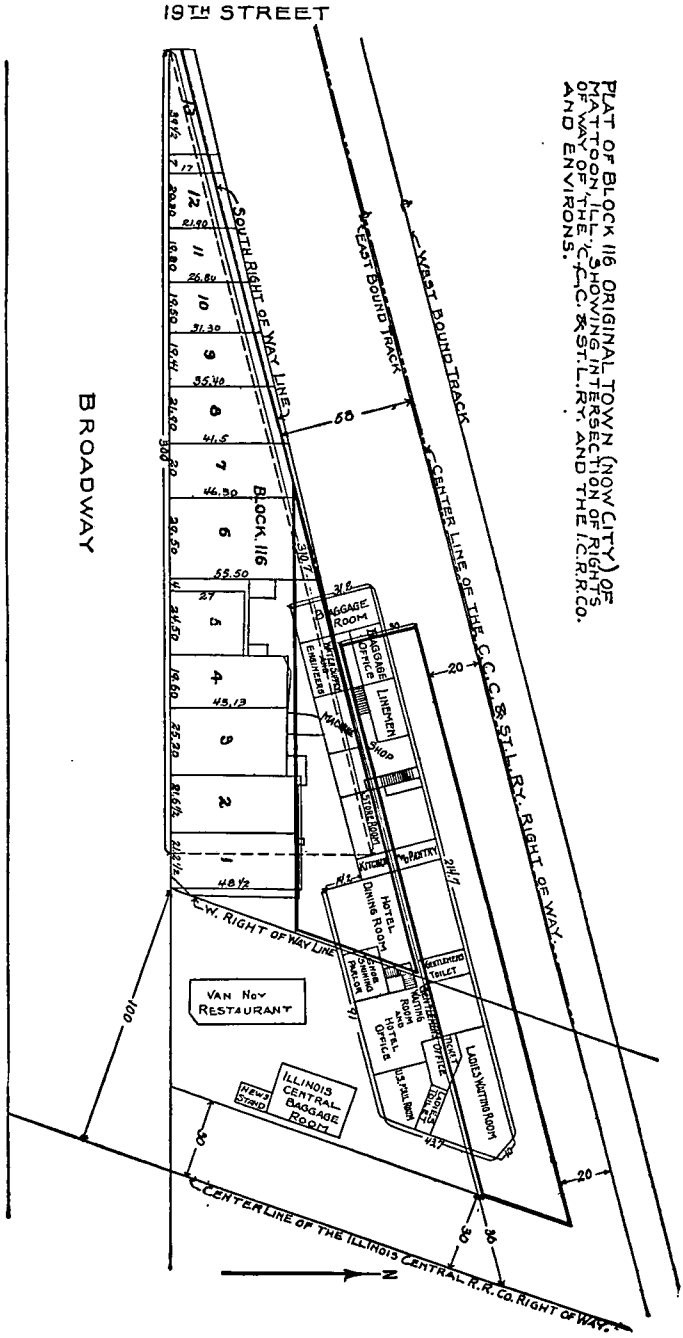
In 1876 Noyes conveyed his property to one Henley as trustee. Included therein were the following descriptions: "So much of the 'right of way' of the Illinois Central Railroad Company as lies west of a line drawn west of and thirty-six (36) feet from the center line of said railroad running at right angles to said center line and parallel thereto, and extending from the north line of Broadway avenue in the town of Mattoon to the Terre Haute, Alton & St. Louis Railroad. Also all of the 'right of way' of the Terre Haute, Alton & St. Louis Railroad Company lying south of a line drawn south of and twenty-five feet from the center line of said railroad, measuring at right angles to said center line and parallel thereto, extending from a point thirty-six (36) feet west of the center line of the Illinois Central Railroad southwesterly along said Terre Haute, Alton & St. Louis Railroad two hundred and twelve (212) feet, measuring on the south line of said right of way, said lands being held by grantor herein under lease from said railroad companies and known as the S 'X' House property." After a number of other properties came the following: "Also block one hundred sixteen (116).".

Henley conveyed in 1878 to one Moulton under the following description: "All that part of block one hundred and sixteen in the original town of Mattoon occupied by the hotel known as the Essex House and its appurtenances and so much of the right of way." Then follows the description of the right of way as in the deed from Noyes; then, "being same leased to said E. Noyes by said railroad companies and subject to condition of said lease, to have and to hold the said premises, with the appurtenances thereunto belonging, to the said party of the second part, his heirs and assigns, forever; it being intended to convey hereby the hotel in the city of Mattoon known as the Essex House."

In 1880 Moulton conveyed to Daniel Messer, who had been a tenant of Noyes prior to the conveyance to Henley, and who had continued his tenancy of the hotel property under Henley. In this deed, the description of the property reads: "All that part of block one hundred and sixteen (116) in the original town, now city, of Mattoon occupied by the hotel known as the Essex House and its appurtenances, also so much of the right of way"—describing the right of way as before. The habendum clause is: "To have and to hold the first-mentioned tract in fee simple and the two last-mentioned tracts for the unexpired term of a lease thereof made by the Illinois Central Railroad Company and the Terre Haute, Alton & St. Louis Railroad Company to Eben Noyes dated February 19, A. D. 1859, and recorded in the recorder's office of Coles county, Illinois, in Book 8 of Deeds, on page 542, and subject to all the terms and conditions of said lease. It being intended hereby to convey to said Daniel Messer the property known as the Essex House in the city of Mattoon, Illinois, subject to the rights of the Illinois Central Railroad Company and the Terre Haute, Alton & St. Louis Railroad Company or its successors as shown by said lease."

Defendants claim under mesne conveyances from Daniel Messer, granting that part of block 116 north and east and west of the numbered lots as shown in the Shinn plat and south of the Cleveland, Cincinnati, Chicago & St. Louis Railroad right of way and west of the Illinois Central Railroad right of way. In these deeds no reference is made to the Noyes lease. Shinn's plat is as follows (see next page):

PLAT OF BLOCK 116 ORIGINAL TOWN (NOW CITY) OF PEKIN, ILL. SHOWING INTERSECTION OF RIGHTS OF WAY OF THE C.C.C. & ST.L.RY. AND THE I.C.R.R.CO. AND ENVIRONS.



It shows the location of the buildings in 1913.

The bill to quiet title, on which the decree now before us on appeal by the defendants was rendered, alleged plaintiff's and its predecessors' ownership and continuous possession since 1855 under the Noyes deed of 1855 of a part of block 116 described as follows: "Beginning at a point where the western boundary line of the right of way of the Chicago Branch of the Illinois Central Railroad intersected the southern boundary line of the right of way of the Terre Haute & Alton Railroad Company in the year 1855; thence along the west right of way line of the Illinois Central Railroad measure southwesterly fifty (50) feet; thence westwardly fifteen (15) feet along a line parallel with and fifty (50) feet northwardly from the north line of Broadway avenue; thence north at right angles nine-tenths (0.9) feet; thence westwardly twenty-eight (28) feet to a point in said line parallel with the north line of Broadway avenue and fifty (50) feet distant northwardly therefrom; thence westwardly parallel with and fifty (50) feet distant northwardly from the north line of Broadway avenue eighty-eight and two-tenths (88.2) feet; thence northwardly at right angles seven and one-tenth (7.1) feet; thence one hundred fifty-three and five-tenths (153.5) feet to the place of beginning." It charged that the conveyance from Noyes to Henley and the subsequent conveyances under which defendants claim title were made and recorded while plaintiff was in possession of the premises. No reference is made to any of the leases.

Defendants, by their answers, denied the allegations of the conveyance in 1855, the ownership, and the possession, alleged their own ownership by mesne conveyances under the deed from Noyes to Henley, and their possession thereafter, as well as a 20-year limitation title. They further asserted title by estoppel, based upon their alleged knowledge and reliance upon the recital of plaintiff's predecessors' disclaimer of interest in the premises found in the decrees of 1871 and 1876; the latter recorded in Coles county in 1877, at and prior to their respective purchases of the property. Defendants further set up the adequacy of a remedy at law. By amendment defendants prayed relief as under a cross-bill, to quiet their respective titles to the premises in question.

Edward C. Craig and Bryan H. Tivnen, both of Mattoon, Ill., for appellants.

James Vause, Jr., of Mattoon, Ill., for appellee.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge (after stating the facts as above). The bill was not subject to demurrer or motion to dismiss. On its face it set out a good cause of action. The main controversy is whether the essential averments of possession and title have been proven. Plaintiff offered no evidence whatsoever as to the possession of the premises at the date of the commencement of its suit in 1913. It relied apparently upon the contention that the property conveyed to it by Noyes in 1855 became a part of and extended the boundaries of the railroad right of way; that the lease of 1859, read in the light of this extended right of way, must be deemed to have included all of the land on which the hotel building was to stand and so much of the adjoining open space appurtenant thereto as was owned by the lessors, and that, because defendants claimed title through a deed made by Noyes, the original lessee, during the pendency of the lease, they were estopped to deny plaintiff's title or possession.

It is entirely unnecessary to consider the extent of a tenant's estoppel, inasmuch as we cannot concur in this interpretation of the lease of 1859. The description of the premises thereby let is clear and cer-

tain. There is no ambiguity of any kind. Only the south line of the Terre Haute, Alton & St. Louis Railroad's right of way as originally established runs parallel to the center line and in a southwesterly direction. The south line of the property described in the 1855 deed runs due east and west. That the railroad, in 1855, had acquired title to the strip now in question, adjoining its right of way on the south, and that the hotel was located on both the strip and the right of way, furnish no sufficient reason to construe the clear and unambiguous language of the lease, so as to include therein either this entire strip outside of the original right of way or even so much thereof as was covered by the hotel building.

The failure to include this strip in the lease may have been due to the acquiescence of the railroad in Noyes' view, as testified to by him in 1870, in the course of the proceedings above referred to, namely, that he had deeded this north part of block 116 to the railroad for a freight house, and as this had been removed before he agreed, in 1856, to convey the block to Radcliffe, the title thereto had reverted to him. But it is idle to speculate on the reasons which influenced the parties to exclude the strip from the lease. It suffices that plaintiff has failed to prove that Noyes was its lessee as to the property in suit, or that it was in possession thereof in 1913. The evidence however, goes further; it demonstrates that neither in 1859 nor at any time thereafter, prior to 1910, did the railroad in any manner whatsoever assert any right in and to the strip. Even in 1899, when, on the expiration of the lease, it demanded possession, and in 1900, when it executed a new lease for a nominal consideration, terminable on 30 days' notice, it adopted the same description of the premises as in 1859. Its own official annual schedules of property in Coles county and its maps fail to include this strip as part of its right of way or property. Indeed, the description of the right of way as 100 feet wide necessarily excludes it as part thereof.

Concededly a tenant is not estopped from contesting his landlord's title to property adjoining the leased premises, or from acquiring title thereto by adverse possession. Whatever may be said of the earlier deeds in defendants' chain of title, at least as early as the deed from Moulton to Messer, in 1880, this distinction between the leasehold interest in the right of way and the fee simple in the strip in question is clearly stated. From that time on, if not before, as the evidence abundantly proves, defendants and those under whom they claim not only had actual, notorious, exclusive, and continuous possession, but they held it adversely to the plaintiff, under an express claim and color of title. The lessee under the 1900 lease and his assignee testify that they were also the lessees of Messer as to the strip in question, and that, while paying rental to the railroad for so much of the hotel property as is located on the right of way described in the lease, they also paid rental to Messer and his grantees for the use of the property here in question.

Within two or three years before this suit was brought a portion of the building located on the strip in question was, however, for the first

time used by the plaintiff railroad; at that time, the west part of the building, marked on the Shinn map "Baggage Room," was rebuilt as there shown, extending beyond the right of way onto block 116. Except as to this part, the record fails clearly to disclose who was in the actual possession of the hotel building at the time this suit was brought. The last assignment of the 1900 lease testified to was made in 1910. The assignee therein was not a witness, and it does not appear whether or not he ever held that part of the hotel building that was on block 116 as defendants' tenant, or whether he continued in possession of any of the property. The evidence does, however, prove that the land between the hotel building and the lots in that block was in the actual possession of defendants.

As plaintiff, therefore, has not only failed to prove its actual possession of the property in question at the time it began these proceedings, but is also barred by laches and limitations from asserting as against these defendants any title under the 1855 deed, the decree must be reversed, and the cause remanded, with directions to dismiss the bill for want of equity. And, as defendants concede that under these circumstances no relief can be granted on the answers as cross-bills, they, too, will be directed to be dismissed, but without prejudice.

And it is so ordered.

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ERIE & M. RY. & NAV. CO. v. DUNSEITH et al.

(Circuit Court of Appeals, Sixth Circuit. February 16, 1917.)

No. 2849.

1. ADMIRALTY ⇐118—APPEAL—REVIEW OF FINDINGS OF FACT.
A finding of fact by the District Judge in an admiralty suit, based upon testimony taken in open court, should be accepted by the appellate court, unless the evidence clearly preponderates against it.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 758–775, 794.]

2. TOWAGE ⇐11(5)—LIABILITY FOR LOSS OF TOW—NEGLIGENT NAVIGATION.
A finding by the trial court that a steamer having a barge in tow was in fault for the stranding of herself and barge on the south shore of Lake Superior in a fog, for failure under the circumstances to take soundings, which would have shown that she was several miles nearer the shore than her master supposed, *held* sustained by the evidence.
[Ed. Note.—For other cases, see Towage, Cent. Dig. § 17.]

3. TOWAGE ⇐11(5)—LIABILITY FOR LOSS OF TOW—PROXIMATE CAUSE OF LOSS—STRANDING.
The loss of the cargo of a barge while aground in Lake Superior, where she had been stranded through the negligent navigation of the towing steamer in a fog, caused by her breaking up in a storm which arose within an hour after she went aground, *held* the proximate result of the stranding, in view of the fact that storms on that lake so often follow foggy weather.
[Ed. Note.—For other cases, see Towage, Cent. Dig. § 17.]

4. TOWAGE ⇐12(1)—STRANDING OF TOW—CONTRIBUTORY FAULT OF TOW.
A barge in tow of a steamer *held* not chargeable with contributory fault for her stranding in a fog, because she starboarded after the

steamer struck, instead of porting, as signaled her by the steamer; the action having been taken in extremis.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 24–26.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in admiralty by John Dunseith and others against the Erie & Michigan Railway & Navigation Company. Decree for libelants, and respondent appeals. Affirmed.

F. S. Masten, of Cleveland, Ohio, for appellant.

G. B. Perry, of Detroit, Mich., for appellees.

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

KNAPPEN, Circuit Judge. The steamer M. T. Greene, owned by appellant, while towing the barge Allegheny, owned by the individual appellees, went upon a sand bar on the south shore of Lake Superior. The barge also grounded and was wrecked, the cargo becoming a total loss. The appeal is from a final decree adjudging the steamer solely at fault, for loss of both barge and cargo. The appellee insurance company is the insurer of the barge's cargo.

We accept the findings of the District Judge as to the course and general features of the steamer's navigation, based upon the testimony of her navigators. The substance of those conclusions is this: The steamer, which was loaded with lumber, left Duluth on June 4, 1913, with the barge in tow, likewise so loaded, and took the inside course between Keeweenaw Point and Gull Rock at about 4:30 o'clock on the afternoon of the next day, then taking a course southeast by east. At about 9:30 p. m., just after passing Stannard Rock (which lies to the eastward of the taken course), the weather became thick and foggy; there was, however, no wind to speak of. When the fog was encountered, speed was checked from 7 miles to about 6 miles per hour, and the same course followed until about 11:50 p. m., when it was changed to east by north by one-half north. This latter course was followed until 6:10 a. m. of the 6th, when the course was changed to east, being continued until 8:45 a. m., when it was changed to southeast by east by three-fourths east. The weather continued thick and foggy. At about 9:30 a. m. the steamer picked up the Caribou whistle from the northerly. At 12:15 p. m. she ported a point for the purpose of running more to the southward to pick up the Crisp Point signal; Crisp Point being about 14 miles westerly of Whitefish Point, which is at the entrance of Whitefish Bay, the latter communicating with the head of St. Mary's river. After sailing the last-stated course about 50 minutes, and thus at about 1:05 p. m., the Crisp Point signal was picked up. The steamer then starboarded a point, intending thereby to come back on the supposed Whitefish Point course, viz., southeast by east by three-fourths east, continuing on the latter course 1 hour and 25 minutes, and until about 2:30 p. m., when in the fog, which still continued, she went on a sand bar about 5 miles east of Crisp Point and 9 miles west of Whitefish Point. The barge also immediately ran on the bar,

and despite the efforts of the steamer and of the life-saving crews could not be released. Up to this time the wind had been light; but soon after the barge went aground a strong wind came up, followed by a heavy sea, which continued during the night and part of the following day, resulting in the wrecking of the barge and the loss of her cargo.

There is no room for doubt that the steamer's running aground resulted directly from her navigator's mistaken belief that when she picked up the Crisp Point signal she was about 9 miles to the northerly of that point, whereas in fact she was but about 2 miles away. This mistake as to location doubtless resulted from inexact knowledge of the actual speed at all times, as applied to the courses run. Had the steamer then been where her navigators thought she was, the change of course then made would have carried her safely past Whitefish Point. In her actual location, the course taken was bound to fetch her up on the south shore before reaching that point. The suggestion that the mistake as to location was due to a deflection of the compass needle, caused by shore attraction, has no substantial basis in the record.

Numerous faults are charged against the steamer including the criticisms that she was not properly officered and manned; that she was negligent in proceeding at so nearly full speed in a fog; that she had no log, and thus no means of knowing accurately how far she was running on a given course; also that she was negligent, under the circumstances presented, in not taking soundings to ascertain her exact location.

[1] 1. The Steamer's Fault. With respect to each of the faults alleged against the steamer, except the failure to take soundings, the District Judge either found in favor of the steamer or thought it unnecessary to decide the question. After an elaborate consideration of the testimony, all of which was taken in open court and under active participation therein on the part of the District Judge, the latter reached the conclusion that, although the steamer was not negligent in not knowing where she was before hearing the Crisp Point signal, nor in misjudging the distance of the sound of the whistle, yet that under the existing circumstances due care and prudence required that her navigators take careful soundings, and that soundings would have clearly disclosed the fact that the steamer was not where her navigators thought she was, and would have indicated that she was close to the south shore. This conclusion of the District Judge, that the steamer was so in fault, reached after a hearing of the character stated, should be accepted by us, unless the evidence clearly preponderates against it. City of Cleveland v. Chisholm (C. C. A. 6) 90 Fed. 431, 434, 33 C. C. A. 157; Monongahela, etc., Co. v. Hurst (C. C. A. 6) 200 Fed. 711, 119 C. C. A. 127; Pugh v. Snodgrass (C. C. A. 6) 209 Fed. 325, 126 C. C. A. 251. The evidence does not so preponderate; but, on the contrary, after a careful consideration of the testimony, we are affirmatively impressed that the conclusion reached by the trial judge was correct.

[2] The prominent considerations which moved the court to this conclusion are these: The recognized uncertainty of sound in a fog as

a guide in determining, not only distance, but direction; that after picking up the Crisp Point signal the steamer's navigators continued to hear it; that they ran 1 hour and 25 minutes after hearing the Crisp Point whistle, listening all the while for the Whitefish Point signal, but unable to pick it up; that for about 2½ hours they had not heard the sound of any other boat, although they had met a number before; that under these circumstances due prudence would have put the steamer's navigators on their guard, and caused them to so far suspect that the actual location was not what they supposed it to be as to require them, in the fog, to take soundings. At 6 miles an hour, the steamer must have run in 1 hour and 25 minutes at least 7 miles on the last course. Assuming that the signal was picked up at the close of the 50-minute course, had the steamer been where her master supposed she was, she would have been within 7 miles or so from Whitefish Point at the time she grounded. Captain McIntosh, defendant's expert navigator, testified that if he had gone 7 miles abreast of Crisp Point and had not picked up Whitefish Point he would be uneasy and would have used his lead, and had he found but 6 or 7 fathoms of water (as would have been the case here) he would have known that he was close to the beach and would have pulled off to the northward. The chart effectually bears out the conclusion that the soundings would have shown that the steamer was off her course, for, as the District Judge found, on the regular Whitefish Point course there was no point at which the soundings would have shown as little as 6 or 7 fathoms, and while for a short space only 8 or 9 fathoms would have been shown, in the locality generally there was very much deeper water. The fact that the master of the barge had the same supposition as held by the steamer's officers as to the actual location when the Crisp Point signal was picked up is not highly significant on the question of the steamer's fault. The latter, not the barge, was charged with the duty of navigation; the barge was under the steamer's control, and was at the rear of the steamer by the length of a long towline, and had nothing to do with her navigation. Without more elaborate discussion of details, and without passing upon the other questions of fault alleged, we have no difficulty in affirming the conclusion of the District Judge that the steamer was negligent at least with respect to the fault just discussed.

[3] 2. Appellant contends that the damage to the barge and cargo was not the direct and proximate result of the stranding, but was due to a subsequent independent and self-operating cause, viz., the intervention of the storm and heavy sea. We cannot agree with this contention. We think that, under the circumstances presented here, the loss of the barge and cargo must be held to have been the natural and proximate result of the stranding. As pertinently said by the District Judge:

"Storms are so common on Lake Superior and so often follow foggy weather, stranding so often results in the destruction of vessels by storm, that it seems to me that we must say that to strand may, and is likely to, subject to destruction by the waves."

The case differs radically from Northwest Transportation Co. v. Boston Marine Ins. Co. (C. C.) 41 Fed. 793, cited by appellant,

where in a suit upon a policy of marine insurance the voluntary scuttling of the stranded ship by her master, to avoid the consequences of a heavy storm which arose several hours after the stranding, was held, under a construction of the contract of insurance, not to be the proximate result of such stranding. The only damage was that directly resulting from the scuttling. As recognized in the case referred to, the particular facts and circumstances in each case largely control and determine the application of the rule of proximate cause. Here, while there was but a slight wind at the time the barge went aground, the wind and sea not unnaturally to be anticipated came up very soon (perhaps half an hour) after the stranding, and directly caused the breaking up of the barge and the loss of the cargo. We agree with the District Judge that the barge is not shown to have been unseaworthy, having in view the season and the character of her cargo.

[4] 3. Appellant suggests that the barge was also at fault for running aground, in that the steamer, at the time she went on the bar, signaled the barge to starboard; and that, had the signal been obeyed, the barge would have gone into good water, but that she ported, and so ran directly on the bar. Assuming for the purposes of this opinion, that the signal to starboard was both given and received seasonably (although that is not entirely clear), we think the District Judge rightly held that in the crisis presented, including the fog and danger of collision with the steamer, the barge cannot be held legally at fault for the maneuver. Had she made no use whatever of her helm, she would have gone upon the bar; the only difference seems to be that, as the helm was used, she went on practically at right angles; and it is not clear that as she was headed, and in her nearness to the bar, starboarding would have prevented grounding.

The decree of the District Court is affirmed.

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## MURRAY v. SIOUX ALASKA MINING CO. et al

(Circuit Court of Appeals, Ninth Circuit. February 13, 1917.)

No. 2655.

1. FRAUDULENT CONVEYANCES ⟸241(2)—CONDITION PRECEDENT—JUDGMENT AT LAW—LOCAL STATUTE.

The rule that a creditors' bill cannot be maintained to set aside a fraudulent conveyance until the creditor has reduced his claim to judgment and had execution issued thereon, which is returned unsatisfied, is modified, where the statutes of the state or territory have created new rights, to the extent that federal courts will enforce such rights, either at law, or in equity, or in admiralty, as their nature may require.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 697–704.]

2. FRAUDULENT CONVEYANCES ⟸241(2)—CONDITION PRECEDENT—JUDGMENT AT LAW—NECESSITY.

Where a mining company, admittedly indebted to plaintiff, was insolvent, and had fraudulently transferred its only property to a nonresident trustee to prevent plaintiff from enforcing his claim, equity will grant relief to plaintiff against the proceeds on a sale of the property by

the trustee, without requiring him to go through the useless form of settling the validity of his claim by an action at law.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 697–704.]

3. CREDITORS' SUIT ⊂=26—PARTIES ⊂=80(6)—NONJOINDER OF OTHER CREDITORS—EFFECT.

The failure of a creditor to bring his creditors' bill on behalf of other creditors does not render the bill generally demurrable, but at most is a defect of parties plaintiff, which can be questioned only by special demurrer, or perhaps by answer.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 114, 117; Parties, Cent. Dig. §§ 126–128, 130, 131.]

4. INJUNCTION ⊂=136(2)—TEMPORARY INJUNCTION—RIGHT TO RELIEF.

Where an insolvent debtor had conveyed its only property to a nonresident, who had contracted to sell it to resident purchasers, a creditor, on filing a creditors' bill, is entitled to a temporary injunction to restrain the purchasers from paying to the trustee the purchase price.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 306.]

Appeal from the District Court of the United States for the Second Division of the District of Alaska; J. R. Tucker, Judge.

Suit by Collin Murray against the Sioux Alaska Mining Company and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

The plaintiff, Murray, sued the defendants, Sioux Alaska Mining Company, called Mining Company, and Hastings Creek Dredging Company and H. M. Smith, and the Hastings Creek Dredging Company and Joseph Belleview, alleging: That between March, 1910, and May, 1912, at the instance of the Mining Company, he performed services at an agreed and reasonable value, and advanced money for the defendant, amounting in all to $3,895.93 and interest. That in 1912 the Mining Company made a bill of sale to the defendant Smith of a certain dredge then owned by the Mining Company in Alaska, the transfer being made as security to Smith for the payment of $5,500 borrowed by the Mining Company from Smith about that time. That subsequently Smith sold the dredge to Knowles and Hansen for $15,000, and received $6,000 on account, which was applied by Smith in payment of the debt of the Mining Company to Smith. That when the bill of sale was made by the Mining Company to Smith it was agreed between the parties thereto that Smith should act as trustee for the Mining Company and hold the legal title by the bill of sale for the dredge, and that all the proceeds from the sale of the dredge above the sum of $5,500 should be paid by Smith at once to the Mining Company. That when the bill of sale to Smith was made the Mining Company had no other property, except a few worthless mining claims, which plaintiff alleges have been forfeited or abandoned, and that the Mining Company is wholly insolvent, except for this equitable interest in the proceeds to arise from the mortgage held by Smith as alleged. That in December, 1914, Smith, in an action against Knowles and Hansen, obtained a decree of foreclosure in a proceeding to collect the balance due on the mortgage already described, and that under execution he has sold all of the interest of Knowles and Hansen in the dredge, and on June 15, 1915, he purchased at marshal's sale all of the interest of Knowles and Hansen in the dredge.

Plaintiff alleges: That Smith was acting as trustee for the Mining Company, and that all his acts were authorized by and conducted in behalf of the insolvent corporation. That on March 2, 1915, Smith in his own name, but acting for the Mining Company, agreed in writing with the defendant Belleview, who was acting for himself and the defendant Hastings Creek Dredging Company, to pay Smith, for the Mining Company, $7,000 for the dredge as soon as Smith could complete the foreclosure proceedings and de-

liver title to the dredge. That Smith, in behalf of the Mining Company, is about to deliver possession and title of the dredge to Belleview and the Hastings Creek Dredging Company, who were about to pay Smith for the Mining Company $7,000. That Smith is a nonresident of Alaska, but that all other defendants are within the jurisdiction of the court. That the Mining Company deliberately and fraudulently selected Smith as its trustee in order to prevent the plaintiff from compelling Smith to account in the district where the dredge is located and that because defendant has no property, except what it has placed in the name of Smith, plaintiff cannot reach the Mining Company by any legal process. That it is impossible to attach the proceeds of the bill of sale, unless the court will restrain Belleview and the Hastings Creek Dredging Company from paying the moneys described to Smith or the Mining Company. That it would be useless for plaintiff to begin and maintain an action at law against the Mining Company, because of its insolvency, except for the equitable claim to the fund above referred to. That because of these facts, plaintiff files this creditors' bill, instead of an action at law, and unless the court grants plaintiff an injunction, plaintiff will be unable to obtain relief against the Mining Company. The prayer is for a judgment against the Mining Company for $4,869.40, together with interest; for injunction pendente lite restraining Belleview and Hastings Creek Dredging Company from paying Smith the consideration for the transfer and sale of the dredge; that Smith be adjudged the trustee of the Mining Company; and on final hearing that Smith and Belleview and the Hastings Creek Dredging Company be ordered to pay $7,000, or so much as may be due to the plaintiff, in the registry of the court to satisfy any decree obtained by plaintiff, and for general relief.

Plaintiff filed a motion for a restraining order at the time of the filing of the complaint, and supported the same by affidavit of William A. Gilmore, one of the attorneys for plaintiff. The affidavit tends to support the averments of the complaint and refers to a letter (made an exhibit to the affidavit) wherein H. S. Sandvig, who was secretary of the Mining Company, states that a mortgage on the dredge was given to Smith when the company made a $5,500 loan, and that the dredge was turned over to Smith in payment of the loan, with the understanding that Smith was to return to the company what he got above the indebtedness. The writer of the letter also states that Smith sold the dredge for $15,000 and had received $5,000. The court granted a temporary restraining order and order to show cause. The defendants Mining Company and Belleview moved to dissolve the restraining order, and demurred to the complaint for lack of jurisdiction and failure to state facts sufficient to constitute a cause of action. Hearing was had on the motion and order.

Belleview stated: That, about March 2, 1915, he "bargained" with Smith for the purchase of the dredge, and before the beginning of the action paid Smith $1,000 as part consideration, and gave to Smith his notes, aggregating $6,000, payable to Smith or order. That the notes are a consideration paid for the dredge, it being understood between affiant and Smith that good title to the dredge should be delivered to affiant by the foreclosure of a mortgage given by Knowles and Hansen, that the mortgage was foreclosed, and that the dredge passed to the possession of affiant. That all the dealings affiant had were with Smith individually, and that he did not know that Smith was trustee for the Mining Company, or that the Mining Company had any interest in the dredge or the proceedings, and that affiant acted in the best of faith.

Belleview said he was the manager of the Hastings Creek Dredging Company, and on March 2, 1915, had made a written agreement with Smith. The agreement was produced. It recites that whereas, Smith is the owner and holder of a chattel mortgage securing the payment of $15,000 by Knowles and Hansen and covering the dredge involved herein; and whereas, default had been made under the provisions of the mortgage, and Smith was about to foreclose; and whereas, if redemption is not made, Smith will procure title to the mortgaged property, and in such event desired to sell the property and Belleview desired to buy: It was agreed, that Smith should foreclose and upon getting title convey to Belleview, and that, in consideration, Belleview would

pay to Smith $7,000, $500 in cash, and the balance at subsequent times, as specified in the agreement. It was provided that, if redemption should be had, then Smith would return to Belleview all moneys which Belleview may have paid under the agreement. On March 4th Belleview transferred his interest in the contract to the defendant Hastings Creek Dredging Company. Belleview said he had dealt with Smith individually, and did not know whether he was trustee or not; that he had received a bill of sale to the property, with the understanding that if he (Belleview) did not make the payments the property should revert to Smith; that he had given a mortgage back upon the property to Smith to secure notes.

The court denied injunction pendente lite, vacated the restraining order, and sustained the demurrers of the defendants to plaintiff's complaint, and thereafter dismissed the complaint as to the Mining Company and Belleview, and Murray appeals.

William A. Gilmore, of Seattle, Wash., James E. Fenton, of San Francisco, Cal., and T. M. Reed, of Nome, Alaska, for appellant.

G. J. Lomen, of Nome, Alaska, for appellees Sioux Alaska Mining Co. and Belleview.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] The established rule of practice in equity in the federal courts is that a creditors' bill cannot be maintained to set aside a fraudulent conveyance until the creditor has reduced his claim to judgment and had execution issued thereon, and until a return is made that execution is unsatisfied. Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. Ed. 804; Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. But in cases where the statutes of the state or territory in which the action is commenced have created rights and provided for their enforcement, there is a modification to the extent that federal courts will enforce and administer such rights, either at law or in equity or in admiralty, as the nature of the new rights may require. Cowley v. Railroad Co., 159 U. S. 569, 16 Sup. Ct. 127, 40 L. Ed. 263; Darragh v. H. Wetter Mfg. Co., 78 Fed. 7, 23 C. C. A. 609.

By section 833, Compiled Laws of Alaska, it is provided that the distinction between actions at law and suits in equity, and the forms of all such actions and suits, are abolished, and there shall be but one form of action for the enforcement or protection of rights or prevention of private wrongs, which is denominated a "civil action." In Madden v. McKenzie, 144 Fed. 65, 75 C. C. A. 222, it was held that, while this statute does not abolish all distinction between law and equity as to procedure, it has the effect to render inapplicable to any complaint the objection that the plaintiff has a plain, speedy, and adequate remedy at law.

[2] We believe plaintiff makes a showing for equitable relief. It is not denied that the Mining Company is wholly insolvent, or that the claim of Murray is not justly owing. Execution would be of no avail as against the Mining Company. In such cases it would seem not to be necessary for the creditor first to reduce his claim to a judgment, and it is to be accepted, as against the demurrer, that the defendant Mining Company purposely and fraudulently chose Smith as trustee

in order to prevent Murray from compelling Smith, a nonresident out of the jurisdiction of Alaska, to account in the courts in Alaska. In such a case equity will not require the question of the validity of the debt due by the Mining Company to Smith to be tried out in an action of law, for it would be useless to go through such a form. Case v. Beauregard, 101 U. S. 688, 25 L. Ed. 1004; Wyman v. Wallace, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738; Tompkins Co. v. Catawba Mills (C. C.) 82 Fed. 780; Adler Goldman Commission Co. v. Williams (D. C.) 211 Fed. 530; Fraser v. Cole, 214 Fed. 556, 131 C. C. A. 102. The property sought to be recovered can only be effectually reached by a proceeding in the nature of a creditors' bill, whereby, as part of the relief to be granted, Smith may be adjudged to be trustee liable to account under his trust.

[3] The point that the action is not brought on behalf of appellant and other creditors is not fatal to the bill. Tatum v. Rosenthal, 95 Cal. 129, 30 Pac. 136, 29 Am. St. Rep. 97. At most there would be a defect of parties plaintiff, which is a ground of special demurrer, or the point might perhaps be presented by answer. Morrison v. Blue Star Navigation Co., 26 Wash. 541, 67 Pac. 244. In Birely's Executors v. Staley, 5 Gill & J. (Md.) 432, 25 Am. Dec. 303, in a suit in equity to vacate conveyances, two creditors joined in the bill of complaint, and it was urged that all or one only should have been made party complainant. The court held that that was a mere formal objection, and if well taken might have been removed by amending the bill. The court said:

"Rules of pleading in equity are not governed by the same technicality as to matters of form that controls proceedings at law. Courts of equity look to substance, not form. The distinction, then (if it exist at all, which we cannot admit), is a mere matter of form; nothing in reason or substance can be urged in its support. If one of many creditors proceed, and be successful, the fund is retained in chancery until all the creditors are notified to come in and assert their claims. The same practice prevails on like proceeding by two."

[4] We think, too, that injunction pendente lite should be issued restraining defendants Belleview and Hastings Creek Dredging Company from paying defendant Smith the consideration for the transfer and sale of the dredge involved until further order of the District Court.

The judgment is reversed, and the cause is remanded, with directions to overrule the demurrer and require an answer; and the order of the District Court, vacating the temporary restraining order, is set aside, and the District Court is directed to grant a temporary restraining order pendente lite.

Reversed and remanded.

## OCEAN S. S. CO., Limited, v. UNITED STATES STEEL PRODUCTS CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 91.

1. SHIPPING ⟸145—CARRIAGE OF GOODS—RIGHT TO FREIGHT—BILL OF LADING.

Under a contract for shipment of goods freight prepaid, where the dock receipts for the goods, given when they were delivered to the ship, stated that they were accepted for shipment subject to the provisions of the line's usual bills of lading, and those bills of lading provided that the freight should be paid on delivery of bills of lading, but the goods were damaged by fire after loading, but before the delivery of the bills of lading, and before it sailed, the delivery of bills of lading, on which was stamped a statement that the goods had been received in good order, but had been damaged, and were liable for general average and special damages, was not a compliance with the requirement for the delivery of bills of lading, which was a condition precedent to the right to recover the freight.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 502–505.]

2. SHIPPING ⟸106—BILLS OF LADING—DELIVERY—PREVIOUS DAMAGE TO GOODS.

The delivery by a carrier of ordinary bills of lading, reciting that the goods were received in good condition, which were dated as of the date when the goods were delivered to the ship, at which time the bill of lading was due, is not a fraud or misstatement for which the carrier would be liable to subsequent holders of the bills, though between the delivery of the goods and the actual issuance of the bills of lading the goods had been damaged by fire on the ship.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 226, 414–419.]

3. SHIPPING ⟸145—BILL OF LADING—PREPAYMENT OF FREIGHT.

A bill of lading, providing that freight shall be paid by the shippers on delivery of bills of lading, and that prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the shipowner, vessel or cargo lost or not lost, must be construed as a whole, and, while prepaid freight might be construed as earned on the delivery of the goods to the ship, the ship could not demand payment of the freight until it delivered or tendered the bills of lading.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 502–505.]

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

Four separate libels by the Ocean Steamship Company, Limited, against the United States Steel Products Company. Decree for respondent in libel No. 1, and libelant appeals. Affirmed.

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

These are all libels in personam, filed May 10, 1916, by the libelant, to recover from the respondent the freight on certain shipments by the respondent on the steamer Eurymachus from New York to Hong Kong. The respondent has appeared and answered, and the causes have been heard together upon the pleadings, with the exhibits thereto, and an agreed statement of facts. The facts in the causes are as follows:

On February 1, 1916, the respondent agreed to ship and the libelant to transport from New York to Hong Kong the articles mentioned in the libels and

that the freight would be prepaid. No more specific agreement concerning the freight seems to have been made than that it "would be prepaid," but the respondent had previously made numerous shipments of other merchandise on libelant's line of steamers and accepted therefor the libelant's usual form of bill of lading which contained the provisions: "Freight for the said goods to be paid by the shippers in New York, on delivery of bills of lading, in cash without deduction," and "prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the shipowner, vessel or cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere."

On the 11th of February, 1916, the goods referred to in the fourth libel, and on the 23d of February, 1916, the goods referred to in the three first-mentioned libels, were delivered by respondent and received by libelant on the pier known as Pier 3, Bush Terminals, in Brooklyn. The method of delivery in each case was that the respondent applied for and received from the libelant an order directing its receiving clerk for the steamship Eurymachus to receive from the respondent the goods mentioned in the order. This order contained a statement that it was issued upon certain terms and conditions, which are not material in these cases, but contained the following marginal note: "Shipper must use Indra Line receipts. Send bills of lading to our offices immediately on receiving the receipt from dock." Upon receiving this order or permit, and on the same day, the respondent delivered the merchandise mentioned in the order to the receiving clerk at the dock, and thereupon received from the receiving clerk a receipt headed "Indra Line, Limited," declaring that the merchandise, giving the marks, numbers, packages, and contents, had been received in apparent good order and condition to await shipment on steamship Eurymachus. The receipt further contained a notice that the goods "are accepted for shipment subject to provisions of line's usual bill of lading and this receipt to be exchanged for such bill of lading."

About February 26, 1916, all of the merchandise referred to in the four libels, being then in the same apparent good order and condition, were stowed on board the steamship Eurymachus, but respondent was not then informed of the actual date when the merchandise was placed on board. For a long period anterior to the present controversies it had been the customary course of dealing between the parties that the libelant would furnish the respondent with blank forms of its bills of lading, and for the respondent at its convenience to fill up the blanks in these forms, and after the shipment deliver up the receiving clerk's dock's receipt to libelant, and present the bills of lading to the libelant to sign.

On the 28th of February, 1916, after the merchandise had been stowed on the steamship Eurymachus, fire broke out in her after between decks and a large quantity of water was necessarily used to extinguish the fire, which resulted in flooding the holds where this merchandise was stowed and wetting and damaging the merchandise. To preserve the steamer and all the merchandise on board salvage services were rendered by various salvors, and in connection with these salvage operations sacrifices of a general average nature were made. After the fire had been extinguished, it was found necessary to discharge much of the steamer's cargo, including the merchandise mentioned in these libels, and the merchandise mentioned in these libels was discharged and placed on pier No. 7, Bush Docks, in Brooklyn. All of this merchandise was then surveyed, and it was found that the merchandise mentioned in libels Nos. 1 and 3 had been so damaged that it was unfit for use and unmerchantable, and that the marks upon 91 bundles of the wire bundles mentioned in libel 3 had become obliterated. It was also found that the merchandise mentioned in libel No. 2 was so damaged that it would be more advisable to sell it in New York than to have it transported to destination, because it would deteriorate further in transportation, and that the marks upon 42 kegs of the nails had also become obliterated. The merchandise or steel bars mentioned in libel No. 4, although damaged, was found to be in condition to bear transportation, and had been reloaded in the steamer Eurymachus.

After the fire referred to the respondent presented to the libelant the dock receipts which had been given for all of the said merchandise, and demanded that it should sign sets of bills of lading in the usual form as theretofore used

between the parties, and as referred to in the receipt of the receiving clerk referred to as the dock receipt. Libelant refused to sign these bills of lading in that form, and insisted that it would sign no bills of lading unless the bills of lading were dated, not of the date of the dock receipts when the merchandise was actually delivered, but of a subsequent date, when the bills of lading should be actually signed, and also should contain stamped across the face of the bill of lading the following clause: "The goods described herein were laden on board the steamer Eurymachus in apparent good order and condition. Thereafter, and on February 28, 1916, fire broke out on the steamer, with the result that said goods were damaged and have become liable for general average and/or special charges."

The respondent declined to accept these bills of lading, and on the 22d of April, 1916, again formally tendered to the libelants the dock receipts issued for the merchandise, and also tendered the freight (to be prepaid) in full, and also, upon such tender of the receipts and freight, demanded clean bills of lading for these shipments in the usual form theretofore used between the parties, and such as would have been signed and delivered to them, had demand therefor been made on the 23d day of February when the merchandise was delivered. The libelants refused to accept the freight, and refused to deliver the bills of lading in the form demanded, but, on the contrary, in turn tendered bills of lading having the notice before referred to written and stamped across the face of the bill of lading, and demanded the payment of the freight to be prepaid under the terms of the agreement. Upon the respondent's refusal to accept the bills of lading with this notice stamped across the face, and to pay thereupon the freight to be prepaid, these libels were filed.

The parties hereto further stipulate and agree as facts in the case that the respondent had sold the merchandise mentioned in the libels on c. i. f. terms, payment to be made as follows: In libels Nos. 1 and 4 by draft, with documents attached, against a confirmed letter of credit payable in New York. In libel No. 3 by sight draft, with document attached, on a bank in London. In libel No. 2 the goods were sold in New York, to be paid for in cash in exchange for documents. Of these facts the libelant had no information anterior to the fire. New York bankers in ordinary course of business decline to accept bills of lading with special clauses noted thereon, such as were required by the libelant to be noted on the bills of lading herein, and which refer to damage to the goods shipped, and allege liability to the goods for general averages and special charges. Such bills of lading New York bankers in ordinary course of business decline to accept as proper documents to be attached to a draft against a letter of credit for the purchase price of the goods, or for discount, without an indemnity from the drawer of the draft, but will accept such bills of lading in either case with respondent's indemnity.

[1] These libels being to recover for the freight due upon the shipments according to the terms and agreement that the freight should be prepaid, the single question in the case is: Have all the conditions requisite to the requirement of prepayment of freight been met by the libelant? The original contract as agreed upon in the statement of facts between the parties was simply that the freight should be prepaid, but upon the delivery of the merchandise at the dock to the receiving clerk the respondent accepted the receipt, which stated that the merchandise was accepted for shipment subject to the provisions of the line's usual bill of lading; and the provisions of the usual bill of lading were that freights would be *paid* by the shipper on the delivery of bills of lading. The whole question, therefore, limits itself to the fact whether or not bills of lading have been tendered by the libelant in compliance with those provisions. And on this the sole question is whether or not the bills of lading which have been proven to have been actually tendered were in conformity with the contract, and whether the libelant had the right to write the notification across the face of the bill referring to matters which occurred subsequent to the delivery of the merchandise for shipment. The bill of lading became due to be delivered as soon as the merchandise was delivered within reach of the ship's tackle. In the present cases it is shown that the merchandise was actually stowed on board on the 26th of February anterior to the fire, but presumptively it was delivered within reach of the ship's tackle on the date mentioned in the dock receipt which was the 23d of February,

1916. On that day, therefore, the respondent became entitled to the bills of lading, and if it had demanded them on that day or any day subsequent thereto, prior to the 28th of February, 1916, when the fire occurred, it is admitted by the libelant that the bills of lading would have been signed in the usual form without the additional notification stamped across the face.

[2] The libelant, however, claims that the bill of lading as against them would be construed as of the date when it was actually issued, and that, as stated by counsel for the libelant, common honesty would forbid their issuing a bill of lading at a date when they knew that the articles referred to in the bill of lading had since delivery to the ship been damaged so as to be unmerchantable, and could not in fact be transported, or rather would not in common business wisdom or prudence be transported, to their original destination; that for the libelant to issue such a bill of lading at this time would put it in the power of the respondent to commit a fraud upon an innocent banker by inducing such banker to discount his bills of exchange upon the assumption that the bills of exchange were accompanied by bills of lading, which last represented merchandise in course of transportation in like good order and condition as when it was originally delivered to the ship. This, however, is to assume that the bill of lading is an independent document, which has no connection with the dock receipt, and must be dated as of the date it is signed and handed to the shipper. On the other hand, it seems to the court that the true interpretation of the matter is that the bill of lading in this case is but a formal and amplified substitute for the dock receipt, and that they both refer to and take effect from the same date. The bill of lading should therefore be dated as of the same date as the dock receipt, as it was upon that day that the merchandise was delivered to the ship, and under the facts of this case the ship's liability began. To hold otherwise would be to hold that the shipowner might vary, himself, the conditions between the day when the merchandise was actually delivered within reach of the ship's tackle and any subsequent date at which it might suit the ship to sail. The only safe rule to adopt would be that the shipper became entitled to the bill of lading upon the date he delivered his merchandise to the ship within reach of her tackle, and that the bill of lading was presumed to be issued and dated as of that date, only lying at the ship's office, ready to be called for by the shipper.

It is difficult to see how the bill of lading issued as of that date involves any misstatement or fraud on the part of the shipowner or the ship. Had the bill of lading been delivered to the shipper on the same day as the dock receipt, the subsequent fire and the damage thereby occasioned would have left libelant in the precise position it stood upon the face of the original bill of lading, and would not have authorized any alteration upon the face of the bill of lading, which at that time might be in the hands of wholly unknown parties. Should the holder of the bill of lading to whom it was issued be guilty of any concealment or misstatement in tendering his bills of exchange to be discounted, based upon bills of lading purporting to be bills of lading of articles or merchandise shipped for transportation, but which the holder knew had since the date of the bill of lading been destroyed or rendered unfit for transportation, it might be argued that this action would be a fraud on the part of the holder of the bill of lading, who attempted to use it as security for his bill of exchange. It would not appear that the master of the ship, or the owner of the ship, who issued the bill of lading, would in any wise be responsible for the fraud or misstatement of the holder of the bill of lading. The bill of lading would represent the contract that the shipper made at the time the merchandise was delivered within reach of the ship's tackle, and the fact that since that date a contingency or peril had happened contemplated in the bill of lading, which was alleged to alter the condition of the articles shipped, it would not affect the matter. In the opinion of the court the shipper was therefore entitled to a bill of lading in such form as would under the agreement have been issued to him on the 23d of February, 1916, when the merchandise was delivered within reach of the ship's tackle, and to be dated as of that date.

[3] The next question is whether, that being the case, the libelant is entitled in these proceedings to recover his freight to be prepaid. The original con-

tract was that the freight was to be prepaid. According to the dock receipt accepted by the respondent the shipment was made subject to the provisions of the line's usual bill of lading. According to the provisions of the usual bill of lading the freight for the goods was to be paid by the shipper in New York in cash on delivery of the bill of lading. Inasmuch as proper bills of lading have not been delivered or tendered, it would follow that the libelant has not become entitled to demand payment of the freight. That result, however, is claimed by libelant to be inconsistent with the other clause of the bill of lading which provides that prepaid freight is to be considered as earned on shipment of the goods, and is to be retained by the shipowner, vessel or cargo lost or not lost. The bill of lading must be construed as a whole, and whilst prepaid freight might be construed as earned on the shipment of the goods, that is, on the delivery of the goods on the 23d of February, 1916, within reach of the ship's tackle, yet, although earned, the ship was not entitled to demand payment until it delivered or tendered the bills of lading, and if it was not entitled to demand payment the respondent was not bound to pay. If the damage to the merchandise was such as to render it incapable of transportation before the commencement of the voyage, then it might be a question whether the libelant was entitled to be paid freight at all, for the settled rule of commercial law is that freight is to be paid for the carriage of the goods. Even if paid in advance, it is to be refunded if, from any cause not attributable to the shipper, the goods are not carried, unless there is a special agreement to the contrary.

The special agreement relied upon by the libelant in this case is that the bill of lading stipulates that the freight is to be retained by the shipowner, vessel or cargo lost or not lost. But that would seem to mean that it was to be retained, once the voyage of transportation was begun, by the loosening of the vessel from her moorings, or the breaking ground in the heaving up of her anchor, so as to commence her voyage, and would not apply where freight, although actually stowed on board, was unloaded without the voyage having been commenced at all. The court, however, does not find it necessary to decide this question in this case at this time. Inasmuch as, upon construing the bill of lading as a whole, it appears upon the face of it that the vessel's right to receive the prepaid freight depended upon tender or delivery of the bill of lading to which the shipper was entitled, and the libelant in this case not having performed this condition and delivered or tendered the bill of lading to which the shipper was entitled, it is not entitled to recover the freight.

It is therefore ordered and decreed that the libels in the above-entitled cause be and the same are all hereby dismissed, with costs against the libelant.

Haight, Sandford & Smith, of New York City (Charles S. Haight, Edward Sandford, and Wharton Poor, all of New York City, of counsel), for appellant.

Kirlin, Woolsey & Hickox, of New York City (J. Parker Kirlin and Mark W. Maclay, Jr., both of New York City, of counsel), for appellee.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed, with costs, on opinion of Judge Smith.

## GOOCH v. PRESBYTERIAN HOME HOSPITAL et al.

(Circuit Court of Appeals, Sixth Circuit. March 6, 1917.)

No. 2912.

1. APPEAL AND ERROR ⟸959(1)—REVIEW—DISCRETION—AMENDMENTS.
The denial of leave to amend pleadings will not be reviewed, unless an abuse of discretion appears.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825, 3826.]

2. JUDGMENT ⟸256(1)—VERDICT—GROUND FOR DISMISSAL.
Pursuant to Shannon's Code Tenn. § 4439, plaintiff, who was suing for self-inflicted injuries received while in hospital under the care of defendants, joined in one action a count on tort relying on defendants' negligence and another count for breach of contract in failing to keep with plaintiff at all times a prudent and careful nurse. On trial, verdict was directed for defendant on the first count, and thereafter on defendants' motion the action was, without further evidence, dismissed as to the second count on the contract. *Held* that, as the two causes of action were on their face distinct, the dismissal was improper; the verdict for defendant on the first count not being conclusive as to the second.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446, 454.]

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

Action by Mary Dockery Gooch, by her next friend, William D. Gooch, against the Presbyterian Home Hospital and others. There was a judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions to grant new trial.

John E. Bell, of Memphis, Tenn., for plaintiff in error.

John L. Stout, of Memphis, Tenn., for defendants in error.

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

EVANS, District Judge. The plaintiff, Mary D. Gooch, by her next friend, William D. Gooch, brought this action in the Shelby county circuit court in Tennessee. In due course it was removed to the court below upon the petition of the defendants, and afterwards the plaintiff was permitted to file an amended declaration in two counts, which took the place of a declaration in one count which she had filed in the state court. After stating that the plaintiff was in bad health it is averred in the first count that:

"It was fully explained to the proprietors of said hospital that the said Mary D. Gooch was suffering from nervous prostration; that she was a neurasthenic, which at times affected her mind and rendered her incapable of taking care of herself, and the defendants were informed that it would be necessary to have with her at all times and under all circumstances a careful, competent, and prudent nurse, for which the plaintiffs paid, and were willing to pay, and offered to pay, and contracted and agreed to pay. Notwithstanding this fact the defendants negligently discharged the nurse, and negligently failed to have a nurse with the plaintiff, Mary D. Gooch, at all times, and by reason thereof the said Mary D. Gooch, in a period of mental aberration, and when she was not watched and guarded and cared for as she should be, fell or jumped down

a flight of stairs and inflicted upon herself serious, severe, and permanent injuries. Her leg was broken; her collar bone was broken; she was greatly shocked and stunned; she has suffered great physical pain and mental anguish; she has been made more an invalid; her recovery has been rendered impossible; her injuries are permanent. By reason of the wrongs and injuries aforesaid plaintiff, Mary D. Gooch, has been made an invalid for life; she has suffered great physical pain and mental anguish, to her great damage, both actual and exemplary, $25,000, for which she sues, and demands a jury to try the case."

The second count alleged that:

"The plaintiff, Mary D. Gooch, was suffering from nervous prostration; she was a neurasthenic, and her mind was seriously impaired to such an extent as to render it necessary for her to be carefully watched and constantly attended, to prevent any injury to herself. Because of her condition the husband and family of the said Mary D. Gooch decided to place her in the sanitarium of the defendants, to the end that she might be properly watched and safely guarded and attended, and entered into a contract with the defendants, for the use and benefit of Mary D. Gooch, by the terms of which contract the defendants were to take Mary D. Gooch and look after her carefully, treat her for her ailments, and keep with her at all times a careful, prudent, and reliable nurse, and in consideration for such treatment and service the defendants were paid and were to be paid by plaintiff's husband adequate and stipulated sums of money. But notwithstanding their contract the defendants wholly made default and failed to keep a nurse with plaintiff, Mary D. Gooch, and negligently discharged the nurse, and negligently left her unattended, and she, the said Mary D. Gooch, while so unattended, in a fit of mental aberration jumped and fell down an open stairway, and thereby sustained serious, painful, and permanent injuries; her leg was broken; her collar bone was broken; she was greatly shocked and stunned; she was made sick, sore, and disabled; she suffered great physical pain and mental anguish, to her great damage, $25,000, for which she sues and demands a jury to try the case."

To each of these counts the defendants filed pleas, first, of not guilty; second, of contributory negligence; and, third, of the statute of limitations. On June 3, 1915, an entry was made upon the record as follows:

"This day came plaintiff by her attorneys, and the defendants by their attorneys, and also a jury of good and lawful men, to wit, G. L. Tatum, L. Gottshall, J. P. Burchfield, Henry Soehmer, W. B. Overall, H. C. Wilson, Jr., A. D. Burke, Chas. E. Lodge, W. A. McLaughlin, J. H. Stewart, J. H. Massey, and S. P. Crawford, who, being duly selected, impaneled, tried and sworn to well and truly try the issues herein joined, and a true verdict render according to the law and the evidence, and having heard the evidence, listened to the argument of counsel. The court thereupon charged the jury to return a verdict for the defendants on the first count of plaintiff's amended declaration, which was accordingly done, and after receiving the further charge of the court, the jury upon their oaths do say that they were unable to reach an agreement and return a verdict on the second count of the plaintiff's amended declaration and were thereupon discharged from further consideration of said count. It is therefore considered by the court that the plaintiff herein have and recover nothing from the defendants and that they go without day on said first count of plaintiff's amended declaration, and that the further consideration of said second count of the amended declaration is reserved for further orders of this court."

Subsequently the plaintiff filed a second amended declaration, in which she set out more in detail the facts respecting the cause of action alleged in the second count of the previous amended declaration. The defendants moved to strike out this amended declaration. After

argument the motion was sustained, and the learned trial judge stated his reasons therefor as follows:

"It appears that this case was tried before a court and jury at a former term, at which time there were two counts in the declaration; the first count being an action of tort, and the second count being a breach of contract. There was a verdict and judgment in favor of the defendant and against the plaintiff on the first count, and a mistrial as to the second. That left the case standing and at issue upon the second count in the declaration. The second amended declaration, to strike which the motion is now made, is of course an attempt to amend the second count in the declaration, for that is all that is left of the case. The said second count being one for breach of contract only, I cannot conceive in what manner it is aided by anything stated in the second amended declaration. Without discussing the several grounds of the motion separately, it is sufficient to say that I think the motion is well taken, and an order will be entered striking the second amended declaration from the files."

Soon afterwards the defendants moved the court to dismiss the action with prejudice, which no doubt means to dismiss it absolutely and on the merits. The essential grounds upon which this motion was based were that there was only one cause of action, that all the issues really involved had been tried and determined in favor of the defendants at the former trial on the merits, that the plaintiff was not entitled to a trial for an alleged breach of contract after the trial for the alleged tort, and that the plaintiff was estopped by the former judgment from proceeding further on the second count. This motion was sustained, and the action was dismissed with prejudice, and with costs to defendants. The judgment which thus disposed of the case is sought to be reversed upon two general grounds: First, that the court erred in striking out the second amended declaration; and, second, that it erred in dismissing the action with prejudice.

[1] The question presented by the first assignment involves only the discretion of the court in dealing with the amendment of pleadings. We see nothing to indicate any abuse of that discretion, and this assignment requires no further notice.

[2] The second error assigned presents a different situation, and has received careful consideration. Obviously there was only one suit; but, as permitted by the practice in Tennessee (Shannon's Code, § 4439), two distinct causes of action were therein joined. The facts respecting the matters thus in dispute may be closely related, but the two causes of action are separate and distinct—one being for the wrong involved in the negligence charged, irrespective of contract; and the other for damages resulting from breaches of an express contract. The fact that the word "negligently" was used in the second count in two connections does not change the nature of that count, because the word, as there used, is mere surplusage, and can be stricken out or disregarded without affecting the sufficiency of plaintiff's statement of her cause of action. This is so because her second count alleges, among other things, that by the contract the defendants stipulated to "keep with her at all times a careful, prudent, and reliable nurse," but that, "notwithstanding their contract, the defendants wholly made default and failed to keep a nurse with her." This allegation is a sufficient statement of a cause of action, although the word "negligently" is not found in it. In the two instances of its use which follow in

the count, one has reference to the "discharge" of a nurse, respecting which there is no express stipulation in the contract, and in the other the use of the word may be quite appropriate, even if not essential. The essence of the plaintiff's claim in the second count is that certain breaches of the contract were, in fact, committed, and obviously the right to recover any damages resulting from such breaches does not necessarily depend upon whether they were "negligently" committed.

There having been a verdict and judgment in favor of the defendants on the first count, and a mistrial as to the second count, it is clear that, while the action for "negligence" has been determined, that for breaches of the express contract has not been adjudicated at all, unless the order of the court in sustaining the motion afterwards made for the dismissal of the cause with prejudice was correct. The defendants' counsel in support of the judgment below in their brief say:

"The issue is res adjudicata. The plaintiff had only one cause of action against the defendants, but had two remedies. She pursued one of them to a final judgment, and the other is merged in that judgment."

This very tersely states the substance of their contention, and among other authorities they cite New Orleans v. Citizens' Bank, 167 U. S. 396, 17 Sup. Ct. 905, 42 L. Ed. 202, Campbell v. Rankin, 99 U. S. 261, 25 L. Ed. 435, Russell v. Place, 94 U. S. 606, 24 L. Ed. 214, and Cromwell v. Sac County, 94 U. S. 357, 24 L. Ed. 195. Those cases, however, and the other authorities cited give no adequate support to the defendants' contention. It is elementary that the judgment of a court of competent jurisdiction upon the merits of a controversy is conclusive in a second suit between the same parties upon the same cause of action. In many cases, however, the question is whether the matter involved in the second suit is the same as that previously adjudicated. The question of identity of causes of action is then of prime importance. That situation may, and often does, require testimony for its elucidation, and then the cases supra would become authoritative.

On the face of the pleadings, the issue under the first count was whether it was negligent not to provide a constant nurse; and the issue under the second count was whether there had been a contract to do so. Prima facie, these issues are distinct; and, prima facie, a cause of action for an injury arising from a tort is a different cause of action from one for an injury resulting from the violation of an express promise, even though the injury and damages be the same. Whether it might have appeared by the testimony in the case upon the trial that the apparent distinction did not really exist is a question not now presented.

However no testimony was heard on the motion to dismiss, and the trial court must have changed the views it had expressed when striking out the second amended declaration, and must have concluded, upon the face of the record, that the matter disposed of by the judgment on the first count was, beyond dispute, the same as that set up in the second. Otherwise we can conceive of no ground upon which the court could have based its judgment on the motion to dismiss with prejudice—no opinion thereon being found in the record.

Assuming that the court, upon further examining the record, had finally reached the conclusion that the two causes of action stated in the amended declaration should be considered as identical, we are constrained to hold that the judgment dismissing the action with prejudice was erroneous, because we are clearly of opinion that the cause of action stated in the second count, at least prima facie, was separate and distinct from that set up in the first count, which had been disposed of by the previous judgment. The issues upon the second count had not, we think, been adjudicated when the motion to dismiss was considered.

Upon the grounds indicated we conclude that the judgment of June 3, 1915, in favor of the defendants on the first count of plaintiff's amended declaration, and which judgment contained a clause reserving for further consideration and orders of the court the matters involved in the second count thereof, was not per se an adjudication of the matters involved in that count, that the plaintiff was not estopped by anything contained in said judgment from prosecuting the claim set up in the second count, that the plaintiff was entitled to have the issues upon that count tried in the regular way, and that it was error to deprive her of that right by sustaining the motion to dismiss.

It results that the judgment of dismissal with prejudice must be reversed, with directions to award the plaintiff a new trial, and to proceed therein in conformity with the views herein expressed.

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## VALENTINE v. QUACKENBUSH.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1917.)

No. 2752.

1. CONTRACTS ⊜346(3)—ACTION FOR BREACH—VARIANCE—STATUTE.

Where the complaint alleged a breach by defendant of his contract to pay plaintiff 10 per cent. above the cost of a building for superintendence and for furnishing material and labor, but the bill of particulars filed therewith showed a charge of 2½ per cent. additional for preparing the plans, and the answer, which was denied by replication, denied liability for the commission for the plans, it was not error to admit evidence of defendant's agreement to pay the commission for the plans, in view of Comp. Laws Alaska 1913, § 919, providing that no variance between the pleading and the proof shall be deemed material, unless it actually misled the adverse party to his prejudice, and when it shall be alleged that the party has been so misled that fact shall be proved, and thereupon the court may order the pleading to be amended upon such terms as may be just.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1719.]

2. APPEAL AND ERROR ⊜1002—REVIEW—VERDICT—CONFLICTING EVIDENCE.

Where the evidence was conflicting as to whether defendant agreed to pay plaintiff for superintendence 10 per cent. of the cost only of the materials and labor furnished by defendant, or of the cost of all materials and labor for the building, and that question was properly submitted to the jury, which found in favor of the plaintiff, defendant cannot, on appeal, object that the percentage on labor and materials not furnished by plaintiff should not have been included in the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937.]

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

3. INTEREST ⟸19(1)—RIGHT TO RECOVER ON LIQUIDATED DEMANDS—STATUTE
Comp. Laws Alaska 1913, § 684, providing that the rate of interest shall be 8 per cent. on all moneys after the same become due, on judgments and decrees for the payment of money, on money due on the settlement of matured accounts from the day the balance is ascertained, and on money due or to become due, where there is a contract to pay interest, and no rate specified, does not authorize recovery of interest before judgment on an architect's commission for superintending the erection of a building, the amount of which was disputed.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 35, 36, 38, 40.]

In Error to the District Court of the United States for the First Division of the District of Alaska.

Action by Charles A. Quackenbush, doing business under the firm name and style of the Juneau Construction Company, against Emery Valentine. Judgment for plaintiff, and defendant brings error. Judgment modified, by eliminating the allowance of interest, and, as modified, affirmed.

Quackenbush, plaintiff below, doing business under the firm name of Juneau Construction Company, brought action against Valentine, defendant below, to recover $5,020.92, with interest from April 1, 1914, alleging that at defendant's request he furnished to defendant all materials and labor used in erecting and remodeling three buildings; that the cost was $27,931.59; that defendant agreed to pay him the cost of materials and labor and 10 per cent. of such cost for services in superintending and remodeling; that he demanded payment, but was refused.

Defendant Valentine answered that plaintiff agreed to superintend the erection according to plans furnished by defendant, and to purchase all needed material at market prices, less dealer's discount; that defendant was to furnish funds as needed to pay for labor and material, and accounts were to be kept by plaintiff, and that, upon completion of the work, plaintiff was to receive a sum equal to 10 per cent. of the total cost of labor and material employed, brought and paid for through plaintiff; that defendant paid plaintiff $28,432.37 under the contract; that the account rendered by plaintiff was incorrect; that defendant was not liable for $539.40 for plan of block, as included in the bill of particulars, or for $561.72 for 10 per cent. on sundry accounts, because certain items referred to were not paid for through plaintiff; that the accounts rendered were not accurate; and that upon true accounting a balance would be due to defendant.

In his replication the plaintiff denied that he undertook to erect two buildings according to the plans furnished by the defendant, and admitted that he was to receive, upon completion of the work, a sum of money equal to 10 per cent. of the total cost of the labor and material used and paid for by him or the defendant, but denied the other allegations set up in the answer. Plaintiff admitted that none of the sundry accounts, which embraced items for a heating plant, installation of a lighting and telephone system, plumbing, and painting, were paid for by or through the plaintiff, but he denied that defendant was not liable.

The case was tried to a jury, and verdict was rendered in favor of plaintiff for $3,706.07, with interest from May 1, 1914. Defendant sued out a writ of error.

J. H. Cobb, of Juneau, Alaska, for plaintiff in error.

Shackleford & Bayless and V. A. Paine, all of Juneau, Alaska, for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] The defendant, plaintiff in error here, assigns as error the action of the court in admitting evidence tending to show that the contract between plaintiff and defendant provided for a commission of 2½ per cent. of the cost of one of the buildings remodeled, for plans, in addition to the 10 per cent. of such cost for the services of the plaintiff. It is said that there was no issue raised as to what plaintiff was to be paid, and that the exception to the admission of such evidence was well taken. But in the bill of particulars, which was furnished by plaintiff before answer, there was a specific charge of $666.82 for plans for the Valentine Block, and in the answer the defendant specifically referred to the bill of particulars filed, and denied liability for the items of $539.40, "plan for block, or for any sum whatsoever therefor," because plaintiff did not furnish such plan and was not entitled to any charge therefor. Upon the trial plaintiff testified that it was distinctly agreed with the defendant, Valentine, that 2½ per cent. was to be the cost of the plans, which was reasonable and customary for architectural work; that the 10 per cent. of the total cost of the building, to which he was entitled, was for superintendence and material furnished, but that the additional 2½ per cent. for the plans of the Valentine Block was calculated upon the net cost of the building, as was customary in making architect's fees. Defendant denied that there was such an agreement and gave his version. The court submitted the issues thus presented, and distinctly told the jury that it was for them to determine from the evidence on both sides what the contract was as to the plans, saying:

"If you decide that the contract was to pay 2½ per cent. of the cost of the building for the plans, then you will compute 2½ per cent. on the total cost of the buildings, including the sundry items, and allow that amount also to plaintiff; if you decide that the contract was as Mr. Valentine alleges it to have been, then you will make no addition for or on account of the plans."

The defendant did not suggest that he was surprised or misled by litigating the issues presented by the evidence; but, if he had, the court would doubtless have allowed an amendment to meet the situation, for section 919, Compiled Laws of Alaska, provides that:

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just."

Pennsylvania Co. v. Whitney, 169 Fed. 573, 95 C. C. A. 70.

[2] The second point presented by plaintiff in error is that certain bills for materials were paid directly by Valentine, and not through Quackenbush as a contractor, and therefore the 10 per cent. commission agreed upon should not be computed on any of the items paid directly by Valentine. The testimony of Quackenbush was to the effect that in May, 1913, Valentine told him that under the contract he was satisfied about the 2½ per cent. for the plan, if it was a good plan,

and that he was going to pay 10 per cent. on the total cost of the building. In the bill of particulars appears the item "10 per cent. on sundry accounts, $561.72," and in the answer the defendant, referring to the specific bill of particulars, denies liability for this item of $561.72, "or for any sum whatsoever on said item." There was no objection to the admission of the testimony of the plaintiff to the effect that defendant told him that he was going to pay 10 per cent. on the total cost of the building. Defendant's evidence was in conflict with that of plaintiff; but there was issue upon the point involved, and the court in clear terms instructed that the plaintiff claimed that, in addition to 10 per cent. of the cost of the Valentine Building, he was also entitled to a commission of 10 per cent. on the sundry items, while the defendant claimed that the contract with the plaintiff was only to have a commission of 10 per cent. upon such material and labor as was furnished by plaintiff, and that the accounts called "sundry accounts," referred to in the bill of particulars, were for materials and labor not furnished by or through the plaintiff, but were matters which the defendant attended to himself, and that therefore plaintiff was not entitled to any commission thereon. The court also said:

"If you find from a preponderance of the evidence that plaintiff was to have 10 per cent. on the total cost of the building, then you will allow him 10 per cent. on the cost of those materials, labor, etc., furnished by him, and 10 per cent. on the value of the 'sundry accounts'; but, if you find that the contract was that he was only to have 10 per cent. on such material and labor as was furnished by him, then you must not allow him any percentage on the sundry items."

The instruction, therefore, well stated the particular issues, and the verdict, being supported by substantial evidence, will not be disregarded.

[3] The next assignment of error is based upon the allowance of interest under the verdict of the jury. Section 684, Compiled Laws of Alaska, provides that:

"The rate of interest in the district shall be eight per centum per annum, and no more, on all moneys after the same become due, on judgments and decrees for the payment of money, * * * on money due upon the settlement of matured accounts from the day the balance is ascertained, on money due or to become due where there is a contract to pay interest and no rate specified."

This statute is in substance exactly like section 3587, Hill's Annotated Laws of Oregon, and was evidently taken from the laws of Oregon. In Richardson v. Investment Co., 66 Or. 353, 133 Pac. 773, in an action upon a contract, the Supreme Court of the state held that it was error to allow interest upon the plaintiff's demand antecedent to the date of the judgment, and construed the statute as only applicable to certain specified demands, and that until judgment was entered the conditions of the statute were not fulfilled. In Williams v. Pacific Surety Company, 77 Or. 210, 146 Pac. 147, 149 Pac. 524, the jury rendered a verdict, assessing damages and interest. That was an action for unliquidated damages, and the court held that the rule was well settled in Oregon that interest could not be recovered thereon. In Sargent v. American Bank & Trust Company, 80 Or. 16, 154 Pac.

759, 156 Pac. 431, the court reaffirmed the rule laid down in Richardson v. Investment Company, supra.

The judgment will therefore be modified by eliminating therefrom the amount of interest computed or included prior to the date of the rendition of the judgment, and, as so modified, it will be affirmed.

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## HAWAII COUNTY v. HALAWA PLANTATION, Limited.

(Circuit Court of Appeals, Ninth Circuit. February 19, 1917.)

No. 2748.

1. COUNTIES ⟸146—LIABILITY FOR DAMAGES—STARTING FIRE ON HIGHWAY.
A Hawaiian county, which is a body corporate having an administrative board, and which can be sued in its corporate name, but whose powers are more limited than those usually conferred on counties, being largely confined to exercise of police powers and ministerial duties and opening and maintaining streets and roads, is liable for damages caused by fire started by its employés on a highway and negligently permitted to spread to adjoining premises.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 212.]

2. NEGLIGENCE ⟸68—CONTRIBUTORY NEGLIGENCE—SPREAD OF FIRE.
It is not contributory negligence, which deprives a landowner of his right to recover damages caused by fire started on the highway and negligently permitted to spread, for him to have permitted dry leaves to accumulate on land controlled by him adjacent to the highway, since he had nothing to warn him that fires would probably be built in that vicinity.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 92, 94, 95.]

In Error to the Supreme Court of the Territory of Hawaii.

Action by the Halawa Plantation, Limited, a corporation, against the County of Hawaii. Judgment for the plaintiff was affirmed by the Supreme Court of the Territory of Hawaii, and defendant brings error. Affirmed.

Wade Warren Thayer, of Honolulu, T. H., and W. H. Smith, of Hilo, T. H., for plaintiff in error.

Henry Holmes, Clarence H. Olson, and Paul R. Bartlett, all of Honolulu, T. H. (S. H. Derby, of San Francisco, Cal., of counsel), for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Halawa Plantation, Limited, a corporation, defendant in error (hereinafter called plaintiff), brought action against the county of Hawaii, plaintiff in error (called defendant), for damages. After demurrer was overruled defendant made general denial. There was a trial before a jury and judgment for plaintiff. The Supreme Court of the territory affirmed the judgment in Halawa Plantation v. County of Hawaii, 22 Hawaii, 753. Writ of error was sued out.

[1] The substance of the complaint is that certain agents and servants of defendant in pursuance of their employment of repairing, maintaining, and constructing a highway known as the main "Govern-

ment Kohala Road," for the purpose of burning certain rubbish on the highway adjoining land of which plaintiff was lessee, carelessly, negligently, and wrongfully kindled a fire on the highway, and neglected to use proper care to prevent its escape, with the result that it extended from the highway to the adjoining land leased by plaintiff and destroyed sugar cane thereon.

The Supreme Court of the territory in its opinion said that if the case were one of first impression, it would be inclined to believe that it would hold otherwise than it did, but that, the rule that a county is liable for injury to private property caused by the negligent acts of its road employés acting within the scope of their employment having been announced in Matsumura v. County of Hawaii, 19 Hawaii, 18, 21 Ann. Cas. 1338, and reaffirmed in the same case in the later decision (19 Hawaii, 496), and the Legislature having met in four regular sessions since the announcement of such rule, without enacting any statute adopting a different one, the court must consider that the Legislature has acquiesced in the rule announced.

The case of Matsumura v. County of Hawaii, 19 Hawaii, 18, 21 Ann. Cas. 1338, was decided in 1908. The complaint there alleged that one, Keola, while employed as an agent and servant of the defendant in maintaining and constructing a public highway—

"did willfully, negligently, and in total disregard of the rights and property of the plaintiff, divert the course of a large stream of water then and there flowing in a certain wooden flume; that the said large stream of water so diverted did rush with great force into and undermine a certain large mound or bank, consisting of earth and rocks, which by the force of the water, so diverted as aforesaid, was loosened and with great force struck the store, dwellings, stables, and outhouses of the said plaintiff in such manner that said dwellings * * * were utterly demolished and destroyed to the damage of the plaintiff," etc.

In a well-considered opinion by Judge Ballou, the court goes back to Russell v. Men of Devon, decided in 1788 (2 Term Reports, 667), usually relied upon as the foundation for the rule laid down by many courts that at common law a county was not liable for torts. We have examined, not only the cases cited in the opinion of the Supreme Court of Hawaii, but many others, and as a result we believe that in the case of Matsumura v. County of Hawaii, supra, the Territorial Court correctly pointed out that Lord Kenyon, in Russell v. Men of Devon, decided as the main point that the body of men sued in the action before him were not associated in a corporate capacity, and therefore that it was inexpedient, if not impossible, to hold the inhabitants at large responsible for the alleged tort. It is undoubtedly true that the case has been applied broadly to sustain a doctrine of general nonliability of a county for tort committed by the agent of the county. But that it should not be used as a basis for so far-reaching a decision is shown by the opinions in the following later English cases, which refer to Lord Kenyon's reasoning: Kent v. Worthing (1882) 10 L. R. Q. B. 118; Borough of Bathhurst v. Macpherson (1879) 4 Appeal Cases Law Reports, 256. In Maguire v. Liverpool Corporation [1905] Law Reports, 1 King's Bench Division, Lord Romer for the court held no action would lie for nonrepair, and cited Russell v. Men of Devon as

holding to that effect; and in Whyles v. Bingham Rural Council, [1900] 1 K. B. Div. Law Reports, 45, in an action to recover damages for death alleged to have been caused by the wrongful and negligent acts and defaults of highway authorities, the court held that for nonfeasance there would be no liability, and cited Russell v. Men of Devon for the ruling, although for an act of misfeasance the court said there would be a liability. Russell v. Men of Devon was there looked upon as going to the extent of denying responsibility for nonfeasance. In Weightman v. City of Washington, 66 U. S. (1 Black) 38, 52, 53 (17 L. Ed. 52), the Supreme Court refers to the frequent misapplication of the doctrine of Russell v. Men of Devon, saying:

"Reference is often made to the case of Russell v. Men of Devon (2 Term, 667) as an authority to show that no action will lie against a municipal corporation in a case like the present; but it is a misapplication of the doctrine there laid down. Suit was brought, in that case, against the inhabitants of a district, called a county, where there was no act of incorporation, and the court held that the action would not lie, admitting, however, at the same time, that the rule was otherwise in respect to corporations. But whether that be so or not, the rule here adopted has been fully sanctioned in all the English courts." Henley v. The Mayor, etc., of Lyme (5 Bing. 91).

Judge Deady, in Eastman v. County of Clackamas (C. C.) 32 Fed. 24, also distinguished the decision and regarded the reason for a distinction between an incorporated town and a county as without substantial difference. In Barnes v. District of Columbia, 91 U. S. 540, 23 L. Ed. 440, the court decided that the District of Columbia, a municipal corporation, is responsible to an individual who has suffered from the defective and negligent condition of its streets. In the course of the opinion the court said:

"And here a distinction is to be noted between the liability of a municipal corporation, made such by acceptance of a village or city charter, and the involuntary quasi corporations known as counties, towns, school districts, and especially the townships of New England. The liability of the former is greater than that of the latter, even when invested with corporate capacity and the power of taxation. 1 Dillon, §§ 10, 11, 13; 2 Dillon, § 761. The latter are auxiliaries of the state merely, and when corporations are of the very lowest grade, and invested with the smallest amount of power. Accordingly, in Conrad v. Ithaca, 16 N. Y. 158, the village was held to be liable for the negligence of their trustees; while in Weet v. Brockport the town was said not to be liable for the same acts by their commissioners of highways. Id. 163, 4, 9. See Brooke's Abridgement, Action on the Case; Russell v. Men of Devon, 2 T. R. 308, and cases there cited; 16 N. Y. supra. Whether this distinction is based upon sound principle or not, it is so well settled that it cannot be disturbed. Decisions or analogies derived from this source are of little value in fixing the liability of a city or a village. See Dillon, supra."

We might go on to cite the conflicting views, but it would serve no useful purpose to do so. In Hawaii a county is a body corporate, having an administrative board, and may be sued in its corporate name. As shown by the opinion in Matsumura v. County of Hawaii, supra, the powers of a county are more limited than are those usually conferred upon counties, in that, in the territory they are largely confined to the exercise of police powers and to ministerial duties of conducting sewers, pump stations, waterworks, lighting plants, and fire departments, but the statute authorizes the opening, closing, and maintaining

of streets and roads and the doing of things necessary and proper to carry into execution the powers conferred. Chapter 4 of Act 39, Territorial Session Laws 1905. The Supreme Court of the territory in the Matsumura Case, referring to liability for misfeasance, said:

"Whatever may be the authority for exempting counties on the theory that they are governmental agencies it cannot be applied to those that have no power to levy taxes, no county courts for the administration of justice, no control over matters of education, provision for the poor, or military organization. They could as well be called 'districts' as 'counties,' or, on the other hand, could be called 'city and county,' as has been subsequently done with the island of Oahu, which has been converted from the 'County of Oahu' into the 'city and county of Honolulu.' S. L. 1907, Act 118. These differences make the extension of immunity to counties in Hawaii merely a blind adherence to nomenclature in the application of an erroneous principle."

The construction which the Supreme Court of the territory has put upon the local statutes pertaining to county organization and to powers and liabilities of counties in the territory is entitled to great weight. This is especially pertinent in the present case, because the Legislature of Hawaii with knowledge of the judicial construction adopted by the Matsumura decision has met in four sessions since the court declared the law, and although it has amended the county act in several other respects, it has failed to change the law as announced in that opinion and decision. Revised Laws of Hawaii 1915, §§ 1503, 1507–1517, 1527, 1531, 1554, 1565, 1573; McChesney v. Hagar (Ky.) 104 S. W. 714.

[2]The defendant makes the point that the question of contributory negligence should have been submitted to the jury. The theory of defendant, as we understand it, is that if it was found by the jury that in the space between where the fire was started and the cane field, there was a group of lauhala trees and under the trees an accumulation of dry leaves and grass which were inflammable, making an effective carrier of fire from the place where the fire was started to where it entered the cane field of plaintiff, and if the land included in the path of the fire from its starting point to the cane field was land under lease and control by plaintiff, and if plaintiff knew of the dry leaves and grass and failed to do anything to lessen "the effectiveness" of the accumulation as a fire carrier, and if "to destroy in some way the effectiveness of the dry material as a fire carrier to prevent any fire originating from any source was such an act as any reasonably prudent person would have done," etc., such failure would constitute contributory negligence and bar recovery. We do not see how plaintiff was under a duty to take precautions against fire by removing the accumulated dry leaves and vegetable matter. Plaintiff could not anticipate that the county through its servants would be negligent or even imprudent in doing work on the road adjoining his plantation. It is too clear for argument that he was carrying on a lawful, but not hazardous, occupation, not in the vicinity of known or seen dangers. With nothing to warn him that fires would probably be built in the vicinity of his field, the question of contributory negligence was outside of the case, and the court was right in declining to charge upon the matter.

Erd v. C. & N. W. R. R. Co., 41 Wis. 65; Yik Hon v. Spring Valley Waterworks, 65 Cal. 619, 4 Pac. 666.

It being our opinion that there was an invasion of plaintiff's rights by the misfeasance of the agents of the county, the judgment is affirmed.

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## THE HALCYON.

(Circuit Court of Appeals, Ninth Circuit. January 8, 1917.)

No. 2830.

1. SALVAGE ⟸26—AMOUNT OF COMPENSATION—NEGLIGENCE IN PERFORMANCE OF SERVICE.

A schooner was broken from her moorings to a wharf in a harbor in Hawaii at night by a heavy wind and drifted into a dangerous position near the shore. On her call a steamer came to her assistance, and had towed her some distance out into the bay when the line parted and the schooner anchored. It was then daylight, and the steamer soon saw that the schooner was dragging her anchor, but did not go to her assistance until she had again drifted into a dangerous position and called for help, which was between one and two hours after she commenced drifting. *Held*, that the steamer's service was one of salvage, but that she was negligent in not going to the assistance of the schooner a second time immediately when the latter was seen to be dragging her anchor, and that the salvage award should be fixed on the basis of the service she would have rendered if she had done so, without taking into consideration the peril of the schooner at the time of her final rescue.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 57–64, 68, 84.]

2. SALVAGE ⟸26—AMOUNT OF COMPENSATION—PROMPTNESS AND SKILLFULNESS OF SERVICE.

It is the theory and policy of the law of salvage to promote intrepidity, promptness, and skill in rescuing the imperiled vessel, and lack of skillful operation, with or without injurious results, may diminish the award; while, on the other hand, the skillfulness of the rescue may influence the award by increasing it.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 57–64, 68, 84.]

Appeal from the District Court of the United States for the Territory of Hawaii; S. B. Dole, Judge.

Suit in admiralty for salvage by Inter-Island Steam Navigation Company, Limited, owner of the steamer Niihau, against the schooner Halcyon; J. A. T. Olson, master and claimant. Decree for libelant, and claimant appeals. Modified.

In a proceeding in rem for salvage, the court below found the facts to be substantially as follows: On the night of January 12–13, 1914, the schooner Halcyon, laden with a cargo of lumber, was lying in the port of Hilo, Hawaii, a little way off the wharf, moored to the wharf and to buoys on the port side. A heavy wind came up from the north which caused her to drift, breaking a line attached to a buoy, and to collide with a smaller schooner moored near her stern. The schooner called for assistance from the steamer Niihau, which was lying anchored in the harbor with steam up. The steamer raised her anchor and came down the wind near the schooner, anchored, and sent a towline by boat to the schooner, which had then drifted close to the shore near the mouth of the Wailoa river, a position which was dangerous. The steamer was towing the schooner to a place out in the bay, when the towline parted.

The schooner, which had already lost an anchor, dropped her other anchor. The steamer also came to anchor. "In a few minutes," as the court below found, it was evident to the master of the steamer that the schooner was drifting again toward the sandy shore on the west side of the mouth of the Wailoa river. The steamer approached her and reached a position a little way to the windward. The schooner raised a signal for assistance, and about that time a boat with a towline left the steamer and came down the wind on a surf line, and delivered the towline on board the schooner, and fastened the same to her bow. The boat then returned to the steamer and brought another and larger line, which was also fastened to the schooner. The schooner was then pulled out of the position in which she was, and was taken to a safe place in the harbor, where she anchored; and, her one anchor being insufficient, the steamer held on to her with a line during the rest of the day and the succeeding night.

The trial court found that the schooner on both the occasions when she was rescued by the steamer was in great danger of going ashore, and of becoming a total loss; that the wind was blowing a gale, variously estimated, but probably 40 miles an hour; that the first aid given in the darkness of the night was attended with some danger to the steamer, in that she had to proceed between a railroad wharf and unlighted buoys, which were 150 or 200 feet away from the wharf; that the parting of the towline was caused by its friction against one of the buoys; and that, at the time when she was first rescued, the schooner was lying in water 18 feet deep amidships, and 12 feet near the stern, showing her to be almost ashore. The court also found that the second rescue was attended with danger to the members of the crew in conveying the towlines to the schooner. The steamer was not a salvage vessel, nor was she engaged in the towing business, but was a freight and passenger steamer of the value of from $45,000 to $55,000 and carried a master and crew of 37 men. She was about to leave the harbor on one of her regular voyages when the appeal for help came from the schooner, and in rendering the salvage service she delayed her voyage from 26 to 28 hours. The schooner was of the value of $1,500, and her cargo, including insurance and freight money, was of the value of $6,381.85. The court below awarded to the owner of the steamer one-half the value of the schooner, and one-third the value of the cargo.

Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., and J. W. Russell, of Hilo, Territory of Hawaii, for appellant.

W. O. Smith, L. J. Warren, and E. W. Sutton, all of Honolulu, Territory of Hawaii (S. H. Derby, of San Francisco, Cal., of counsel), for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellant, the owner of the schooner, in his answer to the libel, to show that the steamer did not render efficient service, alleged that when the hawser broke, and the schooner's remaining anchor was cast to await another towline to be sent from the steamer, "although more than an hour elapsed, during which time the said Niihau had sufficient opportunity to give the Halcyon another and additional lines, yet the said Niihau made no effort whatsoever to supply any line, or to give to said Halcyon any assistance whatsoever until, when the claimant observed the Halcyon very close to the breakers and in danger of running ashore, he hoisted the signals for immediate assistance, and it was only after the hoisting of said signals that the Niihau rendered any further assistance," and the answer alleged it was the duty of

the steamer to have supplied other hawsers "immediately upon the breaking of the hawser during the original tow."

The service rendered by the steamer was clearly a salvage service, attended with some danger to the steamer and to the members of the crew who went in the boat to take lines to the schooner. The serious question in the case is whether or not the salvage award should be reduced by reason of the steamer's failure to stand by when the line parted, and her failure to take the schooner again in tow sooner than she did, and before the schooner reached the dangerous position in which she was when the second towage began. The captain of the steamer testified that, when the line parted, his reason for not returning and taking the schooner again in tow was that he supposed that those on board the schooner had cut his towline as an indication that they wished to be taken no further, and that this impression was confirmed by a signal which he saw given by a man on board the schooner, who extended his arms horizontally and then lowered them. That signal was probably a signal to the crew of the schooner to let go her anchor. When the line parted, a portion of it was left attached to the schooner, and the captain of the steamer saw the line hanging over the schooner's bow. He could not see how long that overhanging line was, but he could see that it extended into the water, and he should have known that it had not been severed by the crew of the schooner. He stood by when the line was drawn in and coiled, which was done within 10 minutes after it parted. He was asked:

"Q. Did you observe at that time that a big portion of it was gone? A. Not a big portion."

He testified that "somewhere about 20 fathoms" were gone. "I didn't measure it." Other witnesses testified that the piece of the line left on the schooner was 30 fathoms in length. According to the testimony of the captain of the steamer, the line parted at 6 o'clock, or possibly 15 minutes later. He testified that, 15 or 20 minutes after the line parted, he noticed that the schooner was drifting. At about half past 8, or a little later, he caused a line to again be taken to the schooner, to draw her out of the dangerous position into which she had drifted. He gave no satisfactory explanation of what he was doing in the meantime. Although repeatedly examined and cross-examined upon that feature of the case, he could only state that he was engaged in watching the schooner and in preparing to send a line to her. But when called upon to state the specific time devoted to preparation, he could account for no more than 40 minutes. A small portion of his testimony on that subject is the following:

"Q. Now, it was somewhere in the neighborhood of about two hours from the time that the towline parted until the Halcyon reached the beach. How do you account for the balance of that time? A. Well, the Halcyon was dragging in slowly; she was dragging during that time.

"Q. Yes, but what were you doing? A. We was—I explained that before. I was watching her.

"Q. So that while—you said that you sent her a line, say, about 10 minutes or so after you anchored at N-2? A. I didn't say that; I said we got our line ready.

"Q. How long did you remain at N-2 before the line started off to the Halcyon? A. So soon as everything was ready.

"Q. I'm asking you how long in point of time? A. When we sent the line to the Halcyon, that was about between 8 and half past 8.

"Q. Now, Captain, I'm not quite clear. You sent the Halcyon a line from N, your position at N-2, between 8 and half past 8. Is that right? A. Thereabouts.

"Q. You say the towline parted between 6 and half past 6? A. The towline parted a little after 6.

"Q. So that two hours elapsed from the time the towline parted until she—until you sent her a line from N-2? A. She was lying to an anchor there; there was no necessity of sending a line until she commenced to drag.

"Q. Then she was lying at anchor at what place? A. She had put her anchor down.

"Q. Wasn't she dragging at that time? A. Not right off.

"Q. How long a time did she remain without dragging? A. I said that before; in the neighborhood of 15 minutes before I noticed particularly that she was dragging."

Counsel for the appellee are able to account for the time only upon the theory that the captain of the steamer was mistaken as to the time when the line parted. They say the appellant's argument is based on Capt. Bruhn's erroneous testimony that the first line parted at 6 o'clock, and they point to other testimony which they say proves that it parted at 7 o'clock. We think it is true that the captain of the steamer was in error as to the time when the line parted. The decided weight of the testimony is that it parted at half past 6. The captain of the schooner, who was the only person who observed the time by a watch, said that it was 6:30, and he is substantially corroborated by several witnesses. The time when the line was taken aboard the schooner for the second towage is definitely fixed at 8:35, or a little later. It seems very clear that, within 30 minutes from the time when the captain of the steamer first noticed that the schooner was dragging on her anchor, he could have again taken her in tow. This is shown by the time it took him to get his line aboard the schooner for the first towage, at which time it was dark, so dark "you couldn't see your hand," as one of the officers of the steamer testified. The chief engineer of the steamer testified that, upon the first appeal for help, the captain came to him at 4 o'clock, "to get ready with the engines"; that the steamer was started between 4 and half past, and at half past 4 was actually engaged in towing the schooner. The second mate testified that at 4 o'clock they got word that the schooner was in distress, that the captain notified the engineers to get ready, and the engineers said they were ready, and that they heaved anchors and started. The testimony as to the length of time the steamer engaged in that first service of towing corroborates the testimony of the chief engineer that it must have been begun at or about 4:30 o'clock.

[2] We are not inclined to accept the theory of the appellant that the captain of the steamer, for the purpose of enhancing the degree of his salvage service, deliberately delayed starting the second time to the relief of the schooner. Nor do we think he was willfully negligent. But we are of the opinion that his delay was a negligent failure to render the prompt and timely service which the situation demanded, that it should be reckoned with in dealing with the appellee's demand for

a salvage award, and that the amount of salvage should be fixed upon the basis of service rendered as it would have been if, at the time when the schooner was perceived to be drifting from her anchorage after the line parted, the steamer had immediately gone to her assistance, and that the peril in which the schooner was at the time of her final rescue should not be taken into consideration. It is the theory and policy of the law of salvage to promote intrepidity, promptness, and skill in rescuing the imperiled vessel. Lack of skillful operation, with or without injurious results, may diminish the award; while, on the other hand, the skillfulness of the rescue may influence the award by increasing it. The Algitha (D. C.) 17 Fed. 551; The Katie Collins (D. C.) 21 Fed. 409; The Henry Steers, Jr. (D. C.) 110 Fed. 578. In The Cape Packet, 3 W. Rob. Adm. 122, Dr. Lushington said:

"There is also another kind of negligence, the effect of which is to diminish the amount of salvage reward, not to take it entirely away. The extent of this diminution, I may further state, is not measured by the amount of loss or injury sustained, but is framed upon the principle of proportioning the diminution to the degree of negligence, not to the consequences."

We think that under the circumstances $2,000 would have been a fair award for the appellee's services.

The cause is remanded to the court below, with instructions to modify the decree as above indicated, awarding the appellee $2,000, without interest, and with costs on the appeal in favor of the appellant.

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## KLEIN et al. v. DARNELL et al.

(Circuit Court of Appeals, Fifth Circuit. February 24, 1917. Rehearing Denied March 30, 1917.)

No. 2966.

1. MORTGAGES ⟸48(2)—DESCRIPTION—AMBIGUITY.
   Where there were two surveys of land in Bowie county under the same name, one being about 10 miles southwest of the city of Boston and the other about 14 miles therefrom, a deed of trust describing the property as the "east half of the" survey, "situated about 14 miles southwest from Boston, in Bowie county," is sufficient; the description identifying only one of the surveys.

   [Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 127.]

2. MORTGAGES ⟸553—FORECLOSURE—ACQUISITION OF TITLE BY TENANT—BURDEN OF PROOF.
   Where defendant was a tenant of plaintiff when he acquired an outstanding title based on foreclosure of a deed of trust, defendant has the burden of proving the regularity of the foreclosure proceedings.

   [Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1581.]

3. EVIDENCE ⟸317(12)—HEARSAY.
   Where the validity of a sale on foreclosure of a deed of trust, which provided that, if the trustee named should fail or refuse to act or became disqualified, the beneficiary should have full power to appoint a substitute in writing, was involved, testimony by the substituted trustee, who held the sale, that the original trustee, in response to his inquiry, wrote

him that he had declined to act, is inadmissible, being hearsay; the refusal of the original trustee occurring before the inquiry was made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1185.]

4. APPEAL AND ERROR ⟸1050(1)—REVIEW—HARMLESS ERROR.

In such case, where the beneficiary of the deed of trust was the only witness to the refusal of the trustee to act, the erroneous admission of the hearsay testimony cannot be treated as harmless, on the theory that it did not affect the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

5. APPEAL AND ERROR ⟸230—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—OBJECTIONS—NECESSITY.

Where it did not appear that the objection to the testimony was made before the witness answered the question, the receipt thereof cannot be complained of on appeal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 183.]

In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Trespass to try title by Samuel Klein and others against J. T. Darnell and others. There was a judgment for defendants, and plaintiffs bring error. Reversed and remanded.

F. M. Etheridge, J. M. McCormick, and H. L. Bromberg, all of Dallas, Tex., for plaintiffs in error.

Rollin W. Rodgers, of Texarkana, Tex., and George W. Johnson, of New Boston, Tex., for defendants in error.

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

GRUBB, District Judge. This was an action of trespass to try titles, instituted by the plaintiffs in error against the defendants in error to recover about 873 acres of land in Bowie county, Tex. The defendants in error disclaimed as to all except 320 acres, the remainder being described as the east half of the Logwood survey, and it was the title to this tract that was in controversy. W. P. Lash was the common source of title. The plaintiffs in error traced title from him, which was good, unless because of a deed of trust executed by Lash to L. McQueen on the 8th day of September, 1898, and before plaintiffs in error's predecessor acquired title from Lash. The defendants in error claim title under this deed of trust. The respective claims of the parties revolve about the validity of the deed of trust and of the proceeding to foreclose it. If both were valid, title is vested in the defendants in error. If either is invalid, then the plaintiffs in error have the legal title.

[1] The deed of trust is assailed because of an alleged insufficient description of the premises conveyed. The description is as follows:

"The east one-half of the T. Y. Logwood headright of land, situated about 14 miles southwest from Boston, in Bowie county, Texas, containing 320 acres."

The description is concededly sufficient on its face. Its alleged insufficiency arises out of the fact that there were two T. Y. Logwood surveys in Bowie county, Tex., and it is claimed the description would

equally fit either, and that thereby an ambiguity is created, patent if judicial notice is taken of the different surveys, or latent if proof of the fact that there were two such surveys is required. The other T. Y. Logwood survey is shown to have been about 10 miles southwest of Boston, in said county. Whether judicial notice be taken of the surveys shown by the county map or not, we think the map itself and the evidence of Johnson, the county surveyor, sufficiently differentiates the two surveys, as to show that the description in the deed of trust is properly referable only to the one here in controversy, and that the record of the deed of trust put subsequent purchasers on notice that it affected the title to the land in controversy. We think the District Court properly ruled on this issue.

[2] The remaining criticism of the title, set up by defendants in error, is the sufficiency of the foreclosure of the trust deed. The fact that the defendant in error Darnell had been and probably was a tenant of the predecessors in title of the plaintiffs in error when the title asserted by him was acquired placed the burden on defendants in error to establish their title to the land in controversy. This required of them to prove the validity of the foreclosure proceeding, by means of which the title of W. P. Lash, the common source, became vested in the mortgagee, Hazard, through whom defendants in error claim.

[3, 4] But one infirmity in that proceeding is relied upon by plaintiffs in error. It is that the original trustee, McQueen, did not act, but the sale and deed were made by a substituted trustee, J. B. Manning, without, as is alleged, the proper authorization so to act. The trust deed provided that:

"Should the said L. McQueen from any cause whatever fail or refuse to act or become disqualified from acting as such trustee, then the said W. X. Hazard, or the legal holder of said promissory note, shall have full power to appoint a substitute in writing, who shall have the same powers as are hereby delegated to the said L. McQueen."

McQueen was in no way disqualified to act, and the substitution could only be justified by proof that he failed or refused to act. Whether he did or not was the narrow issue that was submitted to the jury by the District Judge. Hazard, the mortgagee, a witness for the defendants in error, testified that McQueen refused to act because old and feeble, and of the distance from his home to the place of sale in Bowie county. Evidence was offered by plaintiffs in error tending to show contradictory statements by Hazard in a written affidavit, the effect of which and of his entire evidence was properly left for the jury's determination.

In this situation of the case, the defendants in error were permitted, against plaintiffs in error's objection and exception, to prove by the witness J. B. Manning, the substituted trustee, that after his designation as trustee by the mortgagee, Hazard, doubting his authority to act, he wrote to the original trustee, McQueen, asking him if he had refused to act, and received a reply from McQueen to the effect that he had so refused. The reply letter was not produced, but its contents were proven by the witness. Conceding that a proper foundation for secondary evidence was laid, we still think this evidence was inadmissible,

and prejudicial to plaintiffs in error. It will be observed that the refusal to act is not claimed to have been made in this letter. It had been made, if made at all, before the letter was written, verbally to Hazard, to whom alone it could be made. Hazard had acted on it by designating Manning as a substituted trustee, and it was only after this that Manning wrote McQueen, asking confirmation of his refusal to act. The writing of the reply letter and its contents were no part of the res gestæ of the refusal, but a mere unsworn written declaration by the original trustee that he had, at a previous time, and to another person, refused to act. This was clearly hearsay evidence. Its effect was to corroborate Hazard, the only witness to the refusal, and a witness against whom impeaching evidence had been introduced, by the unsworn evidence of an absent witness McQueen, in the shape of narrative declarations of a past refusal, which were contained in a letter written by McQueen to the witness who testified. They were therefore received without the sanction of an oath, and the maker of them was not amenable to cross-examination. As they related directly to the only fact that was submitted to the jury, viz., the alleged refusal of McQueen to act as trustee, we cannot say that they did not influence the jury to find the fact of refusal, when upon the uncorroborated evidence of the mortgagee, Hazard, they might have been unwilling to do so. We are of the opinion that the admission of this evidence must work a reversal of the judgment.

[5] We find no other reversible error in the record. With relation to the evidence of the declaration of Meyers, agent for the plaintiffs in error, alleged to have been made to the witness, Shew, that the lawyers of the plaintiffs in error had procured him to fence the land because of some infirmity in the title, it is sufficient to say that the record does not affirmatively show that objection was interposed to the introduction of this evidence before the answer was delivered by the witness. The objection may have come too late, and the court's refusal to exclude, so far as appears from the record to the contrary, may have been based on that ground. We do not hold that the evidence was legal evidence or properly admitted.

The judgment is reversed, for the reason given, and the cause remanded for another trial.

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## WANDELL v. MURRAY.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 108.

1. CANALS ⇐18—INJURIES FROM CONSTRUCTION—ACTIONS—PRESUMPTIONS.
Where a contractor was engaged in work on land on either side of the Erie Canal, the doing of which did not interfere with navigation, there is no presumption that an obstruction on the bottom of the canal, which caused the sinking of a passing boat was due to his fault or negligence.

[Ed. Note.—For other cases, see Canals, Cent. Dig. §§ 20–24.]

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

2. CANALS ⟸18—INJURIES FROM CONSTRUCTION—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence considered, and *held* not to sustain the allegation of a libel that the sinking of libelant's canal boat in the Erie Canal, by striking an obstruction on the bottom, was due to the negligence of one of the two subcontractors of respondent, who were engaged in work on the banks, in dropping a stone into the canal, but to show that the place where the boat struck the obstruction, and where there was testimony showing that a stone was afterward found, was outside the radius of either of the derricks in use on the work.

[Ed. Note.—For other cases, see Canals, Cent. Dig. §§ 20–24.]

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

Suit in admiralty by Nicholas Wandell, owner of the canal boat S. C. Meil, against Patrick H. Murray, surviving partner of the firm of Casey & Murray. Decree for libelant, and respondent appeals. Reversed.

Stanley & Gidley, of Buffalo, N. Y., for appellant.

Lewis, Adler & Laws, of Philadelphia, Pa., and Hoyt & Spratt, of Buffalo, N. Y., for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. November 3, 1911, the canal boat S. G. Meil, laden with wheat arrived at a point just east of lock 37 in the Erie Canal. She was the last of a tandem tow of three boats bound east from Buffalo to New York City. The boats had to go through the lock separately, and after the first two had passed through a team of horses took hold of the Meil. Between 8 and 9 p. m., as she was passing a scow lying about 10 feet off the heel bank of the canal and opposite to a hoisting derrick belonging to the Acme Engineering & Construction Company, she struck some obstruction on the bottom, which caused her to leak and soon afterwards to sink. The bottom of the canal in this lock is solid rock. The District Judge located the place of the accident in accordance with the testimony of all the witnesses, as above stated.

[1] The libel charges the defendant with having negligently dropped a stone which caused the damage into the canal and having left it there. Subsequently, on the morning of November 21st, after the water had been run out of the canal for the season, some witnesses for the libelant testified that they found a stone on the bottom about 10 or 12 feet from the towpath bank at the place where they had been told the boat struck. This stone they say disappeared shortly after it was found. The defendant had a contract with the state of New York to blast away rock on the south or heel side of the canal at this lock and to build a wall of dressed stone on the north or towpath side, and he had sublet the former work to the Acme Company and the latter to the Lathrop, Shea & Henwood Company, each of which used a derrick.

The District Judge got the impression that the Acme Company was engaged in widening and deepening the canal, and that the stone in

question must have been thrown up by blasting. Therefore he applied to it the rule laid down by us in Huntley v. Empire Engineering Co., 211 Fed. 959, 128 C. C. A. 457. This made a very exact analysis of the testimony unnecessary. It was enough that no other cause for the presence of the stone had been shown and the defendant had made no explanation.

In the Huntley Case the defendant was engaged in deepening the canal itself, and was bound to see that the work it was doing did not interfere with navigation. There was no possible explanation for the presence of the obstruction, other than that work. The case was an exceptional one, and the decision not to be extended. Here the defendant had nothing to do with the canal, but was engaged in operations on land on each side of it. The libelant could not rely upon the presumption that, in the absence of explanation by the defendant, he must have caused the obstruction.

The Acme Company and the Lathrop Company were independent contractors; but, as the defendant does not raise the question of his liability for their acts, we do not discuss it. It is enough to say that, when the work going on involves a nuisance, e. g., excavating or obstructing a public street or waterway, quite a different measure of liability may apply from that appropriate to operations which only indirectly and through negligence cause injury. McCafferty v. Railroad Co., 61 N. Y. 178, 19 Am. Rep. 267.

[2] It is quite clear that the boom of the Acme Company's derrick, which only extended about 20 feet over the canal, could not have reached to a point 12 feet from the towpath side; the canal being 65 feet wide. Could, then, a stone have been dropped at the place fixed by the Lathrop Company's derrick? Its derrick, with a boom 60 feet long, was on top of the stone wall in course of construction on the towpath side. The libelant's witness Shingle, who was driving the team, says it had got to where the stone was being unloaded on the cars when the boat fetched up. As the towing line was 200 feet long, the place of the striking must have been some 200 feet west of the wall. The libelant's witness Klock says the stone which was pointed out to him on the morning of November 21st was not within reach of the Lathrop Company's derrick, whose boom was from 50 to 80 feet east of that point. A surveyor employed by the defendant some 13 months after the accident made a map of the location, placing the Acme Company's derrick, which had been removed in the meantime, at a point fixed by McDonald, who was the company's foreman at the time. This was 153 feet west of the beginning of the stone wall where the Lathrop Company's derrick was. Murray, the defendant, puts the Acme Company's derrick 270 feet west of the Lathrop Company's derrick. The libelant's witness Woods is the only witness who says that the stone he found on the morning of November 21st was within reach of the Lathrop Company's derrick.

We think the weight of the testimony is that a stone at the place of the accident as fixed by the District Judge could not have been dropped by the derrick of either of these companies, and if the stone said to have been found was within reach of the Lathrop Company's der-

rick, as Woods says, then the libelant's boat did not run upon it, because the place of the accident was much further to the west.

The libelant having failed to prove that the stone which he claims did the injury was dropped by either of the defendant's subcontractors, the libel should have been dismissed.

The decree is reversed.

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## In re OBERGFOLL.

(Circuit Court of Appeals, Second Circuit. January 16, 1917.)

No. 140.

BANKRUPTCY ⊂=217(3)—POWERS OF COURT—GARNISHMENT BY STATE COURT.

Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 (Comp. St. 1913, § 9651), providing that all levies, judgments, attachments, or other liens obtained through legal proceedings against an insolvent person within four months prior to the filing of a petition in bankruptcy against him shall be null and void in case he is adjudged a bankrupt, nullifies the lien of a garnishment process issued by a state court within four months before bankruptcy against the wages of the bankrupt, so that an order of the bankrupt court after discharge of the bankruptcy restraining proceedings under the garnishment is not invalid as an attempt to oust the state court from possession of the fund.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 323, 330.]

Petition to Revise Order of the District Court of the United States for the Eastern District of New York.

In the matter of Charles L. Obergfoll, bankrupt. Petition by the American Bluestone Company to revise an order of the District Court. Petition to revise denied, and order affirmed.

Lewis A. Rosen, of New York City (Abraham Crosney, of New York City, of counsel), for bankrupt.

Benjamin W. Burger, of New York City, for petitioner.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. It appears that the American Bluestone Company brought suit in the Municipal Court of the City of New York on a note given by the petitioner, and that the suit was determined in its favor on October 5, 1908.

Thereafter on February 18, 1915, a garnishee order was entered in the Supreme Court of New York which directed the paymaster of the city to withhold weekly 10 per cent. of the petitioner's earnings.

In pursuance of the order, the sheriff of New York county levied on the salary due the bankrupt from the city of New York the sum of 10 per cent., and that amount of his earnings has been weekly withheld.

On March 24, 1915, the petitioner was adjudicated a bankrupt by the District Court for the Eastern District of New York, and an order was entered in that court on April 15, 1915, directing the paymaster to withhold from the salary of the petitioner the amount ordered deducted under the garnishee execution above referred to and to retain the

same for a period of 12 months from the date of adjudication or until the question of the bankrupt's discharge should be determined, and to retain said amount in his possession until the further order of the court.

The petitioner was granted his discharge on June 27, 1916, and then asked the court, in view of the fact that his discharge released him from the judgment obtained by the American Bluestone Company, that an order should be entered vacating the stay and that the paymaster be directed to pay over to him all moneys collected under the garnishee order from the petitioner's earnings. Thereupon the District Court vacated its order of April 15, 1915. It has also ordered that further collection under the garnishee execution issued out of the New York Supreme Court on February 18, 1915, be restrained; and it has likewise ordered that the paymaster pay over to the trustee in bankruptcy all moneys collected by him under the garnishee execution and in his hands, and that the trustee pay over therefrom to the bankrupt all deductions made since the date of the adjudication in bankruptcy. The petitioner has objected that the court below was without jurisdiction to make the order on the ground that it is beyond the power or right of that court to interfere with the process issued out of the New York Supreme Court. In support of his contention, he calls attention to decisions of the Supreme Court of the United States declaring that, when a court has taken into its custody property of any kind, another court should not be permitted, either to oust the possession of the first court or in any way to interfere with its complete control and disposition of the property for the purpose of the cause in which its action has been invoked. That this principle has been laid down in a long line of cases cannot be denied. See Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Buck v. Colbath, 3 Wall. 334, 341, 18 L. Ed. 257; Covell v. Heyman, 111 U. S. 176, 182, 4 Sup. Ct. 355, 28 L. Ed. 390. The principle which these cases enunciate is fully recognized by this court and will be unhesitatingly applied in all proper cases. The difficulty is that the principle invoked has no application to such a case as that now before us.

The order which the petitioner seeks to have reviewed was made under authority of section 67f of the Bankruptcy Law, which reads as follows:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt."

The order made by the New York Supreme Court on February 18, 1915, became a lien on that date. New York Code of Civil Procedure, § 1391. The adjudication in bankruptcy was made on March 24, 1915, which was less than four months after the lien was created. Therefore the lien became null and void automatically by virtue of the provision of the Bankruptcy Act above quoted. The making of the

order which the petitioner is here objecting to was no interference with the process of the Supreme Court of New York, as such process had been already annulled by the Bankruptcy Act, and there was nothing to interfere with when the order was made.

The principle herein involved was applied in the case of In re Harrington (D. C. 1912) 200 Fed. 1010. In that case a creditor had obtained a judgment against him upon a debt provable in bankruptcy and from which a discharge would be a release, and after adjudication levied execution against the salary of the bankrupt to the extent of 10 per cent., as authorized by the New York Code of Civil Procedure. The court held that inasmuch as the discharge, if granted, would relate back to the adjudication and release the bankrupt from all liability on such debts as were provable and existed at that time, an order was properly granted which enjoined the enforcement of the garnishee execution, but impounded the 10 per cent. until the question of the bankrupt's discharge should be determined.

If there could be any doubt in such cases, the doubt has been extinguished by the decision of the Supreme Court in Chicago, Burlington & Quincy R. Co. v. Hall (1913) 229 U. S. 511, 516, 33 Sup. Ct. 885, 57 L. Ed. 1306, where the court speaking of a levy in a garnishee proceeding in a state court declared that all levies, seizures, and liens, obtained by legal proceedings within four months, that may or do interfere with that possession, are annulled.

The petition to revise is denied, and the order is affirmed.

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## HASTORF v. F. R. LONG–W. G. BROADHURST CO. et al.

(Circuit Court of Appeals, Second Circuit. January 16, 1917.)

No. 116.

1. SHIPPING ⊂=41—CHARTERS—DEMISE OF SCOW.
   The charter of a scow without motive power, but including a man to take care of her, generally called the master, at a stated hire per day, is a demise by which the charterer becomes the owner, pro hac vice, but as between the parties the owner is responsible for any injury to the boat through the acts or negligence of the master.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 149–155.]

2. SHIPPING ⊂=54—CHARTER—LIABILITY FOR INJURY TO VESSEL.
   The fact that one of the pockets of a dumper scow under such a charter became clogged while in use by the charterer, so that it would not dump, does not in itself establish negligence of the charterer, so as to render him liable to the owner for the injury.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219–221.]

3. SHIPPING ⊂=54—CHARTER—LIABILITY FOR INJURY TO VESSEL.
   A scow, while in possession of a charterer under a demise, was grounded through the fault of her master, who was the servant of the owner, and while so aground was injured by blasting done by the charterer; a very excessive charge being used in one of the blasts. *Held* that, while not liable for the grounding, the charterer was liable for the injury from the blast being bound to know that the boat was liable to injury therefrom while aground and to exercise due care.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219–221.]

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

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

Suit in admiralty by Albert H. Hastorf, owner of the dumper scow Montreal, against the F. R. Long-W. G. Broadhurst Company and Henry E. Fox, impleaded. Decree for respondents, and libelant appeals. Modified.

Foley & Martin, of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for appellant.

Joseph D. Lee and Peter S. Carter, both of New York City, for appellee F. R. Long-W. G. Broadhurst Co.

Nolan Brothers, of New York City, for appellee Fox.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. [1] April 16, 1912, Hastorf, the libelant, owner of the dumper scow Montreal, chartered her, including a man to take care of her, to the Long-Broadhurst Company, for an indefinite time at $20 a day. The contract was entirely oral. Such employment of boats without motive power of their own, which go, including a man generally called the master, into the absolute control of the charterer, have in this harbor, at least since the decision of the late Judge Addison Brown in 1892 in The Daniel Burns (D. C.) 52 Fed. 159, been regarded as demises; the charterer becoming the owner pro hac vice. Monk v. Cornell Steamboat Co., 198 Fed. 472, 117 C. C. A. 232. The District Judge thought that our decision in North Atlantic Dredging Co. v. McAllister Steamboat Co., 202 Fed. 181, 120 C. C. A. 395, indicated that such a charter as the one now under consideration was not a demise. In that case the substantial question involved was whether the daily hire of a pump dredge was to be paid only while the dredge was in operation, or whether it also covered the time occupied in getting her to the place of her work and back to her original berth. In other words, was the contract one for mere services while working, or was it a charter from the time the dredge left her original berth to the time she returned to it. We held it to be a charter. As to another very subordinate claim, we held the charter not to be a demise, without going at large into the facts, because the dredge, with her crew of 18 men, remained in the possession and control of the owner. There was no intention whatever to depart from or qualify previous decisions.

[2] The Long-Broadhurst Company employed the scow in carrying the débris of an old pier which they were tearing down at Hackensack, N. J., to sea. She had six pockets, and No. 5 got clogged, so that it would not dump. Thereupon it was arranged that the libelant should take the scow May 2d, load the other five pockets, take her to sea, and try to clear the stuck pocket. This he did not succeed in doing, and May 6th the Long-Broadhurst Company took possession again and delivered the scow to one Fox, who was engaged in excavating in Pelham Bay. Fox loaded her with the excavated material to be carried to sea. While there the scow got aground, suffering some dam-

age, which was considerably increased by Fox's use of dynamite in blasting.

It will thus be seen damage was done to the No. 5 pocket while the scow was in the exclusive possession of the Long-Broadhurst Company, and to her bottom while she was in the exclusive possession of Fox, to whom the Long-Broadhurst Company had sublet her. The Long-Broadhurst Company was responsible, not only for its own negligence, but for any negligence of Fox, and brought him in as a party under the fifty-ninth rule in admiralty (29 Sup. Ct. xlvi). The mere fact that No. 5 pocket would not dump was not proof of negligence, and no other proof was offered. The clogging of the pocket is quite consistent with the character of the material the scow was intended to carry. We think the Long-Broadhurst Company is not liable for this claim.

The District Judge found that the grounding of the scow at Pelham Bay Saturday, May 11th, was due to the unreasonable refusal of her master to permit her to be moved to a place where she would safely lie afloat. This in his opinion caused the boat to hog and we agree with him that the libelant cannot recover for the damage so caused. Between the owner and the charterer in cases of such boats, the former is liable for any injury to the boat by reason of the negligence of her master in caring for her. Hastorf v. Hudson River Co. (D. C.) 110 Fed. 669, Zabriskie v. City (D. C.) 160 Fed. 235.

[3] The District Judge found further that damage was done to the king posts and braces of the scow while she lay aground on the morning of May 13th or 14th, as the result of Fox's blasting. He held, however, that the libelant was bound to know that injuries were much more likely to be sustained by a boat aground than by one afloat, and apparently disallowed a recovery for the damage caused by the blasting as a consequence of the grounding for which he had held the libelant liable. But Fox was also bound to know that this boat which was in his custody would be liable to such injury, and it lay upon him to take the necessary precautions to prevent injury. The proof is that the explosion shook the scow most violently, and a very excessive load of dynamite was used on one occasion. We assume that Fox was authorized by public authority to make these blasts, and was not liable for the consequences if he used due care (Benner v. Dredging Co., 134 N. Y. 156, 31 N. E. 328, 17 L. R. A. 220, 30 Am. St. Rep. 649), but for an injury to a boat in his possession which he knew or through his agents was bound to know was aground, we think he would be liable, especially when caused by excessive blasts.

The court below is directed to modify the decree, by giving the libelant compensation for damages resulting from the blasting, with costs of both courts, payable primarily by Fox, and secondarily by the Long-Broadhurst Company.

## HUDSON & M. R. CO. v. IORIO.

(Circuit Court of Appeals, Second Circuit. February 6, 1917.)

No. 169.

1. COURTS ⟸89—TRIAL ⟸142—QUESTION FOR JURY—INFERENCES FROM CIRCUMSTANCES—PRECEDENTS.

Where a question of fact exists, or reasonable men could draw different inferences from circumstances shown without contradiction, the question is for the jury; but, where a rule of decision applicable to the facts has been established by controlling authority, that authority must be followed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Trial, Cent. Dig. § 337.]

2. COMMERCE ⟸27(8)—INJURY TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—EMPLOYMENT IN INTERSTATE COMMERCE.

An employé of a carrier, practically all of whose business was interstate commerce, is not engaged in interstate commerce while placing rails in a pit, where they were to be stored until needed, since the test whether the thing upon which the employé was working at the time of injury was an instrument of commerce depends upon its use in such commerce at the time of injury, not upon remote probabilities, or upon accidental later events.

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

Action by Angelo Iorio against the Hudson & Manhattan Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Writ of error to review a judgment entered in favor of Iorio (plaintiff below) in the District Court for the Southern District of New York. The plaintiff in error is a corporation operating the underground and underwater railway between New York City and points in New Jersey. Except for such trifling business as may exist between the several stations of its subway on one side or the other of the Hudson river, it is wholly engaged in interstate transportation. Iorio was a trackman in the railroad's employ. At one of the terminals of the road there is (between the tracks) a pit, in which new rails are stored against the time when they may be required for track repairing or any other purpose. Iorio was assisting in putting rails into this pit, when by the negligence of fellow workmen he fell into the pit and received injuries, to recover for which this action was brought under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]).

Janover, Frankel & Janover, of New York City (Chester E. Frankel, of New York City, of counsel), for plaintiff in error.

Benjamin Davidson and Charles S. Aronstam, both of New York City, for defendant in error.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The single question presented by this record is whether Iorio, at the time of injury received, was engaged in work so closely connected with interstate commerce as to be practically a part of it. Shanks v. Dela-

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

ware, etc., R. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; Chicago, etc., R. R. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941. This question the trial judge put to the jury, which has resolved it in favor of defendant in error. The facts being undisputed, we are required to ascertain whether such finding can be sustained under the rulings of the Supreme Court.

On one hand, it is urged that the act of putting rails in storage for future use as might appear cannot be an act so closely related to interstate commerce as to be a part of it, any more than is the extraction of coal from a mine, for the purpose of operating locomotives in interstate commerce. Delaware, etc., Co. v. Yurkonis, 238 U. S. 444, 35 Sup. Ct. 902, 59 L. Ed. 1397. On the other hand, it is said that the rails, in handling which Iorio was injured, were, humanly speaking, certain to be as much used for the facilitation and performance of interstate carriage as were the bolts which were being taken to repair a bridge regularly used in interstate commerce, a situation considered in Pedersen v. Delaware, etc., Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153.

[1] Where any question of fact exists, or where reasonable men could draw different inferences from circumstances shown without contradiction, the matter is for the jury; but where a rule of decision applicable to the facts as finally established has been laid down by controlling authority, that authority must be followed.

[2] There is plainly a difference between the actual or imminent employment of the bolts in repairing the bridge, as in the Pedersen Case, and the mining of coal wherewith to run interstate locomotives, as in the Yurkonis Case. Whether such difference entails a distinction is a matter upon which opinions might conflict, as the dissent in Supreme Court decisions under this statute clearly shows. But by the latest pronouncement of that court in Minneapolis, etc., Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. —— (January 8, 1917), it is in effect declared that when one claims the benefit of the act here invoked, because of the character or employment of the thing upon which he was working at the time of injury, then the character of that thing "as an instrument of commerce depended on its employment at the time (of injury), not upon remote probabilities, or upon accidental later events."

It cannot be said that the rails which Iorio was engaged in storing against a use that was certainly not imminent, and might never occur, were at the moment engaged in, or practically part of, interstate commerce; for that commerce was going on without any present assistance, either from Iorio, or the rails on which he was working, or the men who were working with him. We therefore hold that the actual employment or use at the moment of injury of the thing upon which the person injured was working is the test of applicability of the statute, under circumstances such as shown here. By that test plaintiff below was not practically engaged in or a part of interstate commerce when he was hurt, and the judgment is reversed.

# THE J. W. WONSON.

## THE OSCEOLA.

(Circuit Court of Appeals, Second Circuit. January 23, 1917.)

Nos. 61, 62.

COLLISION ⊂⊃102—STEAM VESSELS CROSSING—MUTUAL FAULTS.

A collision on the North River, opposite the upper end of the Battery, after dark, between a steam yacht, which had just rounded the Battery and was passing up, and a steam lighter, coming down to pass around into East River, in which the yacht struck the lighter on the starboard side at right angles, *held* due to faults of both vessels; the lighter being in fault for crossing the course of the yacht, in violation of the starboard hand rule, and the yacht for having no lookout and failing to see the lighter until she received a passing signal, when it was too late to avoid collision.

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

Suit in admiralty for collision by James P. Stevenson, owner of the steam yacht Osceola, against the steam lighter J. W. Wonson, Leah M. Saville, claimant, with cross-libel against the Osceola. Decree against the Wonson, and her claimant appeals. Modified.

James J. Macklin, of New York City, for appellant.

Harrington, Bigham & Englar, of New York City, for appellee.

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

WARD, Circuit Judge. This is a libel and cross-libel in a cause of collision. October 31, 1912, at about 6:30 p. m., the yacht Osceola came into collision with the steam lighter J. W. Wonson in the North River at a point opposite the upper end of the Battery. The bow of the Osceola struck the starboard side of the Wonson about amidships at right angles. The bowsprit of the Osceola was carried over to her starboard side, and she was swung alongside the Wonson, so that both were headed in towards the Battery. The yacht was proceeding from East Twenty-Third street, East River, to Eighty-Sixth street, North River, at a speed of 10 knots by the land, and the lighter was proceeding from Pier 13, North River, to Pier 6, East River, at a speed of 8 knots by the land. The night was dark and clear.

The account given by the witnesses for the respective vessels is utterly irreconcilable. Those on the Osceola say that after coming out of the East River, and when on a course up the North River, a signal of two whistles was heard off her port bow, and immediately thereafter the dim green light of the Wonson was discovered, crossing the yacht's course from port to starboard. The yacht blew an alarm and backed full speed on her engines, but the collision was inevitable. The witnesses from the Wonson say that as she was proceeding down

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

the North River, and gradually turning to port to round the Battery, she discovered on her starboard bow the green light of the Osceola, bound up. The vessels were then on a safe course green to green. The yacht gave a signal of two whistles, which the steam lighter answered with two and starboarded. The yacht then blew a second signal of two blasts, and showed both her side lights to the lighter; the lighter answered with two and stopped her engines; the yacht then showed only her green light, and blew a third signal of two blasts, which the lighter answered with two; then the yacht showed her port light and blew a fourth signal of two blasts and ported right into the lighter. The lighter answered with two, and each vessel blew an alarm as they came together.

By the Wonson's account the vessels were approaching each other green to green. The Osceola, being bound up the river, blew four signals to pass in safety starboard to starboard, and yet, in direct violation of the signal, ported. Such an account of the yacht's navigation is utterly incredible. This was followed up by the equally incredible testimony of one Fickett, a sailing master who was in the pilot house of the Wonson at the time. He was a man 6 feet 6 in height, and testified that, seeing the yacht's erratic navigation, he looked out at about the middle of the front windows to ascertain whether the side lights of the lighter were burning bright, and found they were. Side lights are required by law to be fitted with inboard screens projecting 3 feet forward of the light, so as to prevent them from being seen across the bow. Article 2 (d), Inland Regulations of 1897. No light can be seen, except by direct or reflected rays reaching the eye. One can stand immediately under a lamp box, screened as required by law, and be wholly unable to say whether the lamp is burning or not. How much more so in the case of one standing between the boxes! We are quite satisfied that the Wonson was struck as she was crossing the Osceola's course, and is at fault under the starboard hand rule.

The Osceola, however, had no lookout forward, and her own account of her navigation was that her attention was first called to the Wonson by a signal of two blasts, and that the collision was then inevitable. What excuse can there be for this? Assuming that the green light, which was required by the regulations to be visible for a distance of two miles—article 2 (b) (c), of the Inland Regulations of 1897—was not so because of the dimness, still the range lights should have been seen in time to take precautions to avoid collision. The Osceola, although the privileged vessel under article 19, was at fault for not keeping a proper lookout as required by article 29. See what we have said on this subject in our opinion lately handed down in D., L. & W. R. R. Co. v. Central R. R. Co., 238 Fed. 560, — C. C. A. —.

The decree is modified, by directing that both vessels be held at fault, and the usual decree of half damages entered.

## THE EASTON.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 107.

COLLISION ⇐82(2)—STEAM VESSELS CROSSING—FOG—VIOLATION OF RULES.

The admitted failure of a steam lighter, navigating in a fog, to stop on hearing fog signals from an unseen vessel nearly ahead, as required by article 16 of the Inland Rules (Act June 7, 1897, c. 4, § 1, 30 Stat. 99 [Comp. St. 1913, § 7889]), *held* to cast upon her the burden of showing that the fault did not cause a collision with a crossing vessel, which burden was not sustained, and to sustain a decree finding her solely in fault for the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 170, 172–174.]

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

Suit in admiralty for collision by Edward M. Timmins, owner of the tug Mutual, against the steam lighter Easton; the Central Railroad Company of New Jersey, claimant. Decree for libelant, and claimant appeals. Affirmed.

Macklin, Brown & Purdy, of New York City (William F. Purdy, of New York City, of counsel), for appellant.

Burlingham, Montgomery & Beecher, of New York City (Chauncey I. Clark, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. This action is for collision between libelant's tug Mutual, and claimant's steam lighter. The accident occurred in weather hazy at least, and asserted by claimant to have been very foggy. The court below believed the story of libelant, and held the Easton solely at fault, for refusing to yield the right of way to the Mutual, which tug was or should have been seen on a crossing course and the Easton's starboard bow, 400 feet away.

That this decision was right on the facts found is not denied, but claimant asserts fundamental error in not finding that the collision happened in a fog so dense that the Mutual was not and could not be seen until less than 150 feet away. On such a point as this, we should be very loath to disturb a finding reached after seeing and hearing witnesses; but, even assuming appellant's contention as to the weather conditions, there was plain fault in the Easton. Her captain testified that in thick fog he heard fog signals ahead, or nearly so; he then gave a fog whistle, and, when he "heard it coming a little closer," stopped his boat; then the Mutual "popped right out of the fog; * * * she wasn't over 150 feet away."

This is open admission that the Easton's navigator did not obey article 16 of the Inland Rules and stop his engines when he heard, forward of his beam, the fog signal of a vessel whose position was not ascertained. This action has often been condemned (The St. Louis, 98 Fed. 750, 39 C. C. A. 201; The Delaware, 213 Fed. 214, 129 C. C.

A. 558), and is quite enough to cast the burden of proof on the Easton, to show even contributing fault in the other vessel (The St. Louis, supra). The admitted action or inaction of the Easton is enough to account for the collision; this raises a presumption against her, which is not rebutted in this record. The Newburgh, 130 Fed. 321, 64 C. C. A. 567, and cases cited.

Libelant's damages, as computed by the commissioner, included for loss of use of tug during the repair period $40 a day. We think that amount well supported by the evidence, and the action of the District Court in raising it to $45 was not justified.

Let the decree be modified, by reducing the per diem allowance mentioned to $40, and, as modified, affirmed, with costs.

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## THE MADISON.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 123.

COLLISION ⊜91—STEAM VESSELS MEETING—CHANGE OF COURSE AFTER PASSING AGREEMENT.

A collision at night on East River, between two meeting tugs with tows alongside, *held*, on the evidence, due solely to the fault of the upbound tug in changing her course to port in rounding Corlear's Hook, after the exchange of signals to pass port to port.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 187–192.]

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

Suit in admiralty for collision by the Lehigh Valley Transportation Company, owner of the steam tug Slatington, against the steam tug Madison; the Delaware, Lackawanna & Western Railroad Company, claimant. Decree for respondent, and libelant appeals. Affirmed.

The following is the opinion of Augustus N. Hand, District Judge:

The libelant's tug Slatington was proceeding up the East River carrying a cattle float on her port side and a car float on her starboard side. The claimant's tug Madison, carrying on her port side a car float, came into view some distance up the river and blew one whistle, to which the Slatington responded by a single whistle. The captain of the Madison says that he was in the center of the stream, a little toward the New York shore; that he saw the red or port lights of the Slatington, and blew the above whistle as a proper signal to pass port to port. The captain of the Slatington, on the other hand, says that he saw the green lights of the Madison, that she was toward the Brooklyn side of the river, and that the natural position would have been to pass starboard to starboard. However this may be, the Slatington answered the signal of the Madison, and therefore was bound to attempt to do all she could to pass port to port. The captain and floatman of the Madison say that they suddenly saw the green lights of the Slatington and realized that she was changing her course. He then blew an alarm, the Slatington blew an alarm, and, though the latter is said to have then changed her course again in an attempt to resume the port position, shortly after a collision occurred.

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

I think the interpretation of the facts urged by counsel for the claimant is most consistent with the testimony and should prevail. His contention is that the accident was due to the fact that the mate of the Slatington, who was steering the vessel at the time the first whistle was blown, was keeping close to the New York shore to avoid the strong tide setting towards Brooklyn while rounding Corlear's Hook. Indeed, this, I think is admitted by both sides. In coming around the Hook the Slatington would inevitably show her port lights first. If she then still kept towards the New York side of the river, as claimant's witness contends, she would be in such a situation as to show her green lights. The captain of the Madison, having seen only the Slatington's red lights, gave a signal to pass port to port, and was proceeding under a port helm. Suddenly he saw the green lights of the Slatington, realized there was danger, and blew the alarm whistle. The captain of the Slatington, who had in the meantime taken the wheel, returned a counter alarm whistle. The Slatington evidently, after blowing the single whistle, still kept on for a time on the west side of the stream, and in so doing in reality starboarded her helm, instead of porting her helm, as she should have done. When the Madison blew the alarm, the Slatington did port her helm, but it was then too late. The change of course and uncertain movement of the tug Slatington were, I think, the cause of the collision. I cannot see how the accident could ever have occurred if the Slatington, after answering the signal of one whistle, had ported her helm and continued on that course. The Madison is criticized for not proceeding further to port after blowing the first whistle, but I think the testimony indicates that she was proceeding on a gradual course to port that would have been perfectly safe if the Slatington had not changed her course after the signal was given.

The injury seems to have been caused wholly by the negligence of the Slatington, and an interlocutory decree should be granted, dismissing the libel, with costs.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones and Anthony V. Lynch, Jr., both of New York City, of counsel), for appellant.

A. J. McMahon, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed, with interest and costs.

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## SAFETY CAR HEATING & LIGHTING CO. v. GOULD COUPLER CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 69.

1. EVIDENCE ⟸506—OPINION EVIDENCE—SUBJECTS ON WHICH COMPETENT.

The testimony of experts in an infringement suit as to the meaning of untechnical words used in the patent, which it is the province of the court to determine, is incompetent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309.]

2. PATENTS ⟸177—CONSTRUCTION—SCOPE OF INVENTION.

While a patentee is entitled to all the fairly disclosed possibilities of his invention, whether specifically described or not, unless he has foregone a part of his right by limitations in his claims, where the claims are for combinations of old elements, and the invention is in the combining, it is essential to discover, not what somebody else could do with those elements, but what the patentee did with them.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 253, 254.]

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

3. PATENTS ⊂328—VALIDITY AND INFRINGEMENT—CAR-LIGHTING SYSTEM.
The Thompson patent, No. 1,070,080, for a car-lighting system, construed, and *held* not infringed.

Coxe, Circuit Judge, dissenting.

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

Suit in equity by the Safety Car Heating & Lighting Company against the Gould Coupler Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 229 Fed. 429.

Appeal from decree in equity finding infringement by defendant-appellant of claims 4, 9, 10, 11, 12, and 13 of patent No. 1,070,080, granted August 12, 1913, to Harrison G. Thompson, for a "car-lighting system." The claims in suit are as follows:

"4. In car-lighting apparatus, in combination, an electric generator, a storage battery connected to be charged thereby, a variable resistance medium comprising a plurality of contacting members adapted to vary the aggregate resistance with pressure thereon, said resistance medium being connected in the field circuit of said generator, a current coil serially connected between said generator and said battery, a voltage coil connected across the charging circuit, separate movable cores respectively coacting with said coils, and means mechanically connected with said cores and tending normally to compress said medium and adapted upon either of said cores being attracted to tend to weaken the pressure upon said medium."

"9. In car-lighting apparatus, in combination, an electric generator, a storage battery adapted to be charged thereby, lamps connected across said battery, a variable resistance medium connected in the field circuit of said generator, a current coil, means comprising a member of magnetic material coacting with said current coil and tending to increase said resistance as said member is attracted, and means adapted automatically to complete a shunt about said coil upon the voltage of said generator falling below that of said battery.

"10. In car-lighting apparatus, in combination, an electric generator, a storage battery adapted to be charged thereby, lamps connected across said battery, a variable resistance medium comprising a plurality of contacting members adapted to vary their aggregate resistance with pressure thereon, said resistance medium being connected in the field circuit of said generator, a current coil, a magnetic member positioned in the field of said coil, means coacting with said magnetic member and variable resistance tending to vary the pressure upon said resistance with a variation in current flowing in said coil, and means controlled in accordance with the relative voltages of said generator and said battery and adapted substantially simultaneously to disconnect said generator and shunt said coil.

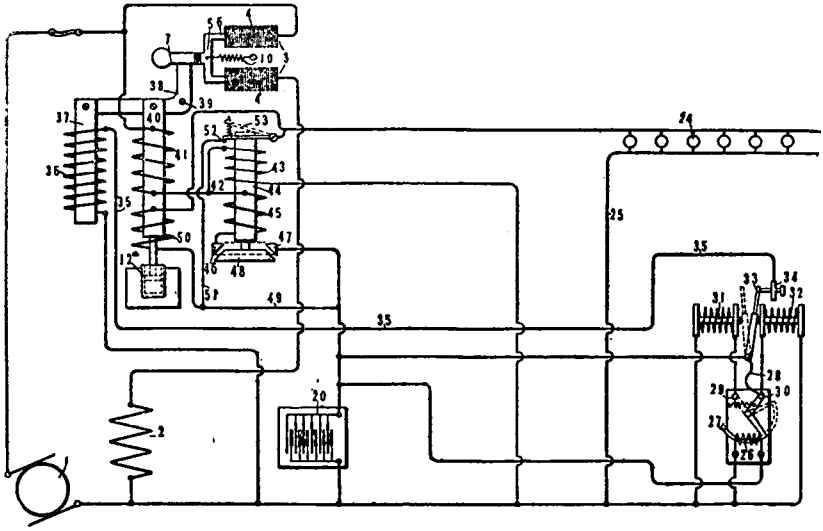
"11. In car-lighting apparatus, in combination an electric generator, a storage battery adapted to be charged thereby, lamps connected across said battery, a variable resistance medium comprising a plurality of contacting members adapted to vary their aggregate resistance with pressure thereon, said resistance medium being connected in the field circuit of said generator, a current coil, a magnetic member positioned in the field of said coil, means coacting with said magnetic member and variable resistance tending to vary the pressure upon said resistance with a variation in current flowing in said coil, a switch comprising a voltage coil connected across said generator and a movable core having a contact member at one end thereof, said switch being adapted to disconnect said generator by movement of said contact member upon the generator voltage falling below that of said battery, a shunt about said first coil, and means coacting with the remaining end of said core adapted to complete said shunt upon said switch being opened.

"12. In car-lighting apparatus, in combination, an electric generator, a

storage battery adapted to be charged thereby, lamps connected across said battery, a variable resistance medium comprising a plurality of contacting members adapted to vary their aggregate resistance with pressure thereon, said resistance medium being connected in the field circuit of said generator, a current coil, a magnetic member positioned in the field of said coil, means coacting with said magnetic member and variable resistance adapted to vary the pressure upon said resistance with a variation in current flowing in said coil and tending normally to compress said medium, a switch comprising a voltage coil connected across said generator and a movable core having a contact member at one end thereof, said switch being adapted to disconnect said generator upon its voltage falling below that of said battery by movement of said contact member, a shunt about said first coil, means coacting with the remaining end of said core adapted to complete said shunt upon said switch being opened, a second voltage coil, and means adapted upon said battery reaching a certain state of charge to render said second voltage coil effective in reducing the pressure upon said variable resistance medium.

"13. In car-lighting apparatus, in combination, a generator having a shunt field winding, a storage battery connected to be charged thereby, a resistance medium operatively connected with the field circuit of said generator, means comprising a coil serially connected between said generator and said battery adapted upon the current therein tending to increase, to so affect said resistance as to weaken the field of said generator and normally to maintain said current substantially constant, said resistance being normally free from other effective electrical influence, a normally ineffective voltage coil adapted upon becoming effective to control said generator current by acting on the resistance of the generator field circuit, and means adapted upon the voltage of said battery attaining a certain value to render said voltage coil effective in controlling said generator current."

Figure 2 of the patent, which was used by all witnesses as exhibiting the matters in controversy, is inserted on the page following:



Richard Eyre, William Houston Kenyon, and Walter C. Noyes, all of New York City, for appellant.

Duell, Warfield & Duell, of New York City (Frederic P. Warfield, Charles H. Duell, H. S. Duell, and L. A. Watson, all of New York City, of counsel), for appellee.

Before COXE, WARD, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Electric car-lighting systems, depending ultimately upon axle driven generators, did not originate with this patentee; nor regarded as new articles of manufacture did any component part of the system disclosed by him. This is so fully admitted by all parties that no further comment is necessary. Every claim in suit is for a combination, or co-ordinated arrangement, of well-known electrical tools or appliances, to the end that such arrangement may produce a result desirable, useful and novel; and of course what is patented is not the result, but the embodied means by which the same is reached.

Nevertheless the nature of the combination, and therefore of the invention, cannot be grasped unless the wished-for result, the patentee's desideratum, is first understood. The contest between these litigants is, at bottom, as to the meaning of sentences and phrases used in the specification and claims, whereof the words require little if any exposition, not obtainable from technical handbooks of approved authority. The parties diverge radically even when stating in most general terms the object of invention, and such difference serves as a starting point for investigation.

Plaintiff holds that the invention is "an improvement in the means for assuring the production of a current of constant value, notwithstanding the variations in speed of the generator, due to the changes in speed of the car, thereby assuring a steady and efficient output of current, *with special reference to the use of such current in charging the storage battery, while at the same time protecting the storage battery from the injurious effects of overcharging.*" Therefore the system disclosed and claimed is one in which the "current output of the generator (is) *materially diminished* when the battery has been fully charged, to prevent overcharging," the "injurious effects of which are well known, and need not be reviewed"—in the argument from which these quotations are taken. The foregoing is plainly descriptive of a combination of parts, capable of adjustment within the limits loosely indicated by the phrases "materially diminished" and "injurious effects"; if this view is correct, any diminution of current avoiding a surcharge deemed injurious by the operator, is within Thompson's invention.

Defendant, on the other hand, considers the system under consideration as one which "to achieve the broad result of protection of the battery from overcharge, effects successive long periods of charge and discharge; these periods being initiated and controlled by apparatus acting to initiate one condition when the battery is charged, and the other condition when the battery is discharged. The period of charge is one wherein the generator is rendered operative by being in circuit; the period of discharge is one wherein the generator is rendered inoperative by being disconnected at the main switch, even though its speed is above its normal cutting-in speed." This description presents as the patentee's purpose, a current supply to the lamps proximately emanating from the battery, until the storage cells have reached a predetermined stage of weakness, the generator being until then out of action; the dynamo then resumes operation primarily for the purpose of again charging the storage battery.

Thus plaintiff asserts that the disclosure of the patent is of a system wide enough to cover a mere reduction of charging current without disabling the generator, one in which the battery may be an adjunct kept in reserve until such time as slowing or stoppage of the car renders its use necessary; while defendant declares that Thompson invented and described a plan for primarily using the storage battery with the generator in reserve as a sort of pump, to (so to speak) fill up the tank when need arose. To resolve this difference resort must be had to the specification and drawings, with such definition or explanation of technical terms, and words of art as may be necessary; but such explanations once made, the first question is of the meaning of a written document, a meaning to be spelled out of its four corners, and usually to be established before recourse is had to the file wrapper for further light, while the ascertainment of meaning always precede any consideration of equivalents.

[1] The record herein largely consists of the opinions of expert witnesses as to the meaning of words and phrases needing no definition; such testimony (if it can be given that name) is a volunteering of duties laid by law on jury or court, and should not be suffered. Opinion evidence, on the very point submitted for decision, is always incompetent. Turning to the patent itself to ascertain its meaning, it is first observable that no provision is made for regulating the voltage of the lamps. Of this omission plaintiff's expert says "the patent does not concern itself (therewith), * * * it is concerned with dynamo regulation." The statement quoted is obviously consonent with what the patentee says, viz.: that his invention relates "to the charging of storage or secondary batteries"; one object being to provide means "for the efficient charging of a storage battery," in which "the charging generator is rendered inoperative upon its functions being accomplished." The natural inference from these words is that the generator's function is accomplished when the secondary battery is charged.

Another stated object of the inventor was to "provide automatically acting means adapted to permit the generator to resume action independent of the speed at which the train is running." The means for arriving at these results are shown in the diagram prefixed hereto. The main switch (*48*) is shown open, but, conceiving it closed, the path of the main generator circuit is seen passing around a solenoid core (*40*) in and through the current coil (*41*). A sufficient increase of current draws up the core; such core movement affects (through lever *38*) the carbon pile resistance (*4*) mounted in the field circuit of the generator, and so in a manner confessedly old restores the current to normal.

But if no more in the way of regulation were done than this, the announced object of the patentee would fail, for no means would exist of preventing battery overcharge. This Thompson effects by what he calls a "relay" comprising the "voltmeter coil *26*," in conjunction with "contact member *27*"; an apparatus which when the battery voltage is high enough, will move the "contact member" so as to energize coil *32*, and that in turn attracts the armature *33*, and so closes a circuit from the battery through coil *36*, which acting on core *37*, pro-

duces movement of the same lever on which the current coil operates, and increases resistance in the carbon pile, thus diminishing the generator current flowing through the main circuit, until (the battery current overcoming that from the generator) the core (*44*) of the main switch drops, the switch opens and the generator is out of service.

When the battery has discharged to the predetermined limit the "contact member" (*27*) produces an engagement at *29*, coil *31* is energized, armature *33* moves to its core, and coil *36* is disconnected. This brings the parts of the carbon pile closer together, lowers resistance in the field circuit, enables the generator to pick up, whether the car is going at or in excess of critical speed, and the main switch closes, re-establishing the main circuit. Voltmeter coil *26*, however, operates slowly, so that not until the "contact number *27*" re-establishes contact at *30*, does the cycle recommence.

[2] That this is possible round of movement in the apparatus shown is not denied, but is said to be too literal, or (in the language of an expert) does not seek to find out what the patent discloses "as an operating device." This phrase seems to suggest that the court must read into the specification what might have been done with the tools or means mentioned by the inventor. Undoubtedly he is entitled to all the fairly disclosed possibilities of his invention, whether specifically described or not, unless he has foregone a part of his right by limitations in his claims; but where the claims are for combinations of old elements, and the invention is in the combining, it is essential to discover, not what somebody else could do with those elements, but what the patentee did with them. The old question recurs: What was this particular patentee's contribution to the sum of human knowledge?

Thompson says in so many words that coil *36* (the voltage coil) will "exert a powerful effect" on the field circuit, and such would naturally be the case by reason of the distance from the fulcrum at which power is applied. And it is "in this manner" that the current is reduced or "substantially terminated," and (continues the specification) this action results "in the absolute prohibition of any current being forced through the charged cells. The lamps are then operated by the battery, the generator giving no output." And when the battery voltage has fallen below the arranged limit, the apparatus described "permits the generator safely to resume action" and "normal charging conditions are again resumed."

To us it is clear from the foregoing that the patentee did not describe nor invent, a regulation by or through a voltage coil; he has such coil, and it is useful in his system for the designed purpose—i. e., the disconnection of the generator at the appointed time, and that time was when the battery was substantially charged; further he wished to do this because he desired the prohibition of *any* current through the charged cells. It will not do for plaintiff's expert to say that Thompson did not mean "any current"; neither witness nor court can declare that a man did not mean (and is not bound by) what he said in so solemn a document as a patent specification.

The result is that when plaintiff asserts that the operation of coil

*36* is to supersede the current coil and assume control of the operation of the regulator (i. e., resistance pile), when it is necessary to protect the battery from overcharge, the statement is only true in the sense that plaintiff can take and has taken (in its commercial installation) the familiar electrical appliances enumerated in the specification, and so rearranged them as to regulate by a voltage coil; but the voltage coil of the patent as described, only regulates in the sense of stopping; that was what the patentee wanted, and he evidently wanted it because he devised an apparatus for preventing *any* current passing through charged cells.

The record is full of lectures by the experts on the meanings found by them in the specification language; a proposition probably as crucial as any (in arriving at comprehension of plaintiff's contention) is one of Mr. Hammer's (expert for plaintiff). He was asked whether the patent disclosed regulation by core *36*, or a system in which that coil acted to disconnect the generator and do no regulating; and he answered "it does both, * * * it may do either, if properly adjusted and prepared for that purpose." This is probably quite true, in the sense that a voltage coil will perform either function; but the question before us is, what will the voltage coil of Thompson do, "substantially as described"? The quoted words being implied in every claim. The answer is that it disconnects and does not regulate, and there is nothing in the patent to show that Thompson wished it to regulate, and much to prove that he did not. He said he wanted a "normally ineffective voltage pile," and the only work suggested for it is to exert a "powerful effect" on the resistance, to the end that an "absolute prohibition of *any* current" through the charged cells may result.

[3] The system of the patent, thus interpreted, is comprehensible, and so far as we can learn novel; to go further is to rewrite the specification. The defendant's system is one of admitted regulation by the action of current and voltage coils, so adjusted for amperage and voltage as to enable the core of each coil to act on one end of the resistance pile. The voltage coil is connected across the generator, and not (as in the patent) across the battery circuit. No more detailed description of this device need be given, as its construction and operation are not in dispute.

The defendant's device, compared with that revealed by the patent does not infringe claim 4, because it is a wholly different scheme or system; but more specifically it possesses no "voltage coil connected across the charging circuit" functioning or capable of acting in the only way Thompson disclosed his voltage coil as functioning, and the only way he thought of using this piece of old apparatus, viz. by adding the pull of the voltage coil to whatever strength the current coil might exert, whereas the defendant's voltage coil itself regulates the generator output, whenever it is active, and then it alone pulls on the resistance, wholly superseding the current coil. This the patented system could not be arranged to do, without a redistribution of parts not suggested by the patent. Claim 13 is not infringed, because defendant's structure has no means "adapted upon the voltage of the

battery attaining a certain value, to render the voltage coil effective in controlling the generator current," viz. the system of relays by which coil 36 is put into the battery circuit. Nor can any equivalent for this element be found in defendant's apparatus. It was said by Mr. Hammer that defendant had no relay, but did have means for rendering the voltage coil effective. This is true, but they are not plaintiff's means, and are not asserted to be, except by so reading the patent that any means productive of regulation by voltage, infringe. We have already indicated our opinion that this patent reveals no intent to regulate by voltage, except as stoppage is regulation; but, even on plaintiff's reading, *all* means of control by voltage cannot be covered. If claim 12 be more than an aggregation, the patented combination is not infringed for the same reasons hereinabove stated as applicable to claim 13.

The remaining claims in suit (9, 10, and 11) cover combinations, whereof the element not appearing in other claims is, as phrased in claim 9 "means adapted automatically to complete a shunt about (the current) coil, upon the voltage of (the) generator falling below that of (the) battery." As was stated of record below, "shunts are the A B C's of the electric system," and plaintiff relies, not on the fact that the patentee shunts the current coil, but that the combination of apparatus described coacts to produce some new result. Reference to the specification shows that the object of this short circuiting is to prevent the current coil having any effect on the dynamo, when the generator is speeded up from rest, which would be the case if contacts *52* and *53* were not closed when the main switch is open, thus short-circuiting or shunting the current coil out of the main circuit.

But if this application of electrical usage has been made before for substantially the same purpose, it cannot be used to vivify and validate a combination claim, which, with this shunting omitted, would confessedly be worthless. The patents to Bliss, 799,516 and 799,520, plainly reveal shunting contacts used for the purpose in question, and it was admitted by plaintiff's witness that if Bliss' system (designed for a plurality of cars) could be used on one car, it showed the very thing used by defendant, and used for the same purpose. No satisfactory reason is given for the assertion that the shunting contacts of Bliss depended for utility on a plurality of cars. It was admitted that the "mechanism was there," but was not "very useful."

Jepson, 981,198, shows and describes shunting contacts, which clearly do cut out the current coil when the generator is picking up. It is contended that, because the styles of contact vary from those disclosed in the patent before us, no limitation is imposed by the reference. But the question is whether the defendant's apparatus does or does not contain a short-circuiting or shunting device, similar to and serving the same purpose as, that disclosed by the prior art patents. We feel assured that it does, and that therefore such apparatus cannot infringe. So far as Thompson's rights go, any one can do what Bliss and Jepson did; whether the combination of the patent, in the exact form disclosed, is or is not valid, need not be decided.

The sum of our decision is that, reading the patent according to its

plain words, and not admitting the glosses and amendments volunteered by plaintiff's experts, no infringement is shown; therefore the decree below is reversed, and the cause remanded, with directions to dismiss the bill, with costs in both courts.

COXE, Circuit Judge (dissenting). This action was brought upon claims 4, 9, 10, 11, 12 and 13 of the Thompson patent, No. 1,070,080. It was tried by Judge Hazel who heard the testimony of most of the important witnesses in open court and, after giving the testimony careful consideration, he concluded that the claims above enumerated were valid and infringed. Subsequently a motion for a rehearing was made and the cause was reargued before Judge Hazel who again considered the issues with care and reached the same conclusions, filing an amended opinion restating his views.

The impression which I obtained at the argument, and which has been strengthened by an examination of the evidence and of Judge Hazel's opinions, is that Thompson made an unquestionably meritorious advance over the prior art. His was not a broad generic invention but constituted a highly useful advance in an important branch of industry. Judge Hazel took unusual care in the examination of the testimony and exhibits and, being convinced of the great utility of the invention, has overruled the defenses, most of them being technical in character. It seems to me that this meritorious patent can be defeated only by taking a circumscribed view of the invention and an erroneous view of the prior art. Thompson unquestionably made an advance in the art of electric car lighting. His patent can be defeated only by limiting it to the precise construction shown. Why should it be so limited? It should be so construed as to give him the fruits of the improvement he has made.

The decision of the District Court, after an usually careful consideration of the prior art, has given him this and nothing more. I think it unnecessary to go further into details. To do so would simply involve a restatement of the propositions discussed and decided in the opinions below.

For these reasons I feel constrained to dissent.

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REED v. CROPP CONCRETE MACHINERY CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1916. Rehearing Denied January 2, 1917.)

No. 2292.

1. PATENTS ⇐112(4)—PRIORITY OF INVENTION—DECISION OF PATENT OFFICE.
A finding by the Patent Office in interference proceedings of priority of invention in favor of one applicant, and the issuance of a patent to him, creates a strong presumption that he was the first inventor as against the other parties to the proceeding, which can be overcome only by the most convincing and satisfactory evidence.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 165.]

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

2. PATENTS ⟸106(2)—JUDGMENT IN INTERFERENCE PROCEEDINGS—SCOPE—DISCLAIMER.

Under rules of practice of the Patent Office No. 107, which provides that any party to an interference may file a disclaimer of the invention of "the particular matter in issue," in which case judgment shall be rendered against him, such a disclaimer only extends to the particular claim or claims as to which the interference has been declared, and the judgment following does not affect the question of invention as to other claims, although they may contain other interfering matter.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 147.]

3. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—CONCRETE MIXER.

The Reed patent, No. 981,111, for a concrete mixer, claims 1, 2, and 11, *held* valid and infringed, claims 7, 12, 13, 17, 18, 19, 20, and 21 *held* not infringed by the patentee in the Cropp patent, No. 947,196, on the ground that whatever of patentable novelty is therein shown is covered by the prior Cropp patent.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Arthur L. Sanborn, Judge.

Suit in equity by Matthew Howard Reed against the Cropp Concrete Machinery Company and Andrew J. Cropp. Decree for defendants, and complainant appeals. Reversed.

For opinion below, see 218 Fed. 643.

Appeal from decree dismissing for want of equity bill to restrain alleged infringement of certain claims of United States patent No. 981,111 to Reed. Appellant, Reed, and his company, the Standard Scale & Supply Company, were in the business of making and selling scales and gas engines, but not concrete mixers. Appellee Cropp was engaged in devising and constructing concrete mixing machines, and had used some of the Reed engines, which were adapted to furnish power for such machines. Late in 1907 Reed met Cropp at the Chicago Cement Show, and was evidently impressed with Cropp's ideas of concrete machinery, although Cropp then had no patents. Shortly afterwards they arranged an agreement for Cropp to make his mixers and sell them through Reed's company. Cropp began building machines, and under date of March 2, 1908, entered into a written contract with the company whereby it was to have the sole and exclusive right in the United States and elsewhere to sell "the concrete mixing machines devised and manufactured by or under the supervision of second party" (Cropp) for one year, and as much longer as they could agree; Cropp to receive a stipulated price for each machine. The Reed engine was to be used, and Cropp was to protect the company against actions for infringement.

The following May 7th they entered into another contract, superseding the first. By it the company on certain conditions assumed certain of Cropp's financial obligations, and Cropp conveyed to the company mixing machines and parts thereof as enumerated, and thereafter the company was to manufacture and sell the "Cropp mixing machine" and to have "the sole and exclusive right for the manufacture and sale of said concrete mixing machines in the United States" and all foreign countries, and the company "will provide for the manufacture of the Cropp mixers, furnishing all necessary material and labor," and Cropp agreed to superintend the manufacture and construction of the mixers and assist in their sale, and was to receive from the company $50 for each mixer sold up to 50, and $40 for each one in excess of 50. Cropp agreed as before to protect the company against actions for infringement in the use of his (Cropp's) "machine" or "devices." The term of the contract was until January 1, 1909, and as much longer as the parties could agree. The evidence is indefinite and uncertain as to what machines were constructed during the existence of the contractual relation.

But it seems that at the time the second contract was made at least one machine had been completed, which embodied substantially the claims which are the subject-matter of this litigation, except claims 1, 2, and 11.

August 8, 1908, Cropp filed in the Patent Office his application for improvements in concrete mixing machines. His patent, No. 947,196, was granted January 18, 1910; its general scope appears from his claims 9 and 15, which are typical of those that bear on this controversy, and read as follows:

"9. The rotary mixing receptacle having at its receiving end a charging device consisting of a centrally apertured disk secured to the receptacle, and a series of blades extending at their outer ends from the disk inwardly and diagonally with respect to the receptacle for a short distance from the disk for the purpose of directing the material into the receptacle, said blades having their portions adjacent to the disk of substantially the same width as said disk from the opening therein to its periphery and their inner portions widened."

"15. In a mixer, in combination, a revoluble drum having an apertured disk at its receiving end, means within the drum to agitate and mix the material, a continuous series of circularly arranged charging pockets located at one end of the drum within its cylindrical wall and closed at their outer ends and having their outer portions of substantially the same width as the said disk from the opening therein to its periphery and their inner portions widened, and means to introduce material to the inlets of the pockets."

On September 28, 1908, Reed filed his application for the patent here in issue. In both applications, as well as in some of the claims of both the patents as granted, there is shown an inner head whose periphery contacts with that of the drum and which has openings near the outer edge for the materials to pass through. Each likewise shows claims for improvements in the discharging end of the drum, not here in issue. Various claims of Reed's patent describe a series of charging blades extending diagonally inwardly from the flange of the drum at the receiving end, the blades overlapping at their inner ends. It appears that August 14, 1908, between the filing dates of Cropp and Reed, Sanborn filed application for a patent for improvements on such mixers, having, like the other two, for one of its objects the introducing of material into the drum at one end near its periphery "enabling a low charging chute to be employed" and describing a series of diagonally and inwardly projecting blades and pockets not far different from the other two.

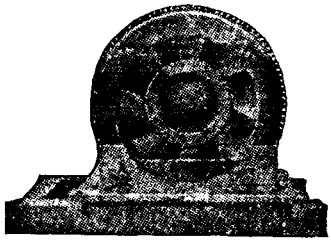
On suggestion from the Patent Office, Cropp and Reed incorporated in their applications Sanborn's claim 5, and thereupon interference was declared thereon; such claim being as follows: "In a mixer, in combination, a revoluble drum, means therein to agitate and mix the material, a continuous series of circularly arranged charging pockets located at one end of the drum within its cylindrical wall and closed at their outer ends, the open inlets of the pockets being turned toward the axis of the drum, a circular head having its periphery contacting with the tops of the pocket walls and set in from the adjacent end of the drum, and means to introduce material to the inlets of the pockets outside of said head."

Prior to the date fixed for filing preliminary statement, Cropp filed a disclaimer as to said claim, declaring he was not the first inventor thereof, and amended his application accordingly, whereupon his patent was granted. Thereafter Reed, by his attorney, also filed disclaimer of the claim, wherein it is recited that Sanborn had assigned to Reed his entire interest in the Sanborn application, and that Reed "hereby disclaims the subject-matter covered by said interfering claim, and requests said interference be dissolved and the claim allowed to Sanborn." The Patent Office dismissed Reed's disclaimer on the ground, among others, that it was not executed by Reed, but by his attorney. Thereupon there was filed in the Patent Office a concession of priority of the invention involved by Sanborn to Reed, which concession being found by the Patent Office to be in accordance with the rules, the claim in interference was awarded to Reed, and the patent in issue to Reed was issued January 10, 1911, wherein the claim in interference became the first claim of his patent. December 31, 1912, patent to Sanborn was

issued. The claims of the Reed and Cropp patents, barring Reed's claims 1 and 2 subsequently added, are substantially like those of their applications as of the time when Sanborn's claim 5 was suggested to them.

The relations between Cropp and Reed terminated at expiration of the contract. Cropp organized appellee Cropp Machinery Company, which proceeded to make Cropp mixers. The litigation between Reed and Cropp, and their respective companies, soon began, and has since been in active operation, although it does not appear that any considerable number of mixers have been made by either party. This action is based on an alleged infringement by Cropp and his company in making and selling two mixers to one Wahl, which it is claimed embody in their constructions claims 1, 2, 7, 11, 12, 13, 17, 18, 19, 20, and 21 of Reed's patent. The commercial Cropp machine, which also fairly shows the construction of the Wahl machines, as to which the infringement is charged, is shown by Fig. 1.

FIG. 1.



Charles M. Clarke, of Pittsburgh, Pa., and Otto R. Barnett, of Chicago, Ill., for appellant.

Glenn S. Noble, of Chicago, Ill., for appellees.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). It is not seriously contended that claim 1 of the patent does not read upon the Wahl structure. The distinctive feature of this claim, viz. "a circular head having its periphery contacting with the tops of the pocket walls and set in from the adjacent end of the drum," is present in the disk or ring *D*. While the precise function of this inner contacting ring is not clearly shown by the evidence, it is apparent that it may serve the purpose of stiffening the blades and better holding them in relative position, as well as helping to form a sort of wall to keep the materials from flowing back into the charging end. In the many cuts of complainants' commercial machine shown in the catalogues in evidence, this inner ring or head is nowhere shown: but this would not warrant the use of it by another in violation of a valid patent therefor.

[1] The question of priority involved in the interference having been thus settled in Reed's favor, and patent including the claim in interference awarded to him, in this suit for infringement thereof against Cropp and his privies, there arises a strong presumption in favor of Reed's priority, which can be overcome only by evidence of a most convincing and satisfactory nature. Smart v. Wright (8th C. C. A.) 227 Fed. 84, 141 C. C. A. 632; Computing Scale Co. v. Standard Computing Scale Co. (6th C. C. A.) 195 Fed. 508, 515, 115 C. C. A. 418; Hillard v. Remington Typewriter Co. (2d C. C. A.) 186 Fed. 334, 108 C. C. A. 534; Novelty Glass Co. v. Brookfield (6th C. C. A.) 170 Fed. 946, 955, 95 C. C. A. 516; Stonemetz, etc., Co. v. Brown, etc., Co. (C. C.) 57 Fed. 601, 604; Kirk v. Du Bois (C. C.) 33 Fed. 252; Celluloid Mfg. Co. v. Chrolithian Collar & Cuff Co. (C.

C.) 24 Fed. 275; Wire Book Sewing Machine Co. v. Stevenson (C. C.) 11 Fed. 155.

But Cropp does not undertake to impeach his disclaimer by maintaining that he was the first inventor of the combination having this inner contacting head. On the contrary, he insists, not only that he did not invent it, but also that Reed was not the first inventor. It is claimed that the filing by Reed of a disclaimer in favor of Sanborn of the claim in interference of itself sufficiently shows that Reed was not the inventor. The record discloses a disclaimer by Reed of the claim in interference, which disclaimer the Patent Office dismissed as being irregular. Thereafter Sanborn filed a concession of priority of invention to Reed, as indeed the preliminary statements by Reed and Sanborn in the interference proceedings showed the invention to have been first made by Reed. These things are proper to be considered in evidence with all the other evidence on the subject of whether Reed was in fact the first inventor. If Sanborn was the original inventor of this feature, then Reed was not, and he could not in such case prevail upon his claim 1. These matters were before the Patent Office, and the patent was granted to Reed. We cannot hold that by merely showing the disclaimer of Reed, which was filed and subsequently dismissed by the Patent Office, Cropp, the alleged infringer, has thereby sustained his burden of establishing that Reed was not the first inventor; and so claim 1 must stand, unless otherwise overcome.

Patents to Ransome, No. 416,950, and McKelvey, No. 663,999, are cited in the prior art as to such use of the inner head or ring. We do not find disclosure in either of these patents responding to the elements of the combination of claim 1 in respect to an inner circular head having its periphery contacting with the tops of circularly arranged charging pockets, located as described in the claim. The record disclosing nothing further which would tend to show that Reed was not the first inventor of the combination with such inner contacting ring or head, appellees have failed to overcome the presumption that he was.

[2] Respecting claims 2, 7, 11, 12, 13, 17, 18, 19, 20, and 21, it is earnestly maintained that their determination must follow that of claim 1 for two principal reasons—first, that they describe the same invention or device as claim 1, and that the award to Reed of the interference necessarily carried with it these other claims; and second, that even if they described an invention different from that of claim 1, yet since they are similar to some of Cropp's claims these might have been brought into the interference proceeding, and that the determination of the interference not only adjudicated the claim specifically there in issue, but all other claims common to any two or more of the applications, though not within the scope of the interference claim, which might by appropriate proceedings have been brought into the interference.

As to the first of these contentions: Reed's claim 1 does not in our judgment describe a structure like his other claims (except 2 and 11), which are alleged to be infringed, nor that of Cropp's typical claims 9 and 15. Said claim 1 describes the combination of a revoluble drum, means therein to mix the material, "a continuous series of circularly

arranged pockets located at one end of the drum within its cylindrical wall, enclosed at their outer ends, the open inlets of the pockets being turned toward the axis of the drum," and the circular inner head with its periphery contacting with the tops of the pocket walls. The circular arrangement of the pockets means that they extend about the inner surface of the drum. There is no requirement that they be overlapping or of any particular size or shape, save only that they be closed at the outer end, and open on the side toward the axis of the drum, which means nothing more than their tops shall be open. But the element of a central partition contacting with the tops of the blades is wanting in Cropp's as well as in Reed's other claims, except 2 and 11. We cannot hold that Cropp's diagonal blades, manifestly spaced apart to form pockets, and sufficiently far apart to permit material being forwarded between them, is the equivalent of the inner head of Reed's claim 1. The fact that a drum with a series of diagonal charging blades may be revolved at a speed which will forward the material to be mixed, and while revolving prevent the mixed material from flowing back, is a result which might be accomplished with a single diagonal blade if the drum were revolved fast enough. To the extent that the inner contacting head may have utility in holding the material from overflowing the blades and running back, that element is found in the claim in interference, which is Reed's claim 1, and also in Reed's claims 2 and 11, but is not found in Reed's other claims in suit, nor in Cropp's claims 9 and 15.

It does not appear which of the Reed and Cropp original claims were deemed in the Patent Office to show the equivalent of Sanborn's claim 5, but probably it was those claims in each which described an inner head or partition, whether, as in Sanborn's claim 5, having its periphery contacting with the tops of the pocket walls, or, as in certain of the Reed and Cropp claims, with the periphery contacting with that of the drum. Claim 2 is like claim 1, save only that it shows the inner head as "centrally apertured." Claim 11 describes the blades, and an "apertured disk set in from the front end," and we find in both these claims the equivalent, variously expressed, of invention in claim 1, and therefore included in Cropp's disclaimer, and in the award to Reed of the issue in interference. But, as above indicated, we find that the others of the above enumerated claims of Reed, describing as they do an invention different from that of claim 1, were not so included or determined.

The second contention is predicated upon the general rule that:

> "When the second suit is upon the same cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented in the first action."

Rule 109 of the Rules of Practice of the Patent Office is cited to show how other claims common to any of the applicants might be brought into the interference, and decisions of Commissioners of Patents and of the Court of Appeals of the District of Columbia are cited to show that under certain circumstances a second interference will

not be allowed in the Patent Office on claims which might have been included in the first. The rule provides that:

"An applicant involved in an interference may, at any time within thirty days after the preliminary statements (referred to in rule 110) of the parties have been received and approved, on motion duly made as provided by rule 153, file an amendment to his application containing any claims which in his opinion should be made the basis of interference between himself and any of the other parties. Such motion must be accompanied by the proposed amendment, and when in proper form will be transmitted by the examiner of interferences to the primary examiner for his determination," etc.

If it be assumed that the rule has application to claims existing at the time the interference is declared, and is not limited, as its wording might indicate, to claims afterwards first made by amendment, it would seem that neither the rule nor rulings apparently made under it would have application to a case such as this, where disclaimer was filed before time fixed for preliminary statements, in view of rule 107, which is as follows:

"An applicant involved in an interference may, with the written consent of the assignee, when there has been an assignment, before the date fixed for the filing of his preliminary statement (see rule 110), in order to avoid the continuance of the interference, disclaim under his own signature, attested by two witnesses, the invention of the particular matter in issue, and upon such disclaimer and the cancellation of any claims involving such interfering matter judgment shall be rendered against him, and a copy of the disclaimer shall be embodied in and form part of his specification (see rule 182)."

This rule seems to contemplate that the disclaimer shall extend only to the particular claim or claims as to which the interference is declared. To avail of the rule the applicant must disclaim invention "of the particular matter in issue," and must cancel "any claims involving such interfering matter." By implication other claims, involving other interfering matter, remain unaffected, as though no interference had been declared.

Finding, as we do, that Reed's claim 1 does not include the invention shown by his other claims (except 2 and 11), of which infringement is charged, and concluding that these other claims, common as they were with claims of Cropp at the time the interference was declared, are not affected by the determination of the claim in interference, we must look to the evidence which the record discloses to determine whether or not the District Court properly decided the question of priority as between Reed and Cropp, respecting the invention shown in these other claims of Reed, as well as in the claims of Cropp, and which are embodied in the Wahl machines, minus the inner contacting head or ring thereof.

[3] Cropp's application was filed August 8, 1908, and Reed's September 28, 1908. Cropp's patent was granted January 18, 1910, and Reed's January 10, 1911. Each has undertaken to carry back his date of invention, but the evidence on that subject, aside from that afforded by the record in the Patent Office, is too indefinite, inconclusive, and unreliable to warrant the finding that either has shown a date of invention prior to that of the other, and the District Court, which saw and

heard the evidence, made fair estimate of the probative value of their testimony on that subject in saying in its opinion:

"There is nothing worthy of attention in the testimony tending to show any date of the inventions earlier than the respective applications."

It might be said that the situation of the parties as disclosed by the record points more strongly to Cropp as the inventor. He was concerned with the devising and building of concrete mixing machinery, and evidently satisfied Reed that he had ingenuity and ability along that line, else Reed would not have entered into the contract for financing Cropp. Until meeting Cropp, Reed had no experience with concrete machinery, save only that his company sold engines suitable to furnish power for operating mixers. Under the first contract Reed's company was to handle the mixers built and devised by Cropp, and under the second Cropp was to superintend construction, and the company was to manufacture and sell "Cropp mixers." The contracts were drawn by the company, and provided for its exclusive right, for practically the entire world, to manufacture and sell "Cropp's mixers" for the limited period of the contract, and Cropp agreed to protect it against actions for infringement in handling Cropp's "machine" or "devices." In making Cropp's "mixers," "machines," and "devices" the subject-matter of the contract, and conferring on the company exclusive rights in regard to them, the parties must have had in view something definite and distinctive, existent or prospective, as to which an exclusive grant by Cropp might mean something.

To show that Reed had mechanical and inventive genius, a number of earlier patents to him were shown in evidence, all of them in regard to improvements in weighing devices. It does not appear, however, that Cropp had any prior experience in the matter of securing patents, and such was the situation of the parties that, had Reed been so disposed, his far larger experience in such matters would have been helpful in appropriating ideas and developments of Cropp manifested before or during the existence of the contract.

At any rate, a review of the record does not satisfy the inquiring mind that the invention involved in these other claims is that of Reed rather than of Cropp, whose application was first filed and patent first granted; and compelled as we are to look to the filing dates of the respective applications as the most reliable evidence showing priority of invention, we find priority in Cropp as to any invention shown in claims 7, 12, 13, 17, 18, 19, 20, and 21 of the patent in suit, so far as they are readable on the Wahl mixers.

We conclude that both appellees, in making and selling the Wahl mixers, incorporating the inner head or ring *D*, contacting with the tops of the charging blades or pockets, infringed claims 1, 2, and 11 of the Reed patent, and that as to Reed's claims 7, 12, 13, 17, 18, 19, 20, and 21, in so far as they are readable on the Wahl mixers, as between Cropp and Reed, Cropp is the first inventor of any patentable novelty therein shown.

The decree of the District Court is reversed, and the cause remanded, with direction to the District Court to enter a decree in accordance with the views herein expressed.

## OUTLOOK ENVELOPE CO. et al. v. GENERAL PAPER GOODS MFG. CO. et al.

(Circuit Court of Appeals, Second Circuit. January 12, 1917.)

No. 42.

1. PATENTS ⟸167(1)—CONSTRUCTION—SPECIFICATION AND CLAIMS CONSTRUED TOGETHER.

It is a general rule of construction of patents that no patent covers all the inventive conceptions of the patentee existing at the time when he procured it, but only such device, with reasonable equivalents of elements, as he described and claimed, and what the claimed invention is must be found in the specification, with such light as the drawings may throw upon it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243.]

2. PATENTS ⟸328—INFRINGEMENT—WINDOW ENVELOPE MACHINE.

The Slater patent, No. 893,105, for an envelope machine, which is essentially a patch-applying mechanism for making window envelopes, and which can be used in connection with well-known machines of the prior art, *held* not infringed.

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

Suit in equity by the Outlook Envelope Company and the United States Envelope Company against the General Paper Goods Manufacturing Company and others. Decree for complainants, and defendants appeal. Reversed.

Appeal from decree in equity in favor of plaintiffs, entered in the District Court, the suit being on claims 5, 14, and 15 of patent No. 893,105 (to Slater), for an "envelope machine." Claims 5 and 15 of this patent were before this court in Outlook Envelope Co. v. Samuel Cupples Envelope Co., 223 Fed. 327, 138 C. C. A. 589 (which will be hereinafter called the Cupples Case). Claims 5 and 15 are there set forth (223 Fed. 332, 138 C. C. A. 589), Claim 14 is as follows: "In an envelope machine, the combination of the following instrumentalities, means for applying gum around an opening in an envelope blank, means for feeding the gummed blank to a pressing mechanism, means for applying a patch to the envelope blank to cover the opening, a pressing mechanism for securely affixing said patch to said blank, and means for folding the flap of the envelope."

Benjamin M. Kaye, of New York City (Livingston Gifford and Joseph L. Levy, both of New York City, of counsel), for appellants.

Frederick P. Fish, Louis W. Southgate, and O. Ellery Edwards, Jr., all of New York City, for appellees.

Before COXE, WARD, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. The nature of Slater's invention was sufficiently stated in the Cupples Case. We now assume that the patent is of a primary nature, and that the machine embodying it has proved useful and profitable in the art of manufacturing with cheapness, rapidity, and in great numbers what are called "window envelopes." The single question in this litigation is whether this defendant's device is an infringement.

It is worthy of note that, while the patent is called one for an "envelope machine," the valuable invention revealed does not purport to cover a complete apparatus for manufacturing those articles, but a contrivance for rapidly and mechanically providing the "window" of an envelope blank with the transparent patch through which the address is to be read. Before Slater, envelope machines of differing types existed in great perfection; and the patentee recognized this by stating that his "patch-applying mechanism" was shown and described in connection with a pre-existing and well-known style of machine. But he further said:

"I do not confine myself to this particular type of machine; any type of [machine], preferably one in which a *dwell* can be given to the envelope blank between the gumming and folding mechanism, is adapted to the application of my patch-applying mechanism."

Thus, however meritorious the patent, Slater himself defined his inventive thought, as limited to a "patch-applying mechanism," whereof he showed and described one specimen, while asserting that it could be used and was useful (a) "in any type of envelope machine," though (b) "preferably one in which a *dwell* can be given to the envelope blank between gumming and folding mechanisms."

In view of our opinion in the Cupples Case, it is enough now to say that the crucial characteristic of the thing described and illustrated by Slater is that it presents to the creasing and folding mechanism of an old envelope machine a blank with the patch already gummed to and across the "window" opening; that this is done by interposing between slightly modified gumming mechanism and an old folding mechanism a new patch-applying mechanism, and that such interposition is accomplished by utilizing for the purpose of patch application a "dwell" or momentary stoppage of the blank on its way from gumming to folding mechanism; which *"dwell,"* or pause, or stoppage, is a calculated hesitation in the necessary travel of the blank, if not an existing characteristic of the machine to which Slater added his ingenious device.

Before considering infringement, claim 14 may be studied; since that form of words is in suit for the first time. The gentleman who drafted Slater's patent acted as his expert witness herein, and admitted that every combination element in claim 14 would be found in any envelope machine capable of making an envelope and applying a patch in the course of the making, unless (possibly) a machine were made applying the gum to the patch instead of to the blank—a difference assuredly immaterial if the claim is to be taken literally. This statement we regard as an admission of what is obvious from the face of the claim, viz.: It is so drawn that, unless read in the light of the disclosures of the specification, it will cover every means now conceivable of producing the result achieved by Slater. Rarely does any claim more plainly require application of the thought stated in Mitchell v. Tilghman, 19 Wall. 391, 22 L. Ed. 125, and Hobbs v. Beach, 180 U. S. at page 400, 21 Sup. Ct. 409, 45 L. Ed. 586, that the words "as described," or "substantially as described," or words of like import which refer back to the descriptive parts of the specification must be

implied, if not expressed, in any claim; for otherwise "the patent in many cases would be invalid as covering a mere function, principle or result, which is obviously forbidden by the patent law, as it would close the door to all subsequent improvements." It follows from this that claim 14 adds nothing to the strength of the plaintiff's case, which substantially rests upon the claims before us in the Cupples Case. Whether defendant infringes claims 5 and 15, depends upon the discovery of equivalence. Plaintiff urges that under Morley v. Lancaster, 129 U. S. 286, 9 Sup. Ct. 299, 32 L. Ed. 715, it must prevail; while defendant holds Westinghouse v. Boyden, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136, to be decisive in its favor. We find no such contradiction in legal statement as this contention implies.

Infringement is always a question of fact, the inquiry is whether certain things which can be usually seen and handled are to be held within or without the protected inventive idea of a patentee. Courts and juries, like other men, do not always think along identical lines; the opinions of different men differ widely as to the meaning and content of things that all men can see and handle. But the rule of law remains the same; the results deduced from the facts differ not with the law, but with the opinions entertained as to the probative value of visible and tangible phenomena, which are never alike in two litigations. This is inherent in the nature of things.

In the Westinghouse Case the rule was stated that where the invention is functional, and the defendant's device differs from that of the patentee only in form or in a rearrangement of the same elements of a combination, the defendant is an infringer. But, even if the patent be a pioneer, the "alleged infringer must have done something more than have reached the same result. He must have reached it by substantially the same or similar means, or the rule that a function of a machine cannot be patented is of no practical value." In the Morley Case it was said that "it is open to a subsequent inventor to accomplish the same result if he can by substantially different means; though where the invention is of a primary character subsequent machines which employ substantially the same means to accomplish the same results are infringements." It is not true that these two oft-cited decisions differ as to the law. Both declare a rule for orderly thought, viz. that to justify a decree for infringement of any patent, a *substantial* similarity must be found—not in function or result, but in the means by which the function is accomplished or the result reached What can never be regulated by law, prescribed by statute, or established by judicial decision, is to compel all men to ascribe the same importance to the same piece of evidence.

[1] The general rule of construction, applicable to patents small and great, has often been declared by this court. "No patent covers all the inventive conceptions of the patentee existing at the time when he procured it, but only such device (with reasonable equivalents of elements) as he described *and* claimed." Loraine, etc., Co. v. General Electric Co., 202 Fed. 215, 120 C. C. A. 615. And a patentee "obtains a monopoly only of what he discloses *and* claims. * * * It is in the specification (with such light as the drawings may throw upon it) that we are to find what the alleged invention is." Hall-Borchert,

etc., Co. v. Ellanam, etc., Co., 213 Fed. 341, 130 C. C. A. 193. The generous judgment, and liberality in equivalents which (in respect of pioneer patents) are incumbent on all triers of the facts, can never go beyond the limits imposed by this rule. A good illustration of the extent to which generosity may go, is found in Treibacher, etc., Co. v. Roessler, etc., Co., 219 Fed. 210, 135 C. C. A. 108, where it was pointed out that the "doctrine of equivalents does not confine the patentee to equivalents which he has expressly referred to," and under a claim which mentioned only an alloy of cerium and iron, the substitution of magnesium for iron was held not to avoid infringement. Consolidated, etc., Co. v. Metropolitan, etc., Co., 60 Fed. 93, 8 C. C. A. 485, exemplifies another canon of construction. There one element of a combination was a "mechanical-fit valve," but the drawings showed only such valve with a knife-edge bearing; yet no restriction upon the claim was inferred from this fact, because there was "no suggestion that anything depends upon a bearing of that shape." Conversely, a claim must be limited by the revelations of the specification and drawing, when something does "depend upon" them; i. e., when the form and mode described are as matter of fact, the limitations of inventive thought. In such case every claim must be confined by the specification statements, because no patent can go beyond the limits of the thought that vivifies it, and justifies the monopoly created thereby. This investigation is always one of fact.

[2] In the present case we find that defendant produces window envelopes exactly like the plaintiffs', and with even greater speed; but he does not interpose between the gumming and folding mechanisms of an envelope machine a patch-applying contrivance, but modifies the folding (and creasing) apparatus of a previously known machine, so that as a part of the act of folding and during its performance the patch is applied. Defendant, instead of presenting to the folding mechanism a patched blank, introduces into that mechanism one gummed, but unpatched, and applies the patch by means of an air blast operating through the folding plunger; and he does it without a "dwell." We are of opinion that the so-called "dwell" of defendant's machine is no more than the instant of time necessary to effect a change in the direction of the plunger movement. The essential difference between such a stoppage and starting in reverse, and the "dwell" of the patent in suit, is that it is not a part, nor possible part, of defendant's method or apparatus, to utilize a pause in the progress of the blank, for the purpose of fastening the patch.

If the device revealed by the patent for feeding and applying window patches to a gummed surface is compared with that used by defendant, there is no similarity. Indeed, the likeness asserted by plaintiff comes down to this—that defendant has a sufficient pause in his plunger descent, to enable the envelope blank or the patch, or both, to register, and that pressure is then applied to affix the patch to the gum. Pressure cannot be patented, nor can any claim cover all possible pressures as an element in a combination, unless pressure per se is functional in the invention, something obviously untrue in this instance.

Plaintiff's pressure is of a wad of patches actuated by a follower, causing the lowest patch to stick to the gum; defendant's is that of an air blast operating upon a single patch inserted in the recessed face of the plunger, before the presentation of the blank, and held there by suction until the reversal of the air blows it against the gum. It is urged that this insertion of the single patch at the time indicated is the utilization of a "dwell." The argument fails, because whatever stoppage or hesitation there is in the operation of defendant's plunger, probably would, and certainly could exist whether the machine was making window envelopes or the ordinary kind. Because an ingenious device is suggested for creating or utilizing a delay in one species of machinery furnishes no *reason* for finding equivalence in the hesitations of other machines; and we have already stated our finding of fact as to defendant's "dwell," if he has one. The truth is that defendant has developed a method of making window envelopes with machines quite different from those improved by plaintiff; and both machines were known before either improvement was conceived.

When the patentee's other assertion is tested, viz. that his mechanism can be used "in any type of envelope machinery," it is plain that in defendant's machine nothing that Slater has disclosed could be used. We express no opinion as to whether such *possible* utilization would advance plaintiff's cause. We conclude that claim 5 is not infringed, because the defendant has used no means "for feeding the blank from the gumming to the folding mechanism with an intervening dwell of the blank"; and claim 15 is not infringed, because defendant has no "mechanism interposed between the gumming mechanism and flap-folding mechanism for applying a patch to the blank."

We may add our agreement with the statement of one expert, who declared that a mechanism by which the patch is applied to the blank while it is in motion and during the folding operation was entirely novel. That describes defendant's device, which is quite as deserving of praise and profit as is Slater's meritorious invention.

Let decree appealed from be reversed, and the bill dismissed, with costs in both courts.

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WHITING-PATTERSON CO. v. OUTLOOK ENVELOPE CO. et al.

(Circuit Court of Appeals, Third Circuit. February 1, 1917.)

No. 2186.

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

Suit in equity by the Outlook Envelope Company and the United States Envelope Company against the Whiting-Patterson Company. From an order (236 Fed. 940) granting a preliminary injunction, defendant appeals. Reversed.

Hector T. Fenton and Frederick A. Blount, both of Philadelphia, Pa., for appellant.

J. Bonsall Taylor and E. Hayward Fairbanks, both of Philadelphia, Pa. (G. H. Kennedy, Jr., of Worcester, Mass., and Frederick P. Fish, of New York City, of counsel), for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. This is an appeal from an order of the court below granting a preliminary injunction, enjoining the Whiting-Patterson Company from making, using or selling a certain machine alleged to infringe claims 5, 14 and 15 of Patent No. 893,105 for an envelope machine, granted July 14, 1908, to W. D. Slater, assignor to the United States Envelope Company, the plaintiff. Since the decision below, the Circuit Court of Appeals of the Second Circuit has decided the case of Outlook Envelope Co. et al. v. General Paper Goods Mfg. Co. et al., 239 Fed. 877, — C. C. A. —, which involves the claims of said patent here involved.

In view of the further light thrown on this patent by such decision, of which, of course, the court below did not have the benefit, we have concluded to set aside the injunction granted below, and remand the case for further proceedings. We refrain from expressing any present view of the questions involved, feeling we will be in better position to do so after proofs taken and on final hearing and decree by the court below.

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## DRESNER v. DIAMOND.

(Circuit Court of Appeals, Seventh Circuit. December 7, 1916.)

No. 2349.

1. PATENTS ⟸243—INFRINGEMENT—COMBINATION OF OLD ELEMENTS.
Infringement of a patent for a combination of old elements must be predicated on an appropriation of the same elements or their equivalents in the same combination.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 382–384.]

2. PATENTS ⟸328—INFRINGEMENT—SUIT CASE.
The Dresner patent, No. 958,860, for a suit case, *held* not infringed.

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

Suit in equity by Samuel Dresner against Nicholas Diamond. Decree for defendant, and complainant appeals. Affirmed.

Rudolph Wm. Lotz, of Chicago, Ill., for appellant.

Charles C. Bulkley, of Chicago, Ill., for appellee.

Before KOHLSAAT, MACK, and EVANS, Circuit Judges.

KOHLSAAT, Circuit Judge. Appellant filed his bill in the District Court to restrain infringement of his patent No. 958,860, for a suit case, granted to him on May 24, 1910. The District Court dismissed his bill for want of equity, and he has prosecuted this appeal.

The one claim of the patent reads as follows:

A suit case formed of two hinged parts, each of said parts comprising a single side member having integral top and end portions and a bottom flap, a single bottom member for both of said parts overlapping and secured to the bottom flaps, each of said side members being cut away and rounded at its corners and the ends of the top and side portions and bottom flap being overlapped and secured together, and corner pieces secured over the corners of said case, substantially as described.

This claim was presented in response to the action of the examiner in rejecting all four of the original claims, and was in terms limited to the

patentee's specific structure. The accompanying drawings of the patent illustrate in detail the parts described and referred to in said claim:

Fig. 7.

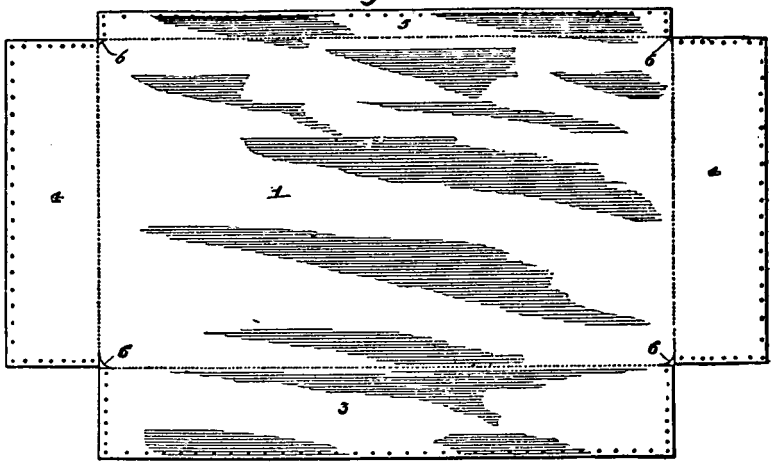



Fig. 7 shows one of the hinged counterparts of the suit case; numeral *1* thereof shows the side, *3*, *4*, and *5* the integral top, end, and bottom flap portions respectively. Fig. 3 shows the single bottom member, and Figs. 4 and 5 the reinforcing corner pieces. The single bottom member, Fig. 3, and two counterparts, like Fig. 7, constitute the three main parts of the suit case. The top and ends of the suit case are formed, as will be readily understood from Fig. 7, by bending the extensions *3* and *4* into proper position for that purpose. Bottom flap *5* is overlapped by the bottom member, Fig. 3, and the two are stitched together at the side edges of the bottom. A shoulder strap or corner piece, Fig. 4, covers each of the top corners of the suit case and unites the top and end portions thereof; and a corner piece, shown in Fig. 5, covers each of the lower corners and unites the end portions and bottom member of the suit case. The free edges of the top and end portions of the case are fastened to the usual metallic hinge frames so as to provide a convenient method of opening and closing the suit case, the ends of these frames being fastened to the respective ends of the bottom member. The material of this bottom, as well as of the other two counterparts of the case, con-

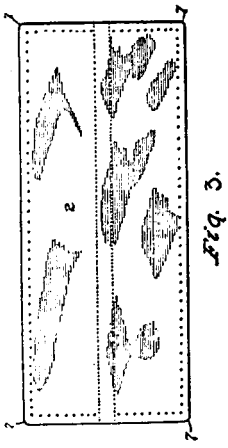



Fig. 3.

Fig. 5.

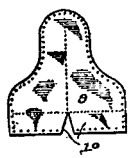
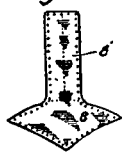



Fig. 4.



sists of stiff cardboard, one surface of which is covered by a thin veneer of leather, so as to give to the exterior of the suit case the proper finish. In appellant's commercial form of suit case, the bottom is made somewhat differently from that described in his patent. The bottom of the patent appears to be of a solid piece of uniform thickness. In the commercial form the inner cardboard material of the bottom is in three sections—one wide section on each side of the bottom next the side section, and one narrow section extending between the wide sections along the longitudinal center of the bottom, all joined by the one-piece leather covering in such a manner as to provide a hinge for the suit case parts.

Appellee's suit case, alleged to be an infringement of the patent, is constructed in two main parts. Instead of using a separate bottom piece, appellee forms his bottom, as well as his top, integrally with the side members; that is, an integral extension of each side piece forms a half of the bottom of the case. The outer leather coverings of these extensions are of a little greater width than the inner cardboard material, and overlap along the longitudinal center of the bottom thus formed. These overlapping portions are fastened together and to a narrow hinge member slightly exceeding the overlap in width and extending the length of the bottom along the longitudinal center thereof.

Appellant charges that appellee's device appropriates all of the elements of the patent. As was pointed out by the Patent Office in rejecting all of the claims originally presented by the patentee, in which rejection appellant concurred, it was not new to make top, end, and bottom members integral with the side members of a suit case, nor to provide a bottom flap for each side section and a single bottom member for both of said parts, overlapping and secured to the respective bottom flaps, nor cut-away and rounded corners for the overlapping of the ends and tops, nor metallic frames in a suit case formed of two hinged parts. All of these elements were disclosed in the prior art references, viz.: Patent to Frankel, No. 384,969, issued on June 26, 1888; Heller patent, No. 362,581, issued May 10, 1887; Armbruster, No. 371,405, dated October 11, 1887; Nusbaum et al., No. 561,808, of June 9, 1896; Tashjian, No. 785,188, March 21, 1905; Clark, No. 797,495, dated August 15, 1905; and patent to Godeke, No. 939,005, issued on November 2, 1909. Later patents are cited by appellee to the same effect. Patent No. 305,710, issued September 23, 1884, to J. R. Patton for a sheet metal box, and Smith patent, No. 634,507, dated October 10, 1899, for a paper box, and others, show rounded corners.

[1] The examiner held that all the elements in appellant's device were old in the art, and that his invention resided in his particular combination of old elements, most of which were covered by the four rejected claims. In such case, infringement, if any, must be predicated upon an appropriation of the same elements or their equivalents in the combination of the patent. Electric Railroad Signal Co. v. Hall Railway Signal Co., 114 U. S. 87, 5 Sup. Ct. 1069, 29 L. Ed. 96.

[2] In the patent in suit no provision is made in terms for a hinged portion. Manifestly there must be something equivalent to a hinge in an operative suit case. In his commercial device the patentee makes

a break in the cardboard of the one-piece bottom, as above stated, but not in the leather covering. Assuming that this commercial form is permissible under the patent, it is apparent that the appellee's device has a three-piece cardboard bottom covered by a two-piece leather veneer. If the leather covering constitutes the bottom, then the bottom of the patented device might consist of an unlimited number of cardboard sections. However that may be, the alleged infringing device does not respond to the language of the claim in suit, nor is the combination the same. Having accepted a patent limited to his specific device, the range of equivalents is necessarily narrow. He is limited to the one-piece bottom. This appellee does not use. Consequently there is no infringement.

The decree of the District Court is affirmed.

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## AMERICAN BALL BEARING CO. v. FINCH.

(Circuit Court of Appeals, Sixth Circuit. February 16, 1917.)

No. 2848.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—ANTI-FRICTION BEARING.
The Baker patent, No. 753,820, for an anti-friction bearing for mounting and turning the front wheels of an automobile, claim 1, *held* valid and infringed.

2. PATENTS ⟸42—INVENTION—"NEW RESULT."
An invention achieves a new result, where a function which had been performed by other means was performed to an efficient degree by an association of means never before combined, though all of them were old, and some of the changes seemed to be only in degree.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 49.]

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

Suit by the American Ball Bearing Company against Edward B. Finch for infringement of patent. Decree for defendant, and complainant appeals. Reversed and remanded, with instructions to enter a decree for complainant.

Livingston Gifford, of New York City, for appellant.

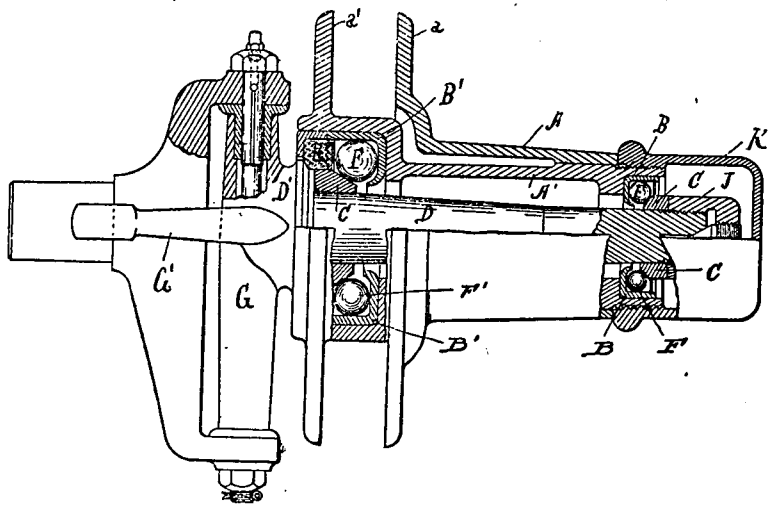
F. P. Fish, of Boston, Mass., for appellee.

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

DENISON, Circuit Judge. This suit was brought in the District Court by the Ball Bearing Company for infringement of Baker patent No. 753,820, issued March 1, 1904, upon application filed February 24, 1902, for an anti-friction bearing; and plaintiff below appeals from a decree holding the patent void for lack of invention. The patent has to do solely with the means for mounting and turning the front or steering wheels of an automobile. According to the now familiar practice, the front axle does not turn upon a central pivot, but is rigid; and each axle end, which forms a spindle for the hub, is practically hinged to the main axle. At or adjacent to its inner end the

hub spindle carries, rigidly attached thereto, a vertical pintle, and the upper and lower ends of this pintle are pivotally mounted in brackets projected up and down from the axle, or are in some other form made to constitute a hinged joint between the axle and hub spindle. This is known as the steering knuckle, and from the knuckle structure an angle arm projects horizontally and rearwardly. Obviously, pushing or pulling on this angle arm will turn the hinged wheel one way or the other. The rear ends of the two angle arms are operatively connected with the steering wheel of the machine.

The three claims in suit are in the margin,[1] and, with the foregoing explanation, their meaning will be quite clear when applied to the single figure of the drawing here reproduced.




[1] The substantial question involved in the case is—invention or not? Anticipation, in the accurate use of that term, is not claimed.

[1] "1. In combination with the spindle and the hub, two sets of balls interposed between said spindle and hub adjacent the ends thereof, said balls being of different sizes, the larger of said balls being located in line with the traction and tread of the wheel, and a steering knuckle carried by said spindle in juxtaposition to the larger balls.

"2. In combination with the spindle formed adjacent its inner end with a collar, a loose cone abutting said collar, a cone on the outer end of the shaft, a hub, races for different sizes of balls in the ends of said hub, balls arranged in said races and engaging the cones, the larger balls being located in line with the tread of the wheel, and a steering knuckle carried by the collar of said spindle in juxtaposition to the large balls.

"3. In combination with the spindle, a collar carried adjacent the inner end thereof, and the steering knuckle formed integral with said collar, a hub provided at its inner end with spoke flanges, cones mounted on said spindle the inner end of which engages said collar, balls carried in the ends of the last hub and engaging the cones, said balls being of different sizes, the larger being in alinement with the spoke flanges of the hub, and means carried by the spindle for adjusting the outer cone."

It is conceded, not only that each element of the claim is old, but that each element is found in earlier associations more or less analogous to those which it occupies in this patent; and the question whether more than mechanical skill was involved in that readjustment and rearrangement of the elements which Baker first made is close and difficult. From an inspection of claim 1, it is to be seen that Baker's thought had to do with the relative positions of the respective vertical planes of the knuckle pintle, the spokes, and the ball bearings at the opposite ends of the hub. The two sets of balls are to be "adjacent to the ends" of the hub, the inner set is to be "in line with the traction and tread" of the wheel, and the steering knuckle (pintle) is to be "in juxtaposition to" the inner set. The vertical plane of the spokes is practically identical with the line of traction or plane of contact between the tire and the ground. The ordinary form of ball bearing hub carried a set of balls near each end and had the spokes mounted midway of the hub. There was, necessarily, some horizontal space between the knuckle pintle and the inner ball bearing. There would result a distance of perhaps six inches between the plane of the knuckle pintle and the plane of traction. When it is desired to turn the wheel, in steering, it will be seen that the knuckle pintle forms the fulcrum of a bent lever. *G'* forms the long arm of the lever, and the distance along the hub from the knuckle pintle to the traction plane forms the short arm. It was obviously desirable to reduce as much as possible the length of this short arm, both in order that the driver at the wheel should get the benefit of all possible leverage and in order that the reverse strains transmitted from the road through the wheels to the steering wheel should be minimized. To get this advantage hubs were made as short as possible, and set as close to the knuckle pintle as they could be, and this positioning was accomplished in a variety of forms.

It was not an unnatural thought that the very best results could be had by getting the tire or spokes and the knuckle pintle into the same vertical plane, and so reducing the short lever arm to zero. This idea was worked out sufficiently to be shown in letters patent by Faure, by Clubbe, and by Knudsen. In each case, as was necessary, the hub was made very large and the spokes correspondingly short. The inner end of the hub, or spoke-carrying framework, must be of a diameter greater than the length of the knuckle pintle, in order that the wheel might revolve in the plane of the longitudinal axis of this pintle. Here arose at once conflict with other desirable principles. The knuckle pintle cannot be too much shortened without losing its best efficiency. It is customarily, and hence probably in its best form, not less than eight or ten inches long; and no such sized open hub or center, at least on the smaller wheels, can be provided without creating serious troubles. It seems inherently probable that this principle of construction would not be commercially desirable, and this probability is enhanced by the fact that the actual use of the form has been comparatively small.

Another method of increasing the steering wheel leverage, and decreasing reverse strains, was to incline the knuckle pintle from the vertical, or the hub spindle from the horizontal, whereby the point of ground traction would be more or less approximately in the plane of the pintle. This method also had practical disadvantages which have prevented its general adoption. In specific instances of this use it has been found desirable to minimize the departure from the parallelism of the two planes, instead of increasing their convergence, as would be natural if the theory were satisfactory.

What Baker did was to take the common ball bearing hub, which he found in use in connection with the ordinary steering knuckle, and to move his spoke line or traction line from the center of the hub to its inner end, so that his spokes were mounted directly over his inner ball bearing. Incidentally, and as perhaps the natural step in connection with such mounting of the spokes, he made the inner balls larger than those at the outer end of the hub. In this way he reached a compromise between the old and common form, having excessive length in the short lever arm, and the theoretically perfect, but practically undesirable, Faure form. He materially reduced the practicable length of this short arm. He minimized the disadvantages of the old form and the steering difficulties inherent therein, and he approximated the theoretical advantages of the Faure form, while avoiding the construction difficulties which had discouraged its use. We are convinced that this was invention. There is no way to demonstrate the rightfulness of such conviction; it often seems to be easier to state reasons against than for the existence of invention; but our conclusion is fairly indicated by several considerations.

The general idea formulated by Baker's first claim has been widely adopted; so it must be clear that the idea is a valuable one, and on its disclosure appealed to the art as useful. It now seems to have been a simple thing to mount the spokes at one end of a hub, instead of in the middle, and to make the appurtenant changes; yet the problem which Baker solved in this way had been present from the beginning of the automobile art (true, not many years); there had been efforts to solve it on other principles; there had been a considerable number of patents issued in the immediate field; and this simple scheme had never occurred to anybody. We are impressed with it as a rather striking example of that patentable utility which is strongly indicated by the very simplicity of the step, by the repeated, but unsuccessful, reachings in many directions for the desired result, and by the general adoption of the patented device as soon as the patented discovery was made.

What we said in Cadillac Co. v. Austin, 225 Fed. 983, 990, 141 C. C. A. 105, has application here. To build and mount to the best advantage a wheel on a horse-drawn wagon intended for a speed of four miles an hour, or upon a buggy intended for a higher speed for a short time, is not at all the same as to make a device of superficially similar character intended for use at high speeds and for long periods. The

road shocks to an automobile steering gear in actual use reach enormous totals, in sums of pounds of stress, and strains that to a wagon wheel are negligible in an automobile may be fatal. In such an environment "questions of invention cannot be decided on prima facie rules," primarily applicable to other conditions. The testimony of experts points out how Baker's combination avoids, or meets to the best advantage different ones of these hub and steering strains. While we are mainly impressed by the success with which he meets the chief strain involved, the only one of which he speaks in his patent—viz. strain upon the entire steering gear—the undoubtedly successful meeting of other strains upon the hub itself is not without force on the question of patentability.

We do not overlook the argument that Baker made only an advance in degree as to the most characteristic materialization of his idea—viz. mounting the spokes at one end of the hub. This argument is based most typically upon the patents to Sperry and Grant. In each the spokes were mounted somewhat on the inner half of the hub—perhaps halfway from the hub center to the inner end—but in neither were the balls at the inner end either exactly or substantially in the spoke and traction plane. Their drawings suggest that each carefully avoids the idea which Baker accepts and uses; and since they were both striving to lessen the distance between knuckle pintle and spoke plane, and since moving their spokes to the end of the hub instead of halfway would have doubled their gains, observing what they did confirms the belief that to mount the spokes at the extreme end of the hub, and directly over the balls, was not an obvious step. They seem to declare that they had reached the limit of what was practicable in the sidewise shifting of the spokes.

Knudsen presents, from another angle, the argument of degree. He gets his anti-friction balls and his spokes close enough together so that the plane of the balls will strike the ground at about the edge of the tire, so that if a tire runs flat enough its traction surface may slightly overlap the ball plane; but this is to force a similarity. Knudsen did not have this result unless obscurely and incidentally; he did not describe it, and probably did not have it at all; his tire was not intended to run flat.

[2] The critical fact upon this question of degree, as well as upon the whole question of patentability, is that Baker's improvement, while in degree, was not merely in degree; and, while it was a change in the location of parts, it was not merely that. In a very proper sense he achieved a new result. Of course, the ultimate function was not new; that ultimate function—minimizing the leverage for reverse strains—had been performed even to a greater extent, but Baker realized that function to an efficient degree by an association of means which had never before been combined. To do this was to get a new result in the meaning of the patent law, even though all the elements were old, and even though some of the changes made seem to be only in degree. Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L.

Ed. 1034; Minerals Separation, Ltd., v. Hyde, 242 U. S. 261, 37 Sup. Ct. 82, 61 L. Ed. ——, decided December 11, 1916.

We think the first claim is valid as broadly as it seems to read; and, as so construed, it is infringed. Defendant has mounted its larger set of anti-friction balls adjacent to the inner end of the hub, substantially, if not wholly, "in line with the traction and tread of the wheel." The center of the balls does not register with the center of the spokes, but nearly so, and the balls project little, if any, beyond the plane of the spoke edges. Defendant certainly has taken the substance of whatever utility there is in Baker's relative location of balls, spokes, inner hub end and knuckle pintle; and it is not material that by reason of a slight departure he fails to get one hundred per cent. of the utility of the patented form.

It is impossible to construe claim 1 as containing those limitations found in claims 2 and 3. Giving to these limitations their due effect, in order to make these claims different from claim 1, we doubt whether claims 2 and 3 are infringed; but this may be passed without decision. Pending this suit, defendant has taken a license and agreed to pay a stated royalty, if any one of the claims is sustained, and held to be infringed, by the final result of this suit; and consequently the issue of infringement as to claims 2 and 3 has become immaterial. Whether or not an injunction against infringement ought ever to be denied at final hearing because of mere laches, the facts of this case do not justify refusing relief for that reason.

The decree below must be reversed, and the record remanded, with instructions to enter a decree that the first claim is valid and infringed. There will be no occasion for an injunction or accounting.[1]

[1] Pending this appeal, the parties have made a settlement of the controversy, contingent upon a finding of infringement.

## STROMBERG MOTOR DEVICES CO. v. ARNSON et al.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 49.

PATENTS ⊂=324(1)—APPEAL—FINAL DECREE—WHAT CONSTITUTES.

A decree in an infringement suit on two patents, sustaining the first patent and awarding an injunction and accounting, and dismissing the bill as to the second, is not a final decree, and the complainant can maintain an appeal therefrom only under Judicial Code (Act March 3, 1911, c. 231) § 129, 36 Stat. 1134 (Comp. St. 1913, § 1121), as from an interlocutory decree refusing to grant an injunction, which appeal must be taken within 30 days.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 600, 604, 605.]

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

Suit in equity by the Stromberg Motor Devices Company against Ludwig Arnson and Alfred Michaelis, doing business as a copartnership under the name of the Longuemare Carbureter Company. From part of the decree, complainant appeals. On motion to dismiss appeal. Motion sustained.

Seward Davis, of New York City, for appellant.

Frederick Zorn, of New York City, for appellees.

Before COXE, WARD, and HOUGH, Circuit Judges.

WARD, Circuit Judge. The complainant filed this bill upon two different patents, one to Ahara and one to Richard.

July 1, 1915, the District Court entered a decree sustaining the Ahara patent with the usual directions as to injunction and accounting, and dismissed the bill as to the Richard patent without costs to either party.

December 28 the complainant appealed from that part of the decree dismissing the bill as to the Richard patent.

Section 129 of the Judicial Code reads:

"Sec. 129. 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, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving or refusing to dissolve, an injunction, or appointing a receiver, to the circuit court of appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: Provided, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof, during the pendency of such appeal: Provided, however, That the court below may, in its discretion, require as a condition of the appeal an additional bond."

If the decree is interlocutory then the appeal regarded as one from the refusal to grant an injunction on the Richard patent does not lie,

because it was not taken within thirty days after the entry of the decree.

But it is contended that an appeal may be taken from a severable controversy, finally determined by the court, notwithstanding that other controversies remain to be disposed of. This is true in an exceptional class of cases, where the merits are finally disposed of and nothing remains to be done but to enforce the decree by execution, notwithstanding that there remains an accounting, not asked for in the pleadings and merely incidental to the decree. Such are Forgay v. Conrad, 6 How. 201, 12 L. Ed. 404; Thomson v. Dean, 7 Wall. 342, 19 L. Ed. 94. Chief Justice Waite, however, said in Winthrop Iron Co. v. Meeker, 109 U. S. 180, 3 Sup. Ct. 111, 27 L. Ed. 898, after considering these cases:

"The case is altogether different from suits by patentees to establish their patents and recover for the infringement. There the money recovery is part of the subject-matter of the suit. Here it is only an incident to what is sued for."

Accordingly these exceptional cases need not be considered.

The appellant relies chiefly on Hill v. Railroad Co., 129 U. S. 170, 9 Sup. Ct. 269, 32 L. Ed. 651, and 140 U. S. 52, 11 Sup. Ct. 690, 35 L. Ed. 331. That controversy arose in a case where there was a plurality of defendants. June 8, 1885, the complainant's bill was dismissed, with costs, as to all the defendants except the railroad company and its directors, as to whom it was retained in respect to one item of charge only, which was referred to a master. July 14, 1887, a decree was entered in favor of the complainant on this claim.. October 17, 1887, the complainant took an appeal from both decrees. The Supreme Court in 140 U. S. 52, 11 Sup. Ct. 690, 35 L. Ed. 331, on motion to dismiss the appeal, held that the appeal was too late as to the decree of 1885, because it disposed finally of the merits as to all the parties, reserving only this subordinate controversy as to single item against the railroad company and certain defendants, in which the other defendants were not interested, and as to which it was provided a further decree should be made. It is quite clear that, if all the parties had been interested in this reserved question, the decree of 1885 would not have been held final. For this reason it was held in Hohorst v. v. Packet Co., 148 U. S. 262, 13 Sup. Ct. 590, 37 L. Ed. 443, that where the bill was dismissed as to one of several defendants, charged to be jointly liable, there could be no appeal because the decree rendered against the complainant was not final.

For the same reason the decree in the present case dismissing the bill on the Richard patent is not final, all the parties being interested in the decree sustaining the Ahara patent which was interlocutory. It has always been the practice in this circuit to dismiss appeals in patent causes from decrees dismissing the bill as to some claims and sustaining it as to others. This was on the ground that such a decree is not final. Kilmer v. Griswold, 67 Fed. 1017, 15 C. C. A. 161; Thomson-Houston Co. v. Nassau Electric Co., 112 Fed. 676, 50 C. C. A. 421. The Supreme Court, in Ex parte Enameling Co., 201 U. S. 156, 26 Sup. Ct. 404, 50 L. Ed. 707, sustained this practice. Al-

though, when that case was decided, an appeal could only be had from an order or decree granting or continuing an injunction, the reasoning applies to this case, because, although an appeal could have been taken from the decree denying an injunction on the Richard patent, it was not taken within 30 days from the entry thereof as required by the act. Mr. Justice Brewer, considering the question now before us, viz., that an appeal would lie without any statutory authority, because the decree was final as to the claims held to be invalid, said:

"In Hill v. Chicago & Evanston Railroad Co., supra [140 U. S. 54, 11 Sup. Ct. 690, 35 L. Ed. 331], there had been an order of dismissal in favor of some of defendants, together with a reference to a master of a separable controversy between the plaintiff and other parties, and the court observed: 'But there was no adjudication as to the payment of the amount to be ascertained by the master; that remained unsettled. It was, however, a severable matter from the other subjects of controversy and did not affect their determination. The fact that it was not disposed of did not change the finality' of the decree as to the defendants against whom the bill was dismissed; that amount, or to whom made payable, did not concern them. They were no longer parties to the suit for any purpose. The appeal from the subsequent decree did not reinstate them. All the merits of the controversy pending between them and the complainant were disposed of, and could not be again reopened, except on appeal from that decree. As to the other parties, it remained to ascertain the amount of one item and to determine as to its payment.' But, as held in Hohorst v. Hamburg-American Packet Company, supra, that rule does not apply to cases where the liability of the defendants is alleged to be joint, and therefore cannot to a case in which there is but a single defendant."

No doubt there are cases in which, by treating a decree between the same parties as partly final and partly interlocutory, appeals taken would save time and expense, a consideration which seems to have moved the court in Scriven v. North, 134 Fed. 366, 67 C. C. A. 348. We think the general principle that causes may not be brought up on appeal piecemeal is more important. We regret that the foregoing views are not consistent with the decision of the Circuit Court of Appeals of the Fourth Circuit in Scriven v. North, supra, and with that of the Third Circuit in Historical Publishing Co. v. Jones Co., 231 Fed. 784, 145 C. C. A. 655.

The appeal is dismissed without prejudice.

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## FOGLESONG MACH. CO. v. J. D. RANDALL CO.

(Circuit Court of Appeals, Sixth Circuit. February 16, 1917.)

No. 2986.

1. PATENTS ⊂=255—INFRINGEMENT—"REPAIR" OF "RECONSTRUCTION" OF PATENTED MACHINE.

The replacing of lost or injured parts of the mechanism of a patented machine constitutes "repair," and not "reconstruction," and it is within the right of the owner of the machine to procure such parts from any one who can supply them.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 397, 399.

For other definitions, see Words and Phrases, First and Second Series, Reconstruction; Repair.]

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

2. PATENTS ⊜255—INFRINGEMENT—REPLACEMENT OF PARTS OF PATENTED MACHINE.

The replacement of parts of a patented machine which were worn or lost or injured in a fire, none of which were elements in the combination of the patent which represented the advance in the art made by the patentee, *held* not a reconstruction which constituted infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 397, 399.]

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

Suit in equity by the Foglesong Machine Company against the J. D. Randall Company. From an order refusing to hold defendant in contempt for violation of injunction, complainant appeals. Affirmed.

Border Bowman, of Springfield, Ohio, for appellant.

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

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

SATER, District Judge. When this case was first before this court (203 Fed. 41, 121 C. C. A. 377), the decree of the District Court perpetually enjoining the defendant from making, using, or vending the plaintiff's horse collar stuffing machine was affirmed. The advance which the plaintiff's assignors, as patentees, made over the prior art, and the very essence of their invention, was found to be a rotatable hopper free from central obstructions and caused to rotate by means of gear teeth or cogs on a ring which extends around the lower periphery of the hopper and rides upon the base member, the teeth meshing with those of a power-driven pinion at the rear of the hopper. The mechanism devised also makes permissible the use of tangled or machine-threshed straw. The case is again here on an appeal prosecuted by the plaintiff to reverse that court's refusal to hold the defendant in contempt for violation of the original decree.

In 1907 the plaintiff sold one of its machines to a manufacturing company at Grand Rapids, Mich. In consequence of a fire in that company's plant in the latter part of 1914, the machine was injured by the bending of its removable rotatable metal hopper and the breaking of the stuffing rod nose. The metal disc which presses downward the straw in the hopper had been misplaced or lost. Excepting the disc, the damaged hopper, and the stuffing rod nose, the machine remained in an operative condition, although some of the smaller and relatively inexpensive parts, which were subject to wear and required replacement at intervals, were more or less worn. Those parts were such as feed rods, feed pipes, bottom plate of the hopper, pinion wheels, cross-heads, studs, sprocket chains, and connecting rods. If, when worn, such parts are replaced, the life of a machine, the selling price of which is $1,800, ranges from 10 to 30 years. Owing to their necessary renewal, a number at least of such parts has been furnished, when a machine is sold by the plaintiff, with the completed machine, and customers, when having none of such parts, have purchased them when re-

pairs were required. In the early part of 1915, the company purchased new machinery of the defendant and turned in its damaged machine in part payment therefor. The defendant, on receipt of the machine, supplied it with a new hopper, disc, and stuffing rod nose, and, on account of more or less wear on minor parts of the mechanism, installed new feed rods, feed pipes, a pinion wheel, a shaft connecting such wheel with beveled gear, a drive shaft, bottom plate, cross-head, and certain studs. The sprocket chains having been weakened to the extent resulting from two years' service, the defendant substituted for them new and heavier ones. This in turn required two new sprockets and two new sprocket wheels. A small friction collar was misplaced in defendant's shop, in lieu of which another similar collar was used. The machine was then sold, following which the plaintiff moved the District Court that the defendant, in view of the original decree, be held in contempt, and for damages, and that such other and further relief as justice will permit be granted. As the result of a hearing, the motion was denied; and hence this appeal.

[1] The question for decision is: Did the defendant repair or reconstruct the machine which it purchased from the Grand Rapids company? In supplying a new hopper, stuffing rod nose, and disc, the defendant merely returned to use injured or lost portions of the mechanism. This constitutes repairing, and not reconstruction. Leeds & Catlin Co. v. Victor Talking Mach. Co., 154 Fed. 58, 60, 83 C. C. A. 170, 23 L. R. A. (N. S.) 1027 (C. C. A. 2). The right to obtain such parts from any person that will supply them and to replace them exists and should be conceded by the plaintiff as owner of the patent. Thomson-Houston Elec. Co. v. Kelsey Elec. Ry. Spec. Co., 75 Fed. 1005, 1009, 22 C. C. A. 1 (C. C. A. 2).

[2] The use of feed rods, feed pipes, beveled gear, sprocket wheels, sprocket chains, clutches, collars, connecting rods, and the like, found in plaintiff's device, was well known in the art relating to stuffed horse collars prior to the invention of the plaintiff's device. The parts installed by the defendant in the machine which it purchased do not go to the elements which obviate central obstructions in the hopper or to the toothed ring which surrounds the lower portion of the hopper and imparts rotation to it through its meshing connections. The elements in the combination claims in the plaintiff's patent, on which the infringement decree rests and which represent the advance in the art made by plaintiff's assignors, were not disturbed by the defendant, but left intact, with the possible exception of the hopper; and that was not characteristic of the invention until it received its peculiar mounting in connection with the undisturbed revoluble parts. The parts substituted were such as the plaintiff sold or voluntarily furnished to customers for use in repairing. Their perishable nature was thus recognized. The substitutions made were no more than any owner might well make who wished to put an old machine in the best workable condition. It is true that the sprocket chain was heavier and stronger than those made by the plaintiff, on account of which new sprockets and new sprocket wheels were required; but the difference between them and those made by the plaintiff produced no change

in the operation of the machine, and, for aught that appears, may have been the result of caution—perhaps excessive—in preparing a second-hand machine for long-continued efficient service. The use of a new friction collar for the misplaced one is a negligible quantity. The machine was not so broken and worn out as to require replacement. The wear and injury were but partial. Under such circumstances, repair is not reconstruction, but restoration, that the mechanism may be kept up to the full performance of its duty. Wilson v. Simpson, 9 How. 109, 123, 13 L. Ed. 66; Thomson-Houston Elec. Co. v. Kelsey Elec. Ry. Spec. Co., 75 Fed. 1005, 1009, 22 C. C. A. 1 (C. C. A. 2); Shickle, Harrison & Howard I. Co. v. St. Louis Car Coupler Co., 77 Fed. 739, 740, 741, 23 C. C. A. 433 (C. C. A. 8).

The conclusion reached on the merits renders unnecessary a consideration of the defendant's motion to dismiss, which may be marked overruled. The trial court is affirmed.

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## HINMAN et al. v. VISIBLE MILKER CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1917.)

No. 102.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—MILKING MACHINE.
The Hinman and Hinman reissue patent, No. 13,876 (original No. 1,097,803), for a cow-milking machine, is a valid reissue, and, while the patent is for an improvement, it is for one of merit, and discloses patentable invention; also *held* infringed.

2. PATENTS ⊂=157(2)—VALIDITY—TECHNICAL OBJECTIONS.
Where the court is convinced that a patentee has made a meritorious invention, it will not deprive him of its fruits on merely technical grounds.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 231.]

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

Suit in equity by Arthur V. Hinman, Ralph L. Hinman, and the Hinman Milking Machine Company against the Visible Milker Company. Decree for complainants, and defendant appeals. Affirmed.

For opinion below, see 231 Fed. 174.

The decree of the District Court of the United States for the Northern District of New York held claims 11 to 21, inclusive, of reissued patent No. 13,876 to Hinman and Hinman for a cow-milking machine valid and infringed and ordering an injunction and an accounting. The original patent No. 1,097,803 was dated May 26, 1914; the reissue is dated February 9, 1915.

Fred Gerlach, of Chicago, Ill., and John Conboy, of Watertown, N. Y., for appellant.

Howard P. Denison and Eugene A. Thompson, both of Syracuse, N. Y., and R. H. Woolver, of Oneida, N. Y., for appellees.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

COXE, Circuit Judge. [1] The patent in controversy is not a pioneer; the patentees only claim for it an improvement and development of the art as disclosed in a prior patent to them, No. 907,236, dated December 22, 1908. The patentees assert that in prior machines there was no way of controlling the vacuum automatically:

"So that with each pulsation of the piston of the air pump the entire contents of the milk chamber are emptied; and there is no way to prevent the milk from entering at some point the center of the milk chamber during the milking stroke of the pump; and no way of preventing a portion of the milk being drawn from the milk chamber into the flexible tube connected with the pump and even into the pump itself."

The patentees have endeavored to remedy these defects by an improved and simple apparatus. The claims in controversy are quoted in full in the opinion of the District Judge and need not be repeated here. Claim 11 is the only one found in the original patent and differs somewhat in phraseology from that claim. It is as follows:

"In a cow-milking apparatus, a milk chamber having a valveless inlet means for exhausting air from the chamber and a substantially air-tight valved outlet closed by gravity and the exhaust of air from said chamber."

We think it is clearly demonstrated by the proof that the patentees produced a meritorious invention in which, to use the language of Judge Ray:

"The suction upon the teats of the cow is realized at alternate strokes of the pump piston and they (the patentees) produced a device easily cleaned and sanitary in which the milk chamber is unobstructed by moving parts or otherwise and which is easily and quickly kept clean. The vacuum is gradually produced upon the out stroke of the pump piston and is gradually applied to the milk chamber, to the teat cups and teats of the cow. This is a great advantage, as the abrupt application of the vacuum makes a milking machine practically useless."

In approaching the question relating to the validity of the reissue—as such—we should bear in mind the fact that the Hinmans are practically the creators of this art. They were the first to produce a safe, efficient, satisfactory and comparatively inexpensive machine. The trial judge correctly says of it:

"This is the neatest, most operative and most sanitary of all and shows a marked and patentable improvement on the prior art."

[2] Our examination of the prior art, as disclosed in the record, convinces us that the Hinmans have practically solved the problem by producing a compact, efficient and simple milking machine which avoids pre-existing defects. We also think that the defendant has appropriated the Hinman device. Regarding the reissue little need be said as the subject is fully treated in the opinion below. The difficulty grew out of some crude drawings made by the local attorney who was not a skilled draftsman. This mistake was corrected and the patent and drawings put in proper shape within a comparatively short time and without any intervening rights being destroyed or interfered with. Where this court is convinced that the patentee has made a meritorious

invention it has been our steady purpose not to deprive him of its fruits based upon technical reasons only. Iowa Co. v. Montgomery, 234 Fed. 88, — C. C. A. —.

The decree is affirmed with costs.

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AUTO VACUUM FREEZER CO. v. WILLIAM A. SEXTON CO.

(Circuit Court of Appeals, Second Circuit. February 27, 1917.)

1. PATENTS ⊂⊃328—VALIDITY AND INVENTION—ICE CREAM FREEZER.
The McCann patent, No. 1,013,672, for an ice cream freezer, discloses invention and covers a simple and efficient structure, constructed entirely of tin plate, which practically produced a new industry and is entitled to a broad and generous construction of its claims. Claims 3 and 5 also *held* infringed.

2. PATENTS ⊂⊃157(2)—CONSTRUCTION—CONSTRUCTION TO GIVE VALIDITY.
When a patentee has produced a structure which inaugurates a new industry and at once becomes popular, and therefore of great value, a court should be zealous to so construe the claims as to give validity to what it believes to be a meritorious invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 231.]

3. PATENTS ⊂⊃245—INFRINGEMENT—SUBSTITUTING EQUIVALENT ELEMENTS IN COMBINATION.
Infringement is not avoided by the omission of an element of the patented combination, if the same result is accomplished in substantially the same way by the substitution of equivalent means. or by the introduction of other devices and features which do not change the operation of the combination or the result attained.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 386.]

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

Suit in equity by the Auto Vacuum Freezer Company against the William A. Sexton Company. Decree for complainant, and defendant appeals. Affirmed.

Samuel E. Darby, of New York City, for appellant.

Edmonds & Peck, of New York City (Philip C. Peck, of New York City, of counsel), for appellee.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

COXE, Circuit Judge. This is an appeal by the defendant from a decree holding that claims 3 and 5 of the patent to William B. McCann for an ice cream freezer are valid and infringed. The defenses are lack of invention, anticipation and noninfringement. No experts were called for the reason, which clearly appears, that the patented structure is so simple that no technical knowledge was needed. This is a practice which should be encouraged in mechanical patent cases, where the construction is obvious and easily understood. It saves time, labor and expense.

[1] The patent in suit, No. 1,013,672, was granted January 2, 1912, and is for an ice cream freezer in which the freezing mixture and a

freezable mixture are placed in contiguous closed compartments of a portable receptacle. The object of the inventor was—First, to separate these mixtures so that neither can be spilled over into the other. Second, to facilitate the distribution of the freezing mixture and its ingredients in their appropriate compartments during the operation of charging the freezer therewith. Third, to protect from wear and injury the top and bottom covers of the freezer standing on end and to insulate the contents from the heat of the external air. The description states further that the freezer is adapted to stand on either end without injury or spilling of its contents, that it can be inverted end for end during the process of freezing for the rearrangement of the freezing mixture and the detachment of the frozen cream from the inside walls of the chamber can be effected by the simple act of opening that chamber. The inventor states his object broadly to be the production of a superior freezer of the kind specified and proceeds to describe in detail the freezer as claimed by him. The claims in issue are as follows:

"3. An ice cream freezer, comprising an external double-walled cylinder having externally concave double-walled heads, projecting screw-threaded mouths in said double-walled heads, and double-walled screw caps closing said projecting mouths within the concavities of said externally concave double-walled heads."

"5. An ice cream freezer, comprising an external double-walled cylinder having externally concave double-walled heads, an outwardly projecting screw mouth through one of said externally concave double-walled heads, an internal cylinder having a screw mouth projecting through the other of said externally concave double-walled heads, and double-walled screw caps covering said projecting mouths within the external concavities of said externally concave double-walled heads respectively."

The practical result accomplished by plaintiff's freezer is the production of ice cream in about 20 minutes without any manipulation whatever. The cream is placed in its receptacle surrounded by a jacket of ice and in less than half an hour the ice cream is ready for consumption. The invention is simple and efficient. It dispenses entirely with the complicated and cumbersome structures of the prior art and brings the product within the means of those who cannot afford the expensive freezers previously used. It discards wood and heavy castings and uses only tin plate in its construction. In short, McCann made a freezer which has practically produced a new industry and he should be given a broad and generous construction of his claims. The court should be zealous to protect such a patent and not seek to defeat it by attempting to show that from the multitude of prior devices a similar structure might have been produced.

[2] The defendant has made an able and persuasive argument to show that the claims are not infringed for the reason that its freezer omits certain elements of the combinations covered by the claims in controversy. It is argued that the defendant does not have the element of the "projecting screw-threaded mouths" or the double-walled screw caps of the claims in controversy. In support of this contention counsel cites such leading cases as Fay v. Cordesman, 109 U. S. 408, 3 Sup. Ct. 236, 27 L. Ed. 979, Keystone Bridge Co. v. Iron Co., 95

U. S. 274, 24 L. Ed. 344 and Water Meter Co. v. Desper, 101 U. S. 332, 25 L. Ed. 1024. There can be no doubt as to the existence of the rule enunciated in these and many other authorities. But it is also true that when the patentee has produced a structure which inaugurates a new industry and at once becomes popular, and therefore of great value, the court should be zealous so to construe the claims as to give validity to what it believes to be a meritorious invention.

[3] The complainant had built up a large and flourishing business under its patent, when the defendant, with knowledge of the patent and the popularity of the complainant's freezer, began its infringement by copying the patented device even to minute details. There can be little doubt that the defendant, with full knowledge of the McCann patent, continued to copy the structure there described and claimed and offered it to the public as a patented freezer. In such circumstances the rule laid down in the cases above cited is relaxed to the extent of giving the patentee a range of equivalents sufficiently broad to hold as an infringer one who accomplishes the result by the same or similar means. The doctrine of the cases relied on by the defendant must be read in the light of the authorities which hold that even an element of a combination may be omitted if the defendant accomplishes the result by substituting equivalent means. If this were not so, claims for combinations could be easily evaded. This rule is clearly stated in Machine Co. v. Murphy, 97 U. S. 125, 24 L. Ed. 935, where the court says:

"So that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape."

The defendant admits that the first freezer made and sold by it infringed the claims in controversy but asserts that it has discontinued its manufacture and sale. This may be true, but the defendant may see fit to resume the sale, in which event an injunction will be a convenient weapon to prevent the infringement from proceeding far.

Regarding type B, the freezer sold by the defendant at the time this action was brought, there can be no doubt regarding its infringement of the claims if they are liberally construed and given a fair range of equivalents. The defendant's freezer and the McCann freezer "do the same work in substantially the same way, and accomplish the same result." This being so the introduction of other devices and features which do not change the operation of the combination or the result reached will not avail an infringer. It is true that the defendant does not have the double wall structure of the small covers but it accomplishes substantially the same result by exposing at all times but one of the single walled caps to the heat of the external air. The defendant states in one of its circulars as follows:

"The Easy Freezer is constructed with a thermic insulation formed by double-walled construction throughout, thus preventing heat from entering the freezing chamber and cold from leaving it. The result is a perfect refrigerating plant on a small scale."

We cannot agree with the proposition that the defendant can escape infringement by such inconsequential changes as are now sug-

gested. After asserting that its freezer is insulated by double walls "throughout" it now seeks to avoid infringement by showing that one of its caps exposes a single wall only to the heat of the outside air and to this extent, if at all, has impaired the usefulness of the cap. "But it is no less an infringement if it performs its primary function in practically the same way."

It is unnecessary to prolong this discussion. We are convinced that McCann made an important and useful improvement in the ice-cream freezing art by bringing the product within the means of thousands of people who previously were denied that luxury. McCann was the first to produce such a structure and the defendant undertook to appropriate the invention by making a freezer which was a palpable and admitted infringement. The infringing structure in this action is the result of another effort of the defendant to secure all the benefits of the McCann structure without the consent of its owner, by making a few formal inconsequential changes in no way altering the paramount and essential features of the invention.

The decree is affirmed with costs.

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WAGNER et al. v. MECCANO, Limited.

(Circuit Court of Appeals, Sixth Circuit. February 6, 1917.)

No. 2977.

1. PATENTS ⊜287—SUITS FOR INFRINGEMENT—SUITS AGAINST MANUFACTURER AND CUSTOMERS.

A patentee in addition to suing the manufacturer of an alleged infringing article, may institute and prosecute suits against customers sufficient in number and location to cover the different aspects of the question which may arise, and to give opportunity for the recovery of profits or damages which could not otherwise be obtained, subject to the rule that the process of the courts must not be abused by being employed vexatiously or oppressively.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 457–459.]

2. PATENTS ⊜324(1)—SUITS FOR INFRINGEMENT—SUITS AGAINST MANUFACTURER AND CUSTOMERS.

The taking of an appeal from an interlocutory decree enjoining defendant, a manufacturer, from infringement of a patent, and the giving of a supersedeas bond conditioned to pay "damages, costs, and profits," is not a bar to the bringing and prosecution of suits against customers of defendant pending the appeal, nor can the bringing of such suits be considered as a contempt of the court granting the supersedeas.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 600, 604, 605.]

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

Suit in equity by Meccano, Limited, against F. A. Wagner and others. Decree for complainant, and defendants appeal. On motion by appellants for injunction. Denied.

See, also, 234 Fed. 912; 235 Fed. 890, — C. C. A. —.

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

Toulmin & Toulmin, of Dayton, Ohio, for appellants.

Healy, Ferris & McAvoy, of Cincinnati, Ohio, and Mauro, Cameron, Lewis & Massie, of New York City, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. In a patent infringement suit in the court below, brought by Meccano, Limited, against Wagner and others, an interlocutory decree in the usual form was entered, awarding an injunction and an accounting against the defendant Wagner, who was the manufacturer of the device involved. An appeal was taken to this court under section 129 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [Comp. St. 1913, § 1121]); and upon the execution of a bond conditioned to pay "damages, costs and profits," the court below approved the bond as a supersedeas. Later, Meccano, Limited, brought an infringement suit in the Southern district of New York against Wannamaker, a customer of Wagner. Wagner now moves, in this court, for an order enjoining Meccano, Limited, from prosecuting the Wannamaker suit, or any other suit against Wagner's customers, and holding Meccano, Limited, in contempt of the supersedeas by bringing the Wannamaker suit.

[1] Thirty years ago, by opinions not reported, but then familiar to some of the present members of this court, Mr. Justice Matthews and Circuit Judge Baxter accepted and applied, in this circuit, the rule that a patentee, in addition to suing the manufacturer, might institute and prosecute additional suits against customers sufficient in number and location to cover the different aspects of the question which might arise, and to get the opinions of the courts in more than one circuit. So far as we know, this practice has never since been questioned in this circuit. The right to bring such additional suits is limited by the rule that the process of the courts must not be abused by being employed vexatiously or oppressively, and, obviously, may be extended to give opportunity for recovering profits or damages that could not otherwise be obtained. It is to be assumed that Marconi v. Kilbourne (D. C.) 235 Fed. 719, was a case of such oppressive use, although it depends chiefly upon Stebler v. Riverside (C. C. A. 9) 214 Fed. 550, 131 C. C. A. 96, L. R. A. 1915F, 1101; and this latter case, so far as concerns its declared principle, is at least greatly modified by the later decision of the same court in Sherman v. Searchlight, 225 Fed. 498, 140 C. C. A. 539. However that may be, the bringing of the Wannamaker suit was well within the rights of the patentee.

[2] The application to hold for contempt seems to be upon the theory that the District Court granted a judicial license to infringe. The record does not indicate that the court had the disposition—and it certainly had not the power—so to do. Of course, there may be profits and damages recoverable against the ultimate seller, which cannot be recovered against the manufacturer, unless the manufacturer's liability may have been sufficiently extended by virtue of some peculiar undertaking specially drawn to cover such contingencies. No such peculiar undertaking was exacted or given. As to Wagner's theory

regarding the effect of the supersedeas bond, we quite agree with Judge Augustus Hand (who has recently granted the preliminary injunction in the Wannamaker Case) that "there is no reason or authority for such a contention." The cases, like Kesler v. Eldred, 206 U. S. 285, 27 Sup. Ct. 611, 51 L. Ed. 1065, which fix the rights of a manufacturer adjudicated not to infringe, have no application. The only judgment yet rendered here is that Wagner does infringe. Nor do we have here a case where a manufacturer has paid damages or profits, and his customer defends on the ground of former recovery.

The motion is denied.

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## WOERHEIDE et al. v. H. W. JOHNS-MANVILLE CO.

(Circuit Court of Appeals, Second Circuit. January 16, 1917.)

No. 129.

PATENTS ⊂328—INFRINGEMENT—CLEAT FOR SECURING PREPARED ROOFING.

The Woerheide patent, No. 973,902, for a cleat for securing prepared roofing, given the liberal construction to which it is entitled by reason of its primary place in the art, *held* infringed.

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

Suit in equity by William H. Woerheide and the Barber Asphalt Paving Company against the H. W. Johns-Manville Company. Decree for complainants, and defendant appeals. Affirmed.

Appeal from a supplemental decree, entered June 30, 1916, holding valid and infringed claims 2, 3 and 4 of letters patent No. 973,902 to William H. Woerheide dated October 25, 1910, for a cleat for securing prepared roofing. The patent was held valid and infringed by the District Court (215 Fed. 604), and the decree was affirmed by this court (220 Fed. 674, 136 C. C. A. 316).

Frederick P. Fish and A. Parker-Smith, both of New York City, for appellant.

Joseph C. Fraley and Henry N. Paul, Jr., both of Philadelphia, Pa., and Edwards, Sager & Wooster, of New York City, for appellee Barber Asphalt Paving Co.

Wing & Russell, of New York City, for appellee Woerheide.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. When this patent was before us, less than two years ago, we thought that Woerheide had added a simple but decidedly efficacious improvement to the roofing art. Prior to his invention the problem of fastening prepared roofing to the roof was in a most unsatisfactory condition. The devices then used, large-headed nails, round metal caps, nails and cement, proved wholly insufficient. None of them solved the problem. The roofing material was torn, a tight joint was not produced and the roofs continued to leak. Unless

some remedy for these radical defects was found the prepared roof industry could not be successfully continued. We have, then, a valid patent for a simple but useful device which successfully solved the problem in a highly useful art. The claims in issue are entitled to a liberal construction and the sole question here is, are they infringed? When the case was here before it was stated in the appellant's brief as follows:

"It is undoubtedly the fact that plaintiff's cleat is the first sheet metal roofing cleat commercially introduced in this country for the purpose of securing prepared roofing."

The advantages of this cleat over the tin caps and large-headed nails in use at the date of Woerheide's invention, are manifest. The cleat prevented gaps and buckling which occurred when the large-headed nails and similar devices were used. There were no intervals in the pressure of the cleats, it was continuous. The nearest approach to this continuous pressure found in the prior art is the wooden strips, but such strips will bend, crack, split and decay. They can never have the endurance and the inflexibility necessary for a roofing cleat. The problem of producing a suitable holder for prepared roofing was not as simple as it now appears, after the result is accomplished. Wood could not be utilized for the reasons just stated. Sheet metal could not be made effective; it would not hold the roofing rigidly between the nailing domes. It may be that if we search this and analogous arts we may find every separate element of Woerheide's invention but we are convinced that never before Woerheide were they combined in a cleat for holding prepared roofing material upon a roof so as to prevent buckling and leaking.

The defendant has shown considerable ingenuity in its effort to avoid infringement. To a casual observer the patented device seems quite different from the defendant's device. It will be seen, however, upon closer examination that the defendant has all the valuable features of the patented structure, although to the ordinary observer they look very different.

The cleat, arched transversely and having greater length than breadth, the narrow crown, the abrupt side walls leading from crown to base, the ends of the cleat, being closed by strengthening stay portions, drawn from the crown to the base and connecting the side walls to resist outward movement thereof, all are present in both of defendant's structures.

The decree is affirmed with costs.

## ALIANO v. EAGLE LOCK CO.

(Circuit Court of Appeals, Second Circuit. January 23, 1917.)

No. 145.

PATENTS ⟸328—INVENTION—LOCK.

The Aliano patent, No. 873,481, for a lock, claim 10, *held* void for lack of invention, in view of the prior art.

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

Suit in equity by Frank S. Aliano, trading as the H. & A. Lock Company, against the Eagle Lock Company. Decree for defendant, and complainant appeals. Affirmed.

This is an appeal from a decree holding claim 10 of patent to Frank S. Aliano, No. 873,481, valid, but not infringed. The patent is for a new kind of lock, which consists of a swinging hasp containing at its end a box, or plate, called the "works box," in which the lock proper is held. From one side of the works box protrudes the bolt. When the hasp falls, the whole box fits inside an orifice of the counterpart of the lock, known as the "keeper plate," which is fastened to the outside of the cover to be locked, usually a trunk. The portion of the keeper plate adjacent to the edge of this opening is struck up, so as to be contained within a downwardly projecting rim of the hasp; the theory being thus to protect the lock from tampering. The claim is as follows:

"10. In a lock, the combination with a swinging hasp having a downwardly projected circular flange, or rim, on the head thereof, a cylindrical cup having a closed bottom, within said head and having a bolt opening in the side thereof, a bolt adapted to be projected through said opening, and means whereby movement of said bolt is controlled, of a lock or socket plate having a circular opening therein and the portion thereof adjacent to the edge of said opening raised or drawn up so as to be contained within the flange or rim of the hasp, to permit the cup to pass through the opening and to permit the bolt to be projected thereunder between said lock or socket plate and a trunk or chest."

The defendant attacked the validity of the claim, and put in evidence several prior locks, in one of which, Exhibit A, the works cup projected through an orifice of the keeper plate, but the hasp had no depending flange; instead of this, the flange extended horizontally, and the keeper plate was bent up, so that the horizontal flange nestled within the depression in the plate. On the other hand, in Exhibit F, introduced in evidence, the hasp had a depending flange, and co-operated with the keeper plate in the same way as in the patent in suit, but the works box did not pass through the orifice in the keeper plate. The defendant insists that the step of combining the elements in these two prior patents did not constitute invention.

Otto Munk, of New York City, for appellant.

John P. Bartlett, of New York City, for appellee.

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

PER CURIAM. The plaintiff's lock, strictly speaking, is new. It is composed of Exhibit A and Exhibit F. In Exhibit A the works cup

projects through the orifice in the keeper plate, but there is no downwardly projecting flange from the hasp. In Exhibit F there is a downwardly projecting flange from the hasp, but the works cup does not project through the orifice in the keeper plate. The patentee must of course be credited with that advance in the art.

In Exhibit A the keeper plate is struck up above the orifice, so that the hasp shall set down flush into it. That is one form, and, so far as appears, as good a form as the plaintiff's. It is true that, if one tries to pry off the plaintiff's lock, the edge of the keeper plate will be jammed between the downwardly projecting flange and the bolt. In Exhibit A there is a flange upon the brim of the hasp which extends beyond the works cup. The edge of the keeper plate is grasped between the bolt and this flange in somewhat the same way as it is in the patent in suit. We cannot see that there is sufficient difference whether one bends the flange of the hasp down over a struck up portion of the keeper plate as Aliano has done, or whether one strikes up the keeper plate beyond the periphery of the hasp, as is done in Exhibit A. There are various ways in which the edges of the hasp and the keeper plate may be bent with reference to each other, so as to prevent any one from intruding between them and to create a certain leverage when one tries to pry them off by force, but such variations hardly seem to us to require invention. There is no sufficient proof of successful user to make up for the apparent simplicity of the device.

If the precise co-operation of flange and keeper plate had not been shown in Exhibit F, or if the large orifice in the keeper plate had not been shown in Exhibit A, it might have required invention to combine them. Each was complete in detail; the only inventive idea was to combine them. We think it was merely one of the options which lay about handy for any one to adopt, and that the claim based upon it is void.

Decree affirmed, with costs.

## EAGLE WOODENWARE MFG. CO. v. DANA MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. February 6, 1917.)

No. 2865.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—MOP WRINGER.

The Hoffman patent, No. 671,136, for a mop wringer, *held* not infringed.

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

Suit in equity by the Eagle Woodenware Manufacturing Company against the Dana Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

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

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

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. This case involves the same patent considered by the Circuit Court of Appeals for the Third Circuit in Ely Co. v. Fritsch, 200 Fed. 424, 118 C. C. A. 576, and, in deference to that opinion, we assume the validity of the patent; but we think it clear that the defendant in this case does not infringe. The claim specifies "two bridges *17*, each having at each end an angular flange, *18*, fitted to the interior curvature of the side of the bucket, and whereby these bridges are secured parallel to each other and below the upper edge of the bucket." In connection with other elements, the result is that the path of the moving roller is controlled by the rigidly fixed bridges. The defendant substitutes for these bridges two guards, fixed at one end only, rising above the bucket in operation, and not directly controlling the path of the moving roller, which, unless the device became distorted, would take the same course if the guards were not present. In their tilting motion, these guards also tilt the two nonmoving rollers which are pivoted instead of rigidly fixed upon the securing frame. The language of the claim and its history in the Patent Office forbid the range of equivalents which would include the defendant's device.

The decree below dismissed the bill; and it is affirmed.

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## NATIONAL METAL MOLDING CO. v. TUBULAR WOVEN FABRIC CO.

(Circuit Court of Appeals, First Circuit. December 21, 1916.)

No. 1240.

PATENTS ⊂=326(4)—SUIT FOR INFRINGEMENT—VIOLATION OF INJUNCTION.

Whether a new structure, made by a defendant after being enjoined by a final decree from infringing a patent, also infringes, is a question with which a District Court may deal according to various methods, and it may in its discretion require the filing by complainant of a supplemental bill, to be answered and heard on formal proofs.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 615–619.]

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

Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Suit in equity by the National Metal Molding Company against the Tubular Woven Fabric Company. From an order, complainant appeals. Affirmed.

See, also, 227 Fed. 884, 142 C. C. A. 408; 236 Fed. 745, —— C. C. A. ——.

Charles F. Perkins and Carroll L. Perkins, both of Boston, Mass., for appellant.

William Quinby, of Boston, Mass., for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PER CURIAM. According to the final decree, the particular structure which had been before the court infringed the plaintiff's patent. Whether or not the different structure made by the defendant after being enjoined according to said final decree also infringed said patent was a question with which the District Court might deal according to various methods, either of which it was at liberty to select in its discretion. If the subsequently made structure had seemed to it to differ only colorably from that upon which the court had passed, it might have issued a supplementary injunction, or have proceeded under a petition in contempt; and these were the methods the plaintiff urged it to adopt. But the plaintiff could not require the adoption of either method as a matter of right; and if the court, in its discretion, regarded a supplemental bill or petition, to be answered by the defendant and heard on formal proofs, as the method best adapted to do justice under the circumstances of the case, it did nothing of which the plaintiff has a right to complain as error. No abuse of discretion is asserted, nor do we find any indication thereof in the record.

The motion for a supplementary injunction was not finally denied, nor was the petition in contempt finally dismissed. The District Court held both in abeyance to await the proceedings under a supplemental bill, if the plaintiff filed one; ordering their denial or dismissal only in case no supplemental bill should be filed. The plaintiff had filed such a bill before it took this appeal, and is thus still less in a position entitling it to say that reversible error appears from the record.

The order of the District Court is affirmed, without prejudice, and the appellee is entitled to its costs of appeal.

## LINDE AIR PRODUCTS CO. v. MORSE DRY DOCK & REPAIR CO.

(District Court, E. D. New York. January 22, 1917. On Settlement of Decree, March 1, 1917.)

1. PATENTS ⟸328—VALIDITY—METHOD OF CUTTING METAL.
The Jottrand patent, No. 831,078, for a method of cutting plates, pipes, and other metal articles, consisting specifically in directing a heating jet upon the object to be cut along the line of section, so as to raise the metal to a temperature enabling oxidation without fusion of the metal, in directing simultaneously a jet of oxygen under pressure upon the heated part of the object, and in moving simultaneously both jets along the line of section, is void for anticipation and lack of invention over the prior art, and especially the disclosures of the prior Menne American and German patents; the Jottrand process being merely the application of the Menne process to a particular purpose requiring only mechanical skill.

2. PATENTS ⟸19—"NEW INVENTION"—PROCESS.
A process is patentable, even if it uses old machinery, if the mode of treatment is new and useful; but the mere diminution in size or reduction in quantity, which may prove advantageous in an application of a certain device to accomplish one specific object or result out of all those covered by a broad prior patent, does not of itself constitute a "new invention."
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 19.]

3. PATENTS ⟸39—INVENTION—PROCESS.
A new and patentable method cannot be predicated upon directions to use a device in some particular way, which requires nothing but skill in the operator or attention to the relative size of the appliances, if the result and method of accomplishing the result were disclosed in the earlier patent.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 46.]

4. PATENTS ⟸198—ASSIGNMENT—MODE OF EXECUTION.
Where an assignment of an American patent was executed by the heirs of the patentee in Belgium before a United States consul, which made it sufficient to pass title in the United States and to be entitled to record, it is immaterial that it was not so verified as to prove itself in the Belgian courts.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 277.]

5. PATENTS ⟸323—SUIT FOR INFRINGEMENT—DECREE.
In a decree for defendant, in an infringement suit, on the ground of invalidity of the patent, the court will not include findings on issues determined in favor of complainant, which would not be reviewable by the appellate court.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 590–599.]

In Equity. Suit by the Linde Air Products Company against the Morse Dry Dock & Repair Company. On final hearing. Decree for defendant.

Kerr, Page, Cooper & Hayward, of New York City (Thomas B. Kerr and Drury W. Cooper, both of New York City, of counsel), for plaintiff.

Gifford & Bull, of New York City (Livingston Gifford and C. G. Heylmun, both of New York City, and J. B. Hull, of Cleveland, Ohio, of counsel), for defendant.

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

CHATFIELD, District Judge. This is an action for infringement of United States method patent No. 831,078, issued September 18, 1906 (upon application filed August 22, 1905), to one Felix Jottrand, a Belgian, who in applying for the patent in question stated that he then resided near Brussels. The Jottrand United States patent is stated by the inventor to cover—

"a method of cutting plates, pipes, and other metal articles; * * * and it has for its object to enable such articles, particularly those of iron or other readily oxidizable metal, to be cut almost instantaneously."

The method consists—

"in heating the object to be cut along the line of section by means of a blowpipe, * * * and to simultaneously direct upon the said line at a certain distance from the jet of the heating blowpipe a jet of oxygen under pressure to effect the cutting of the object by chemical action upon the heated part, the metal being raised to such a temperature as to enable oxidation to take place rapidly without fusion of the metal, while the oxides, which are more fusible than the metal itself, flow readily, and the severance is perfectly clean, as though the metal had been sawed."

The specifications describe in general an apparatus supplying the two jets above referred to: One, the jet of the preheating flame; the other, the jet for the oxygen. The "certain distance" referred to is provided for by arranging and regulating, relatively to the heating nozzle, the conduit for the oxygen, so as to "direct a jet of oxygen to the point which has been raised to the proper temperature by the heating flame."

The testimony, at considerable length, analyzes and describes these various steps, in order to make clear the propositions which are presented, as soon as study of the art has prepared a foundation for consideration of the language used. It appears that materials such as steel and certain grades of iron (wrought iron, etc.) oxidize at a temperature appreciably less than the melting point of the material. For instance, the melting point of steel is between 1,300 and 1,400 degrees C., while the melting point of iron is from 1,520 to 1,587 degrees C. If either steel or malleable iron be heated cherry red—that is, to a point approximating 1,000 degrees C.—it will unite or combine rapidly with oxygen. The magnetic oxide or slag produced by this chemical action has a melting point between 1,250 and 1,260 degrees C.

The evident purpose of Jottrand, as described, was to accomplish the precise results which may be observed in practice. Experiments at the trial, the commercial operations of parties licensed under the Jottrand patent, those acts of the defendant which are claimed to infringe the Jottrand patent, and the other uses which are set forth in the testimony, all show the same chemical processes caused by a similar physical arrangement of parts and conditions.

In all so-called commercial cutting, with any form of torch, such as those brought into this case as exhibits, a supply of gas suitable for use in a blowpipe is ignited at the nozzle of the blowpipe in order to give the preheating flame. In practice, the various parties seem to be in agreement, that the most convenient and best form of nozzle consists of a number of apertures forming an outer ring for combusti-

ble gas. In the center of this ring is a contracted aperture connected with the supply of oxygen under pressure (controlled by a valve or cock) independent of the supply pipes leading to the mixture chamber for the combustible gas of the outer ring. From this central opening can be projected a "jet" or pencil of oxygen, which will penetrate the heating flame and come in contact with the heated metal in a narrow path, as the nozzle is moved in the direction of the desired cut. This will increase combustion, and yet will not drown or smother the heating flame by a large excess of oxygen, which is not of itself a combustible gas.

In the Jottrand patent the oxygen nozzle is shown as a separate tube outside of the blowpipe nozzle, which may or may not present a single aperture. In the case at bar the plaintiff alleges that the nozzle, showing the oxygen jet in the center of a ring formed by the apertures of the blowpipe nozzle, is but an equivalent for the structure shown and described in the specifications and drawings of the method patent in suit.

The defendant, in alleging the defense of invalidity or lack of invention, admits this doctrine of equivalency, but at the same time insists upon the plea of noninfringement, if the Jottrand device patent be brought into the case for the purpose of drawing proof from that form of torch which literally complies with the specifications and drawings. As both the plaintiff and the defendant in practice use the equivalent form of nozzle, which is like the blowpipes of the prior art, the device patent was withdrawn from the suit.

The defendant bases its claim of lack of invention, nonpatentability, and anticipation, aside from alleged public use by one Harris, which will be discussed later, upon the same evidence as that offered to show the state of the prior art. The record shows that in the early part of the nineteenth century an oxyhydrogen or compound blowpipe, with two concentric nozzles, was invented by Dr. Robert Hare, of Philadelphia. In this form of blowpipe the oxygen nozzle was inside the ring of the hydrogen nozzle, and the blowpipe was used to fuse substances which had previously been considered infusible, including platinum. In 1832 a burner was invented by Professor Daniell, of King's College, London, which was described in the various editions of Silliman's Chemistry, and which as late as 1888 was the subject of a paper read by one Thomas Fletcher before the Society of Chemical Industry, at Liverpool, in which such experiments were described, as fusing the end of a $^{3}/_{16}$-inch wrought iron rod, or the fusing of a hole through a chilled iron plate, such as those used in burglar proof safes.

The general form of the Daniell blowpipe or burner has two tapering concentric internal bores, with a stopcock connecting the internal or smaller tube with oxygen gas, while the outer or larger tube supplies hydrogen or other combustible gas, with the intention of uniting these gases in combustion at the end of the tube, in order to produce the hot flame required. The inner tube was used for the transmission of the oxygen gas under pressure, thus forming a blowpipe, in which the jet or pencil from the inner tube would force itself into the flame at

the nozzle. The chemical effect of oxygen upon heated iron was of course well known during the nineteenth century, as were also the melting temperatures of iron and iron oxide, as stated above.

In the Fletcher process of fusing holes in an iron plate by means of a Daniell blowpipe, certain chemical reactions, with physical changes, took place, as to which all the witnesses in the present case seem to be in accord. The heating effect of the blowpipe raised the temperature of the iron to a point where the supply of oxygen served the double purpose of feeding the blowpipe flame and of oxidizing the heated metal against which the blowpipe was directed. As soon as this oxidation took place, a great increase in heat was produced, which, in turn, immediately raised the temperature of the surrounding particles above the melting point of the iron, and to a greater degree above the melting point of the iron oxide itself. The evident problem presented would be determined by the size and proportions of the object upon which the flame was directed. If the melting process extended through the plate, a hole would be perforated. If the melting occurred at the edge or end of the piece of metal, the molten part would drop off.

Upon May 25, 1901, a German patent was taken out by one Herman A. E. Menne, No. 137,588, followed by United States patent No. 703,940, of December 12, 1901, and German patents Nos. 140,149, 143,640, and 147,541, all during the year 1902, and elucidated in an address published in the "Zeitschrift" of July-September, 1904. These patents were all process patents, while United States patent No. 705,418 and German patent No. 140,148 were obtained for a device to be used in carrying out the processes named. Dr. Menne developed his method from the necessities of opening tap holes to blast furnaces, or removing the metallic masses which form at times through cooling in and around the openings of blast furnaces, and which, if not removed, may cause the loss of the entire contents and occasion delay in cutting out the refractory material after cooling. But from the practice in connection with blast furnaces, Dr. Menne, in the address in question, says:

"Another very extensively used application of the method has been found in the rapid dismounting, piercing, separation, slotting of iron and steel pieces of any kind, as, for instance, anchor bolts, armor plates, clutch pieces, pump rods, etc., in that the sawing through or rasping through, etc., operation usually requiring hours and days, is shortened to a few minutes, and that the work may be carried on in loco."

He also says:

"A piece was melted through its entire length in a few minutes. * * * The said process is of great value, whenever it is necessary to effect rapid dismounting (taking down scaffoldings, dismantling). * * * Thick iron supports, columns, rails, etc., can be severed in a few minutes."

Dr. Menne specifically says, in these patents and in the address, that this process of severance by melting is to take the place of sawing or rasping; that is, of making a severacne so as to separate in parts. Menne did not specifically claim invention of the type of torch or instrument which he had in mind for this purpose, but says in his

address that it is constructed similarly to the Daniell burner, and states that the oxygen jet is much smaller than the heating gas opening. In his American patents, supra, he describes and shows a drawing of the torch or nozzle in which the outer or hydrogen tube is about five times the size of the oxygen tube, and in which the oxygen tube itself is described as an inner narrow (but not converging) tube of about 4 mm. bore. In the form of torch used by the plaintiff and the defendant, under present conditions, the oxygen tube has a nozzle opening of about 1 mm. and the opening for the hydrogen flame is approximately 6½ mm. In the drawing of United States patent No. 703,940, Menne illustrates the bore of his outer tube by a drawing allowing 15 mm. as the diameter of this tube, while the inner oxygen tube is represented as having a uniform diameter of about 2 mm.

Menne specifies a use of the tube in much the same terms as have just been employed in describing the operations of Fletcher. He ignites the combined gas at the nozzle. He then heats the surface of the metal with the flame produced. He then turns on a further supply of oxygen, under a pressure of as much as 20 atmospheres, and with this he not only oxidizes the heated metal, but thereby produces so much local heat as to melt the surrounding metal and blow away or forcibly remove the molten material before its heat can be conducted off, with resultant solidification. He thereby supplies as well a fresh metallic surface for the further application of heat, in order to renew the material for continuing the process of oxidation, and thus makes progressive and continuous the melting of the surrounding material, until the metal is punctured and the parts against which the torch is being operated are entirely melted and removed.

The mere mechanical need of care in avoiding a splash of molten material or flare-back in the burner has nothing to do with the development of the process, and Menne recognized that the effect of an excess of oxygen was to cool the flame. Under circumstances where oxygen was present in excess, or where noncombustible material presented solid instead of molten particles, an increased pressure in the oxygen jet must be met by an increase in the gas feed, by which means the heat of the flame would be increased and the resulting increase of pressure would also aid in removing the solid substances. In an addition filed as the German patent No. 140,149, Menne states that, if the part to be melted is hot enough to be affected by the oxygen without the additional heating from the torch, then it can be melted away by continued play of the oxygen under suitable pressure, and that the original heat could be supplied by some other means than the blowpipe.

In German patent No. 143,640 he states that the melting is started by introducing oxygen in excess into the flame, and may be continued with oxygen alone. He also develops this idea further in German patent No. 147,541, in which he says that the combustion gas may be shut off if the mass is sufficiently preheated and contains sufficiently combustible substances. Menne evidently appreciated the proposition that control or limitation in the application of the oxygen to the heated surface would define or restrict the amount of material which would

be oxidized—that is, which would unite in combustion; and he also appreciated that this combustion would impart heat to the surrounding metal and could be limited so as to produce only a uniform and more or less regular extent of melting. He says that iron and steel pieces may be dismounted, separated, slotted, and melted through in place of cutting with a saw or file. He refers to the removal of a ring or collar by a severing through the melting process.

If the operator applied only that amount of heat which would render subject to the oxidizing effect those particles included within what would be a hacksaw cut, if he could supply oxygen so as to chemically act upon those particles and no others, and if the position of these particles is such that they can immediately drop away with such assistance as the oxygen supply may afford, if the advance in the heated area can be accurately limited to the particles immediately in front of the moving stream of oxygen (or if that heating is kept up by the blowpipe flame, advancing with the stream of oxygen, if the effect of blowpipe flame and the supply of the oxygen is reduced, so as to give just the amount necessary to produce these results), we should have, when accurate movement is insured, a sharp cut even in line upon each side and as narrow in width as conditions could allow. This ideal cut was the thought in Jottrand's mind, and he filed his application with a view to patenting the method of producing such a cut, and also the instrument or torch by which the blowpipe flame and the stream of oxygen could be supplied as he suggested.

[1] The testimony thus presents an issue which is difficult of determination, but which may be easily stated and understood from the standpoint of the prior art, and also from the application of their deductions by the expert witnesses in expressing an opinion. The prior art, as particularly illustrated by the Menne patents and the Menne address, had in mind and sought to describe a method and device for the production of a heat which would melt through the resisting substance at any point where penetration was desired. If the lateral spread of the melting (that is, the width of the path of penetration) was to be limited, and if the material was to be slotted or bored or pierced, then the line of this slot could be directed by the interposition of a shield which in the form of a stencil would protect that part of the material which is not to be subjected to the melting influence. In this sense, the prior art shows full appreciation of the self-evident proposition, that, if material is melted in two, a severance will be the result. Dr. Menne evidently appreciated the application of his melting process, that is, the chemical reaction of oxygen upon preheated iron, so as to contribute a melting heat to the surrounding surface for the purpose of making the melted surface subject to removal, and he coupled the application of this chemical process with a forcible removal by the application of the stream of oxygen under pressure.

It would thus be old in the art to merely blow out, or allow to flow out, the melted product of oxidation. It was old in the art to oxidize and to produce adjacent melting. If the object desired was merely to accomplish a melting to such extent as removal of the melted fluid might be desired, then the disclosure of Menne was complete.

But in this sense the Menne process was an equivalent for the use of a hacksaw, in that the removal of a part of the material by a hacksaw would secure its absence to the same extent which removal by melting would insure an open space instead of the solid iron. If hacksaws had never been invented, it would be difficult to conclude that the use of one, or the method of removing iron by means of a saw, should be held anticipated by the Menne processes. If the cutting of wood had always been done by repeated blows of an ax, the severance of the article would not render invalid the invention of a saw to deliver a great number of small cuts in a narrow line. This would furnish the basis for a device patent to make the cut. But could a person claim that he had a patentable method of using the device, or of the way he delivered these restricted cuts to such material as would chip off, instead of bending easily? Or could he thus obtain a patent for a method of cutting by a special saw such kinds of metal as would act like wood, if ordinary saws had already been used in wood cutting?

This brings us to the question just discussed by the Supreme Court in the case of Minerals Separation, Limited, et al. v. Hyde, 242 U. S. 261, 37 Sup. Ct. 82, 61 L. Ed. ——, decided December 11, 1916. The court there upheld a method patent for an advance in process which, "because of its economy and simplicity, has largely replaced all earlier processes. * * * Diamond Rubber Co. v. Consolidated Tire Co., 220 U. S. 428 [31 Sup. Ct. 444, 55 L. Ed. 527]; Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 429, 430 [22 Sup. Ct. 698, 46 L. Ed. 968]; The Barbed Wire Patent, 143 U. S. 275 [12 Sup. Ct. 443, 36 L. Ed. 154]; Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486 [23 L. Ed. 952]." The court says the patentees "discovered the final step which converted experiment into solution, 'turned failure into success' (The Barbed Wire Patent, 143 U. S. 275 [12 Sup. Ct. 443, 36 L. Ed. 154])."

[2] As was said in Cochrane v. Deener, 94 U. S. at page 788, 24 L. Ed. 139, a process is patentable, even if it uses old machinery, if "the mode of treatment" is "new and useful." "A process requires that certain things should be done with certain substances and in a certain order." But Jottrand uses in general an old form of device, he uses a known form of gas in the same mixture as shown by Menne and others, he performs the same steps in the same order, but applies these with the idea of "cutting," instead of "melting." Menne developed the idea of melting and described the collateral steps which would constitute cutting. Menne did not have in mind the use of this method of cutting in its full commercial development of economy in metal and in oxygen. But the increased use of oxygen and its cheaper production, which led to its commercial application at about that time, did not produce new "steps." It only required the use of the old steps, with careful observance of the application, so as to adjust the use to the need and to economic results. Jottrand described a device which may have been patentable in its exact form, but which is not broad enough to bring in the defendant as an infringer of the device patent, and his method patent did not depend upon its use.

As was said in Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, at page 556, 18 Sup. Ct. 707, 42 L. Ed. 1136, a patent cannot be granted for a "principle," or a "mode of operation," and one who has made an improvement cannot include all claims to the whole art or discovery which he has improved. See cases therein cited. From his standpoint, Jottrand sought not the mere accomplishment of melting and the removal of the iron, with the highest degree of perfection attained by the greatest amount of melting, if refractory substances were encountered. Jottrand, on the other hand, had in mind a method of avoiding melting. He goes so far as to claim a method of producing no melting of the metallic iron. He sought to describe a method of severance of certain kinds of iron by means of a narrow cut like that of a saw, which would be the exact equivalent of a cut produced by a hacksaw. He claims the right to patent, not the method of making two pieces of iron by a cut, but the method of making a saw cut, with an apparatus which tends to produce melting. He limits his method to an amount of melting productive of a temperature effective only upon that material made fluid below the melting point of the iron, and he keeps the acting temperature down below this melting point of the iron by controlling the application of the heat from oxidation, and by removing the material at just such a rate as will thus control that production of heat.

Granting that the chemical processes of oxidation and the physical transmission of heat, as well as the physical removal of the melted material, is the same in the Menne process and in Jottrand, the question presented is not whether Menne was working in the direction of applying a melting flame to useful purposes, and whether Jottrand was attempting to accomplish the same useful purposes by a different method of applying one kind of melting flame (the answer to these questions is apparent), but the problem presented is whether Jottrand thus shows a patentable method, and whether, if his method be patentable, it is distinguishable from the evident variations of the Menne process. The mere diminution in size or reduction in quantity which may prove advantageous in an application of a certain device to accomplish one specific object or result out of all those covered by a broad prior patent does not of itself constitute a new invention. De Lamar v. De Lamar Min. Co., 117 Fed. 240, 54 C. C. A. 272; Guidet v. Brooklyn, 105 U. S. 550, 26 L. Ed. 1106; Bullock Electric Mfg. Co. v. General Electric Co., 149 Fed. 409, 79 C. C. A. 229.

This is no different from the mere adjustment of parts in an instrument, where the use of that adjustment makes certain some particular desired result, and where that particular result was known as obtainable by the particular adjustment, either to the prior inventor or to any mechanic using the device. Estey v. Burdett, 109 U. S. 633, 3 Sup. Ct. 531, 27 L. Ed. 1058; Pomace Holder Co. v. Ferguson, 119 U. S. 335, 7 Sup. Ct. 382, 30 L. Ed. 406; United States Repair & Guarantee Co. v. Assyrian Asphalt Co., 183 U. S. 591, 22 Sup. Ct. 87, 46 L. Ed. 342.

[3] Nor can a new method be predicated upon directions to use a device in some particular way, which requires nothing but skill in

the operator or attention to the relative size of the appliances, if the result and the method of accomplishing the result were disclosed in the earlier patent. Siemund v. Enderlin, 206 Fed. 283, affirmed 212 Fed. 410, 129 C. C. A. 604; Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935. Mere reduction in the size of the oxygen tube, or even the tapering of the tube, as shown in certain forms of the Daniell burner, would not furnish invention over the Menne patents, if Jottrand delivered his supply of oxygen under such pressure and in such a way as to induce heat, with resultant melting to as great an extent as the heat could accomplish. These mechanical changes were old, and their effect known. Howard v. Detroit Stove Works, 150 U. S. 164, 14 Sup. Ct. 68, 37 L. Ed. 1039. Dr. Menne expected radiation, and sought to overcome solidification of the melted material, which he wished to remove, by melting sufficient (through the heat produced by oxidation) to present a molten mass only in the area upon which the oxygen under pressure would be driven. Jottrand in practice prevents radiation, with the resultant cooling of the molten material, by removing the melted oxide; but he thus limits the further radiation of heat and resultant melting to the physical boundaries of the saw cut or kerf which is the intended result of the method.

We must therefore look to the statement of the Menne process itself, and to the language of the Jottrand patent and claims, in order to see if Jottrand is but a clever elucidation of something which was actually in Menne's mind, and which was plainly set forth in his description of illustrative operations. We must consider the effect of using the same chemical reaction, but with a different pressure in the oxygen delivered by the extra jet and the employment of a definitely shaped nozzle.

Menne had no reason to consider the difference in the melting point of the oxide and of the metal, except in so far as it entered into the production of sufficient heat to cause melting generally. Menne did not need to consider, and did not consider, the difference between steel and cast iron, in its capacity for oxidation, nor in the amount of heat which was required to produce melting. Menne planned to heat to a sufficient temperature to oxidize the substance upon which he was working. Menne planned to melt or reduce the substance encountered after oxidation. If it proved to be metallic iron or a refractory substance, he produced heat to melt it, so it could be removed by the oxygen jet and gravity. Jottrand, on the other hand, describes only a practical application, which in its theoretical perfection is limited to steel or iron, subject to oxidation at a temperature lower than its melting point.

The trend of the argument can be observed from the statement, made by Menne, that the operator needs only some heating apparatus and a flask of oxygen with a means for supplying it to the heated surface under pressure. Menne contemplated the possibility of first heating the iron and then bringing the oxygen jet by an independent pipe or hose to a point where it could play upon the heated surface. He plainly contemplated that this pipe or hose supplying the oxygen could be used as water would be used to wash off ice. Jottrand, however,

prescribes that the oxygen jet shall be placed at a "certain" (that is a fixed) distance from the hydrogen jets or nozzle, and he suggests that this "certain distance" means one which is appreciable, as well as fixed. He says that the second nozzle is to be capable of regulation "appropriately in relation to its heating nozzle." He then says that the object will be cut "without appreciable loss of metal along a perfectly regular line; it being only necessary to cause the blowpipe nozzle to follow the contour to be cut."

While evidently the nozzle openings may be arranged in different ways, it is Jottrand's purpose to preserve their fixed relative position while the cut is being carried on. He thus arrived at the idea of his device patent, but did not necessarily employ any new process or method. It is evident that, if Menne were using the methods described by him for the purpose of cutting or severing a plate or strap of metal, he would have applied the heating flame until the metal appeared to be ready for the application of oxygen. He would then have applied the oxygen, and if the force of the oxygen was greater than that neccessary to remove the molten oxide, and if this surplus of oxygen cooled his heating flame, it is evident that he would have reduced the quantity of oxygen. It would seem not to require invention to reduce the pressure, and thus prevent waste as well as excessive oxygen, if the supply were evidently too plentiful.

Menne shows in his address, as well as in the United States patent, full appreciation of the effect of too much oxygen and the necessity of increasing the heating flame to overcome the excess, if the excess be necessary to melt and physically remove the molten material. It is difficult to see how a mere change in the degree of pressure or in the quantity of material allowed to be used can involve invention or be the basis of a different method of operation. The difference in expert manipulation of the tools would involve the same propositions as a difference in mere adjustment or application of the gases applied by the operator.

There is evidently no patentable feature in the change from a blowpipe fitted with a Daniell tube for the supply of oxygen (which not only was old in the art, but was plainly disclosed by Menne) to the so-called torch or blowpipe of the Jottrand licensees and the defendant, which provide in a natural manner a convenient structure for furnishing, as in the well-known Daniell burner, a supply of oxygen in the form of a jet. If Menne used a pipe relatively one-fifth or one-sixth the size of his blowpipe aperture, in order to deliver oxygen which was under sufficiently heavy pressure to supply it in quantities at the orifice, no patentable novelty over the Daniell burner would be shown, in reducing the size of the oxygen pipe and tapering the orifice, if the desired object was to confine the discharge in direction and in quantity with the resultant increase in velocity. This is, of course, the well-known method of constructing any nozzle or jet orifice, and would be the one naturally used if the purpose were understood and desired. Hence it would require no invention for Menne to make his Daniell burner in the form of the device used by both the plaintiff and

the defendant, if Menne had in mind the method or the object which would thus be attained.

We are therefore brought back to a consideration of the patentability of Jottrand's application of the chemical and physical propositions involved in the cutting of a thin sheet or plate of iron by one who made the obvious changes in the Menne device needed to carry out the operation exactly set forth in the Jottrand patent. Dr. Menne shows appreciation of the chemical reactions following the application of oxygen to the preheated metal. He also understood the chemical reaction and the physical phenomena resulting from an increase of heat, produced by increased oxidation. He specified in his various patents the reduction of refractory substances by this means, and the production of *sufficient heat to melt the metal to be removed* by the physical force of the oxygen jet. But in using these reactions he does not refer to the limitation in use of the method, so as to produce only similar chemical reaction under those physical conditions existent, when the product to be melted reaches the melted condition and is removed before a temperature is produced and maintained in position which will melt the adjacent metallic iron. Everything relating to the result, from both a chemical and physical standpoint, was well known in the art.

Assuming, therefore, that Menne did not specifically figure out or state that physical condition and arrangement of parts which would continue the conditions under which iron oxide could be melted, but metallic iron would be left solid; and assuming that Dr. Menne passed over any reference to these points as collateral, and hence not necessary to be elaborated in describing the production of heat for the purpose of melting as rapidly as possible, or to as great an extent as possible, we are compelled to consider whether Jottrand, by contemplating and arranging to produce the restricted melting which was sufficient for his needs in melting iron oxide, and in cutting a narrow path, discovered anything more than would be observed by any chemist who was attempting to describe the operations of a mechanic following the Menne method, with the intention and purpose of severing the iron with as little melting as possible. It would not be invention to merely restrict the amount of melting so as to save material. Mere economy in the use of the agents, or in the effect of the result, describes neither a patentable device nor a patentable method.

The plaintiff in this case seeks to patent the application of this idea by stating that the particular use results in economy and hence commercial advantage. He seeks to differentiate by showing that Menne overlooked the economy and had in mind producing a result which involved waste of the material used. But if, following Menne, with the idea of practicing economy, a mechanic would use the parts and produce the result exactly as Jottrand describes, then it is arguing in a circle to find that Jottrand differs from Menne, and has made an invention, because he correctly described and understood those steps of the Menne process which any mechanic would use in doing that which Menne understood, but did not consider from its economical, commercial application to the severing of metal in particular instances

which were only clean and definite forms of rending the solid metal apart.

In considering the understanding which Menne had or did not have as to the amount of melting produced, where the size of the supply of oxygen, and the duration of its use in one place, did not raise the temperature to the melting point of the iron, we find upon examination of the Menne United States method patent that he says:

"When the combustible slags or masses are sufficiently hot, so as to burn in the oxygen current, the hydrogen gas can be entirely cut off, and the melting can be continued with oxygen gas only. This is a way for obtaining narrower holes, as the oxygen gas, escaping from its narrow nozzle, attacks a smaller area than the larger combined flame."

Here we get evidence that Menne contemplated turning off the preheating flame entirely, so as to melt only that portion which would be raised to a melting point by the oxygen nozzle. This is direct evidence that Menne was describing a limitation to both the extent of the melting and the temperature which might be required to reduce the slag to a molten condition. If the slag is refractory to heat, Menne says the supply of oxygen must be increased correspondingly with the supply of combustible gas, so as to produce greater initial heating and greater resultant heat from oxidation. If, on the other hand, the slag melts at a low temperature, then the preheating flame ceases to be of importance, and the heating of oxidation from the oxygen escaping through the narrow nozzle, but still directed with sufficient force to remove the melted material, will make it possible to progress so as to obtain "narrower holes." A narrow hole, if boring or piercing is the object, is self-evident.

But suppose we apply this idea as stated by Menne to his process of slotting or severing as a substitute for rasping through. We should then, looking at the matter from the standpoint of the expert, describe the actions of the mechanic as follows: By the Menne device, a preheating flame is directed to the metal. When the combustible slag or mass affected by the preheating flame is sufficiently hot to burn in the oxygen current (that is, in the case of steel or wrought iron, when it gets cherry red at about the temperature of 1,000 degrees C.), the mechanic will (as the application of the pressure from the oxygen nozzle starts kindling of the iron with resultant melting at the point of contact) cut off the preheating flame and limit the application of oxygen from the nozzle to the narrow hole which is to be extended into a narrow space of severance (or a narrow slot). The mechanic will find that, if the amount of pressure and the supply of oxygen be maintained at a proper amount, so as to remove the molten metal and furnish a melting heat in advance of the flame, it will be necessary only to regulate the speed with which he makes the slot, in order to bring the metal in advance of the oxygen nozzle to the kindling point, and thus have material upon which the stream of oxygen may advance, while evidently the molten material will in the meantime have been carried away at the *melting temperature* of the *"combustible slags or masses"* which have been melted in the narrow hole.

The result would be the formation of a kerf or slot like that de-

scribed by Jottrand and showing upon the sides such portions of molten metal only as had been reduced to that condition by the heat produced during the removal of the combustible mass against which the stream of oxygen had been directed. As has been observed, a mechanical feed and torch holder, as well as expert manipulation, allows a closer approach to the theoretical or perfect cut; but the principle of cutting is no different. Jottrand describes a way of saving metal or material, by intelligent observance in application of the methods which Menne suggests should be used for the purpose of making a restricted severance of the material. This is not the description of an invention on which could be based a method patent.

But much more would it seem that Jottrand was describing a use of the Menne devices and methods, when we refer back to the Daniell burner, which Menne himself says he used, and to the Hare blowpipe as described by Silliman and Fletcher, with which the results of oxy-acetylene cutting can be exactly produced, when a mixture of oxy-acetylene gas is substituted for the hydrogen gas of the original Hare blowpipe, or for the outer tube of the Daniell burner. Menne is working away from the teachings of Hare, Silliman, Daniell, and Fletcher when he opens the converging interior nozzle of the Daniell burner into a tube with an even diameter, which will allow a larger escape of oxygen and a larger amount of melting. But when he also refers to the use of the narrow oxygen nozzle of a Daniell burner, to melt a narrow hole, without further use of a preheating flame, he discloses all that is necessary to enable the mechanic to employ (when he does not wish a large area of melting) either the uniform narrow tube such as is used, according to the testimony, by various persons in the United States for the purpose of cutting, or the Daniell burner converging nozzle, such as that actually used by the defendant in the operations complained of in this action.

This makes it unnecessary to consider in detail the operations at the Chenango furnace, in which a large gas pipe, with a smaller inclosed gas pipe for the supply of oxygen, was used to melt in a pool and to blow out the resultant hole in an iron casting which was located a distance of some feet from the operator of the torch. It is therefore unnecessary to consider the difficulties suggested in the plaintiff's case by the description of the defendant's operations, which produce the results described by Dr. Menne in his reference to the employment of his device and method for the removal of anchor bolts, the slotting and separating of armor plate, etc. The defendant uses the process for cutting off the heads of bolts in the plates of iron ships. One bolt might be cut with inordinate melting, as described by Menne, and the next with a narrow kerf, as stated by Jottrand. But Menne says that the "method is applicable everywhere that masses are present which can be oxidized," and "the suggestion for the development of the method" for slotting or severing "originates from blast furnace practice."

Can the "development" be limited to that use only which caused its origin or discovery? Obviously not, and careful observation of "development" or application is no more than the description of a func-

tion of a machine when used for some particular or novel purpose. Such description is not invention. Risdon Locomotive Works v. Medart, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899. The operations of the defendant are claimed by the plaintiff's witnesses to be Jottrand. They are claimed by the defendant's witnesses to be Menne. The chemical processes evidently are not in dispute. The torch used is evidently a Daniell burner. The melting is evidently limited to the application of the oxygen, but no care is taken to see that this melting is restricted to produce a narrow kerf. One bolt might be so cut as to follow exactly the application claimed by Jottrand. Another bolt might be melted off, and be plainly an application of the Menne process.

Another difficulty which arises upon the plaintiff's theory of the case is presented in the article by Mr. Kindl (Proceedings of the Engineers' Society of Western Pennsylvania, November, 1915), in which armor plate cutting is described as an application of the Menne process, with a torch resembling the Daniell burner, and without the uniform tube shown in the Menne patent as the oxygen orifice. This method described by Mr. Kindl is said by the plaintiff's witnesses to be Jottrand. It might be one in one instance, and the other in a second instance, if the processes are to be held patentable according to the lines of the plaintiff's contention herein.

The claims of the Jottrand patent are as follows:

"1. The method of cutting plates, pipes and other metal articles consisting in heating the object to be cut and directing upon the heated part an oxidizing jet.

"2. The method of cutting plates, pipes and other metal articles consisting in directing upon the object to be cut a suitable heating jet and an independent oxidizing jet.

"3. The method of cutting plates, pipes and other metal articles consisting in directing a heating jet upon the object to be cut, upon the line of section and an independent oxidizing jet at a distance from the heating jet and displacing both jets along the line of section.

"4. The method of cutting plates, pipes and other metal articles consisting in directing a heating jet upon the object to be cut, along the line of section so as to raise the metal to a temperature enabling oxidation without fusion of the metal and in directing simultaneously upon the heated part of the object a jet of oxygen under pressure.

"5. The method of cutting plates, pipes and other metal articles consisting in directing a heating jet upon the object to be cut, along the line of section so as to raise the metal to a temperature enabling oxidation without fusion of the metal, in directing simultaneously a jet of oxygen under pressure upon the heated part of the object and in moving simultaneously both jets along the line of section."

It will be noticed that claim 1 is limited to "cutting plates, pipes and other metal articles." Claim 2 substitutes only the words "directing upon the object to be cut a suitable heating jet" for the words "heating the object to be cut." Claim 3 adds the words "upon the line of section" to the application of the heating jet, and then suggests moving the two jets "along the line of section." Claim 3 might be distinguished from the defendant's structure by its requirement that the oxygen jet be "at a distance from the heating jet." But this is a distance which is evidently implied in the other claims. Claim 4

brings in the idea of limiting the initial heating to a point at which oxidation without fusion may occur. Claim 5 is the same as claim 4, but with the obvious provision that the two jets shall be moved simultaneously along the line of section.

The previous discussion makes it plain that Jottrand intended to describe a method of cutting, in correspondence with claim 5, and that, in so far as claims 1, 2, 3, and 4 are broader than claim 5, they cannot include anything more with which we are concerned, and cannot avoid anticipation by the Menne patents and address, except as claim 5 specifically covers the Jottrand development.

Greater objection from the standpoint of validity might be urged against claim 1 than against any of the other claims, unless we construe claim 1 as substantially limited by the specifications and drawings to the various matters set forth in claim 5. Claims 1, 2, 3, and 4 therefore would be invalid unless limited to a *"cutting"* in the sense described in the specifications, rather than a mere severance by melting, from the application of an oxidizing jet to a heated surface. It would be impossible to hold claims 1 to 4 valid, in a broad sense, over the Menne patents and prior art as set forth in the Menne address, or even over the disclosures of the Hare blowpipe, the Daniell burner, and the Fletcher application.

Menne shows a suitable heating jet and independent oxidizing jet, as set forth in claim 2, and if Menne's process was being used to make a cut, the jets would be displaced along the line of section, as provided in claim 3. In the same way, claim 4 could not be used for the purpose of cutting, unless there were movement along the line of section, and we therefore find the Jottrand patent dependent upon claim 5, as the exact statement of that which is set forth in the specifications and drawings and upon which Jottrand seeks to avoid infringement of the mere melting method of severance made plain by Menne.

According to the undisputed testimony, when following the Jottrand claims, some heat produced by oxidation actually melts a greater or less portion of the metal which has not yet been oxidized. In practice, according to the testimony, a fixed adjustment is secured both as to quantities and pressure, through the skill of the operator, while a feeding device prevents deviation and thus confines the line of melting to the so-called cut. If a person follows carelessly claim 5 of the Jottrand patent, he might fail in his experiment and stop oxidizing the material, with a corresponding cessation of melting, he might melt so much that the cut would be enlarged into a Menne melting through, or he might turn on so much oxygen, without cooling down the metal, that the material would be melted in all directions. In any of these cases he would not be carrying out successfully the Jottrand directions, and it does not seem that patentability, in the sense of invention, should depend upon success in manipulation.

Jottrand does not get beyond the limits of the Menne disclosures by using an oxygen jet or pencil, which is not the free flow of oxygen from a pipe under pressure. A fine stream from the end of a jet will produce the same result as that from a uniform, but still narrow, pipe, emerging under possibly greater pressure but with less velocity. If

the difference is merely in the quantity of material available, no patentable invention would be presented in furnishing the quantity by one means rather than the other. But the plaintiff contends that the jet of oxygen produces a different result than the same quantity of oxygen supplied at exactly the same points by a straight tube.

The plaintiff further contends that Jottrand discloses appreciation of this difference and that Menne does not. But this claim presupposes that Menne, through his endeavor to melt as much as possible, did not understand and did not disclose the effect of limiting the supply of oxygen so as to limit the amount of iron oxide, and to avoid melting of the material outside the range of oxidation. Menne, of course, when he advocated the use of a stencil and interference with oxidation, intended to limit the amount of melting to such material as might be oxidized or melted within the lines of his stencil or plate.

It is impossible to hold that Jottrand could avoid anticipation by Menne if he stood solely upon the accuracy of adjustment by which oxidation alone could be accomplished with no melting. In fact, the plaintiff's own operators do cause some melting, as has been stated. The plaintiff is driven, therefore, to the proposition that Jottrand escapes the defense of anticipation by the Menne disclosure, solely through using a narrow orifice producing a jet of oxygen, instead of a uniform pipe with the stream of oxygen directed against a small portion of the surface, or against a stencil which would have the effect of a gate, and would produce thereby, so far as the results are concerned, a clumsy substitute for a nozzle.

Another defense must be considered, which took up the greater part of the testimony on the trial of the case. It proved to be an interesting issue. One Harris, living in Cleveland, is shown to have been active in the invention, manufacture, and use of so-called acetylene blowpipes and burners from the year 1901 on. Up to the year 1904, or the early part of 1905, he was actively interested in the manufacture and attachment of these acetylene burners to gas cooking ranges. He has shown by a number of witnesses that prior to 1905 he used oxygen which he produced by his own manufacture in actually cutting iron straps and in melting off the ends of pieces of iron such as the ordinary work bench file, through the use of an oxyacetylene blowpipe, to which he attached by wire a separate tube terminating in a nozzle, in order to supply an additional jet of oxygen after heating the material with the blowpipe. He has produced as an exhibit the instrument which he alleges was the one used by him in this way, which answers in general to the Jottrand torch.

Some dispute has been raised as to the possibility of producing oxygen, by Harris, of a quality which would do the work of cutting. Doubt has been cast upon the date at which some of the various witnesses saw Harris do what apparently constituted acts of cutting, according to the method described by Jottrand. But it is clearly shown that Harris did cut metal and operate the blowpipe in question before the date of the Jottrand invention. One piece of metal, attached to a stove sold by Harris at least as early as 1904, traced to a hardware firm in Iowa, and from them to a customer, who turned it over to the

defendant's representative, has been sufficiently identified so that the date of its original construction seems beyond dispute. Doubt has been thrown upon the carefulness with which the parts of this stove were protected prior to bringing them into court, but no satisfactory evidence has been shown to indicate tampering therewith. Analyses by one of the expert witnesses for the defense, accompanied by microscopical examination, with photographic enlargements of the edges of the cut at one end of the strap in question, seem to show a cut in which iron oxide was formed by the application of heat and oxygen, and in which the metallic particles upon the sides of the cut do not bear indication of melting such as would be the result of intense heat other than that by the cutting oxyacetylene torch. The bending and distorting physical changes following the use of a tool to sever the metal when cold or slightly heated are absent.

The testimony of this expert was exceedingly interesting, as was that of the other experts with relation to this particular exhibit. Much testimony was introduced by both sides in reference to the peculiar entries in certain books, which would seem to throw doubt upon the accuracy of recollection of the witness Harris and the other witnesses for the defendant who testify as to the date of Harris' experiments. The cost of oxygen here enters into the case as an evident reason why Harris did not pursue his development of a cutting torch; but it is apparent that Harris (who took out many patents for oxyacetylene heating blowpipes) did not, even though his use was public, progress beyond the stage of experiment, and did not understand or appreciate what he was doing, so as to constitute a public prior use of a method applying more than an accidental variation of the blowpipe of the prior art. He states that he made the blowpipe with the additional tube, for the supply of material to the blowpipe flame in the manufacture of artificial rubies. This extra material was a powder, which he thus fed into the flame. He took this blowpipe for the purpose of introducing oxygen as he would with a so-called "rat-tail burner," with the thought that this might prevent the production of long carbon filaments which formed from "polymerization" and broke off in the burner. The result was worse than before, and he transferred the flame to a piece of metal in order to test its melting or welding qualities. He found that it produced an incandescent spot, which punched a hole and cut off the material. He evidently always treated this as a mere variation in the form of a blowpipe flame, which created a melting heat, and never thought of the oxidizing, except as incidental to the flame of the oxyacetylene blowpipe. He treated it as an impractical and laboratory experiment, which led to no commercial use. His cutting was confined to the giving of laboratory illustrations of how he could melt with an oxyacetylene blowpipe, or to incidental cuts with an implement which was not an object of thought, except that it happened to be convenient at the time and was entirely abandoned when he proceeded to further develop his work in acetylene burners and blowpipes. It never rose to the dignity of an invention, nor even to the point of a definite, intelligent use of a device, as dis-

tinguished from the purely accidental employment of a convenient object. Wood Paper Patent, 90 U. S. (23 Wall.) 566, 23 L. Ed. 31.

[4] The defendant has attacked the title of the plaintiff, and one or two matters in that connection must be referred to. The original assignment to this plaintiff, although admittedly recorded in the office of the Commissioner of Patents, could not be produced at the trial. There seems to be no reason to find that the existence and contents of the original were not sufficiently proven, and the title of the plaintiff is thus traced back to an assignment from the heirs and legal representatives of the inventor, who died in Belgium on May 4, 1907. It appears from the record that the legal representatives (or those succeeding to the personal property in the estate of Jottrand, deceased), according to the law of Belgium, made in writing and delivered an assignment of the patent in suit, and of certain applications for other United States patents, to the Société Anonyme l'Oxhydrique Internationale, a Belgian corporation. It is shown by the testimony that no letters of administration are needed in Belgium, and that those entitled take without formality. Similarly no certificate of such rights, from any legal tribunal, is needed to make prima facie title; but the parties conveying prove their right by executing under oath a paper showing their succession to that title. The Belgian law requires this paper to be sworn to before a "notaire," and it thus stands as a judicial record. In the case in question, this paper, which was worded in compliance with the laws of Belgium, and was signed by those required to make it valid to pass title in Belgium, was not proven before a "notaire," but actually executed before the American consul, in order to make it equivalent to an acknowledgment under the United States law. Section 4898, R. S., as amended by chapter 391, § 5, Act March 3, 1897, 29 Stat. 692 (Comp. St. 1913, § 9444). As those who under Belgian law could convey title thus executed an instrument sufficient to pass title in the United States, for the purpose of assigning patent rights in the United States, the objection that it was not so verified as to prove itself in a Belgian court is of no moment. Title would pass by the writing, and the proof thereof is sufficient for its recording and use as evidence in the United States. Subsequently the Société Anonyme executed a conveyance, valid in form, to an American corporation, which through various further assignments passed on the title to the plaintiff.

This assignment by the Société Anonyme was executed also by Herman W. Falk and Henry Harnischfeger, who were stockholders and officers of the grantee (this American corporation). By this instrument Falk and Harnischfeger assigned to this corporation all rights and demands to damages and profits from any infringement of said letters patent. An earlier instrument, purporting to be a contract and provisional assignment to Falk and Harnischfeger from the Société Anonyme and recited in the assignment to the American corporation, was offered in evidence and excluded upon objection by the defendant. It apparently conveyed title only conditionally until the actual grant to the American corporation could be obtained. Even if received in evidence, it would have left no title in the grantees after per-

formance of the condition divesting them of that title and the release of any rights thereunder by their own admissions in the evidence. Their joinder in the later contract with implied release of all claims or rights thereunder, and the oral proof by Falk and Harnischfeger to the same effect, sufficiently show that no legal title, even to the letters patent, remained in Falk and Harnischfeger after expiration of the original conditional grant. But the exclusion of the paper, upon objection by the defendant, makes it unavailable to the defendant for any purpose.

The defendant alleges that the plaintiff is seeking to compel the use of its own torches or of oxygen sold by it through control of the Jottrand method patent. That there is actually any illegal restraint of trade or creation of monopoly, through threat of prosecution for contributory infringement, does not seem to have been proven. An improper limitation of license to use of the patent, to those customers who buy a certain product, has not been shown. The patent question in the case seems to have been kept clear of the Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 730). But the decision of invalidity makes these matters immaterial, and the answer did not urge this defense, which is clearly an afterthought, or makeweight, which should not be carelessly thrown into the decision.

Nor does the suggestion of acquiescence by the implied license, which was continued so long as the defendant bought oxygen from the plaintiff, make out a defense against the charge of infringement after the so-called license was terminated. Infringement would be found if the method patent were to be held valid; but as this patent does not show invention over the prior art, and must be held anticipated as previously indicated, decision will be given for the defendant, and decree may be entered accordingly.

On Settlement of Decree.

[5] The plaintiff asks the court to include a separate finding or decree as to each defense which was found in the plaintiff's favor, and which was therefore disregarded in giving judgment for the defendant. This decision for the defendant was based upon the defense of invalidity. On appeal, a reversal of the decree would result in a new trial, a further hearing in the Court of Appeals, or a final determination as to the remaining issues upon the present record. The defendant cannot appeal from a decree in its favor, nor can this court give judgment for the plaintiff upon the issues which, so far as this case is concerned, are found in the plaintiff's favor. The decision, in so far as it has a part in the decree, should be embodied only by reference or recital.

A decision for the plaintiff, with findings of validity and infringement by the defendant, would have presented two matters as to which error could be assigned. In Thacher v. Transit Construction Co., 234 Fed. 640, — C. C. A. —, the defendant assigned error only as to the finding of infringement, and the court did not consider on appeal his argument that the patent was, after all, invalid. The form of decree was not involved, and the defendant, if he had attacked the finding

of validity as well as infringement, could have had both matters considered upon the printed record in the Court of Appeals.

But, with decree for defendant, it would not be fair to the plaintiff or to the Court of Appeals to render adjudication upon issues which could not be tested by appeal and which the upper court should not be asked to go into, unless a new trial be had either in the upper court or in this court, after a reversal of the finding upon which decree went for the defendant. In the latter case either side should have the opportunity of presenting the issues with any newly discovered evidence, and neither party should be finally bound, on a new trial or in any *other* action, by a so-called adjudication as to issues not reviewable by the Court of Appeals. If several patents are included in one action, the decree may be for the plaintiff on one patent and for the defendant on another; but as to each patent the decree must be an entirety, covering the issues which control the granting of the decree.

It is suggested that the court should not "hesitate to put in the succinct form of a decree the findings so laboriously reached in a voluminous opinion upon protracted consideration of a voluminous record," and that this "form has the advantages of accuracy, of clarity, and of definiteness—all of great moment in the Court of Appeals and of substantial importance elsewhere. The other form is meaningless, unless its premises and conclusions be searched out of other parts of the record." The court recognizes these premises and the desirability of briefly summarizing the opinion. But the decree is essentially the judgment which disposes of the case, instead of being an index or compendium of the various points which the court has considered.

The decree should order and adjudge only the determination of the controversy.

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## LINDLAY et al. v. RAYDURE.

(District Court, E. D. Kentucky. February 3, 1917.)

1. COURTS ⇐367—RULES OF DECISION—OIL AND GAS LEASE.
The validity of an oil and gas lease, which the lessee could surrender at his option, is a local question, the decision of which by the court of the state in which the land is located is binding on the federal court.

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

2. MINES AND MINERALS ⇐73—OIL AND GAS LEASE—ESTATES CREATED.
An oil and gas lease, purporting to convey to the lessee all the oil and gas in the land, and leasing the land to him to drill and operate wells for a specified term and so long thereafter as oil or gas was produced in paying quantities thereon, does not convey a vested interest in the oil and gas, since there can be no ownership of them until they have been reduced to possession, but does convey a vested interest in the right to explore for oil and gas, or an interest in those minerals contingent on their discovery and reduction to possession, and such lease is therefore not executory, but is executed as much as any other lease.

[Ed. Note.—For other cases. see Mines and Minerals, Cent. Dig. §§ 201, 210.]

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

3. MINES AND MINERALS ⟸58—OIL AND GAS LEASE—CONSIDERATION—ADEQUACY.
A consideration of $1 is sufficient to support an oil and gas lease by the terms of which the lessee's interest is subject to defeasance for breach of condition subsequent to drill wells and pay royalties, though he is not bound by any covenant to perform the condition.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 168, 169.]

4. MINES AND MINERALS ⟸58—OIL AND GAS LEASE—CONSIDERATION—CLAUSES SUPPORTED.
In an oil and gas lease, given for the consideration of $1, which provided that the lessee should drill a test well within one year and should pay a specified sum per year for the time during which the completion of the well was delayed, the consideration supports, not only the right to drill the well during the first year, but also the privilege of paying the specified sum and securing a renewal of the right, so that the right to make such payment and secure the renewal is not dependent on a subsequent agreement by the lessee to make the payment.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 168, 169.]

5. EVIDENCE ⟸432—PAROL EVIDENCE—CONTRADICTING RECITAL—PAYMENT OF CONSIDERATION.
Parol evidence is not admissible, even in equity, to show that the consideration of $1, which the lease recited had been paid, was not in fact paid.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1981–1989.]

6. MINES AND MINERALS ⟸81—OIL AND GAS LEASE—REMEDY OF LESSEE—INJUNCTION.
A suit by the lessee under an oil and gas lease to enjoin the removal of oil and gas from the premises by a subsequent lessee is a suit to prevent trespass and waste to the interest of the lessee, not for specific performance of the lease, and therefore the doctrines that equity will not specifically enforce a contract where there is no mutuality of rights and remedies, nor if the consideration was inadequate, or it was unfair to hold the party to it, do not apply.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 211.]

7. MINES AND MINERALS ⟸81—OIL AND GAS LEASE—REMEDY OF LESSEE—INJUNCTION—ADEQUATE REMEDY AT LAW.
A lessee under an oil and gas lease has no adequate remedy at law, which deprives him of his right to enjoin a subsequent lessee from removing the oil and gas.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 211.]

8. MINES AND MINERALS ⟸81—OIL AND GAS LEASE—REMEDY OF LESSEE—INJUNCTION—ADEQUACY OF CONSIDERATION.
The right of the lessee under an oil and gas lease to enjoin the removal of those minerals by a subsequent lessee is not affected by the inadequacy of the consideration for the lease.
[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 211.]

9. MINES AND MINERALS ⟸58—OIL AND GAS LEASE—VALIDITY—MUTUALITY.
The rule that unperformed contracts, optional as to one party, are optional as to both, applies only to a contract which is wholly executory, in that it consists of mutual promises, each the consideration of the other, but does not apply where a consideration is paid for an oil and gas lease, which gives the lessee a present interest in the right to explore for the

mineral and a contingent interest in the minerals discovered, though he has the privilege of surrendering the lease at any time.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 168, 169.]

10. MINES AND MINERALS ⊂=73½—OIL AND GAS LEASE—PERIOD OF TENANCY.
The lessee under an oil and gas lease for the term of 10 years, and as much longer as oil and gas should be produced in paying quantities, with right to surrender the lease and be discharged from liability thereon, the consideration for which lease had been paid, was not a tenant at will, so that the doctrine that a tenancy at will of one party is at the will of the other does not apply.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 200.]

11. MINES AND MINERALS ⊂=58—OIL AND GAS LEASE—VALIDITY—SURRENDER CLAUSE.
In an oil and gas lease, granting for the consideration of $1, paid by the lessee, the right to drill and operate wells and the right to the oil and gas discovered thereon, subject to a payment of royalty, a clause authorizing the lessee at any time to surrender the lease and be relieved from all liability thereon does not invalidate the lease as a matter of principle, nor according to the weight of authority or the decisions of the courts of Kentucky, where the land was situated.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 168, 169.]

12. COURTS ⊂=365—RULES OF DECISION—DECISION OF STATE COURT—SCOPE.
A decision of the state court that $1 is such an inadequate consideration for an option to purchase real estate as to invalidate the option does not require the holding that a similar consideration is not sufficient to support an oil and gas lease, under which the lessee must expend a considerable sum of money, which will be a loss in the event of failure to discover oil.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971.]

In Equity. Suit by John W. Lindlay and others against W. S. Raydure. On final hearing. Decree for plaintiffs.

Burnam & Burnam, of Richmond, Ky., and R. W. Smith, of Irvine, Ky., for plaintiffs.

Hugh Riddell, of Irvine, Ky., and Frank A. Baldwin, of Bowling Green, Ohio, for defendant.

COCHRAN, District Judge. This cause is before me for final decree. It involves a controversy between holders of rival oil and gas leases. Thomas Tipton and George Pitts owned adjoining farms in Estill county, Ky., within this district, the one containing 185 acres and the other 75 acres. Each executed—the one on May 20, 1915, his wife uniting with him, and the other on May 22, 1915, he then being a widower—such a lease on his farm to the plaintiff Harvey Huntsman, who subsequently assigned three-fourths thereof to his coplaintiffs, one-fourth to each. The Tipton lease was lodged for record November 12, 1915, and the Pitts November 10, 1915. The two leases were alike, save in the one particular, hereafter indicated. Each recited, as the consideration therefor, payment of $1, receipt of which was acknowledged, and the covenants and agreements on the part of Huntsman therein contained, purported to grant and convey all of

the oil and gas in the land, and demised, leased, and let the land for the purpose and with the exclusive right to enter thereon at all times to drill and operate wells for oil and gas for the term of 10 years, and so long thereafter as oil and gas, or either of them, was produced, except that the lessor was to have 8 per cent. of the oil produced. Huntsman covenanted and agreed to pay $100 per annum for each gas well from which gas was marketed, and to complete a well within one year from the date of the lease, or to pay at the rate, in the Tipton lease of 25 cents, and in the Pitts lease of 10 cents, per acre for each additional year the completion thereof was delayed, payable yearly in advance, until a well was completed or the lease surrendered as therein provided, which payment might be deposited to the lessor's credit in the Farmers' Bank of Irvine, county seat of Estill county. In each it was provided that the completion of the well should be a full liquidation of such rentals during the remainder of the term of the agreements, that Huntsman was to have the privilege at any time of removing all machinery and fixtures, and that upon the payment of $1 at any time he should have the right to surrender the lease for cancellation, after which all payments and liabilities thereafter to accrue thereunder should cease and determine, and it be absolutely null and void. Each contained other provisions usual in such leases, which it is not necessary to set forth.

On October 13, 1915, Tipton and his wife made a lease on his farm similar to that which they had made to Huntsman, except in that Tipton was to have one-eighth of all the oil produced and it contained no surrender clause, which was lodged for record November 17, 1915; and on October 21, 1915, Pitts made a lease on his farm similar to that which he had so made, except in that Huntsman was to pay 25 cents, instead of 10 cents, an acre per annum for delay in completing the test well, which was lodged for record November 15, 1915; each lease being to the defendant Raydure. At the time of making of these leases the year had not elapsed which Huntsman had under his leases to complete a test well and he had not commenced to drill on either farm. Tipton and Pitts made these two leases to Raydure upon his representation that the Huntsman leases were void and upon an agreement on his part to defend against them. Huntsman was then still the sole owner of his leases. He did not assign interests in them to his coplaintiffs until in February and March, 1916. At that time nothing had been done under any of the leases. In April, and in time enough to have completed a test well before May 22, 1916, when the year would expire for completing it under the Pitts lease, plaintiffs selected a site for drilling a test well on the Pitts farm and were in the act of placing a drilling outfit thereon for that purpose, when they were forcibly prevented from so doing by the defendant. They made no attempt to commence drilling such a well on the Tipton farm. They were made to understand that it was not agreeable that they should do so, and that they would be resisted. Before the expiration of the year they tendered Tipton the rental for the succeeding year, which he refused to accept, and they thereupon deposited same to his credit in the prescribed bank. On the other hand, Raydure, before the expiration

of the year under the Huntsman leases, entered upon both farms and has drilled five wells on each, each of which wells is capable of producing 50 barrels of oil per day.

This suit was brought May 15, 1916, and in it plaintiffs seek an injunction against defendant, restraining him from producing oil on or removing it from those farms, and from interfering with their so doing, and judgment against him for $200,000 damages; i. e., $100,000 for each of the wrongs already done. A number of questions bearing on plaintiffs' right to relief have been raised in the case. Two of them pertain to both of the Huntsman leases. One is whether they are invalid because of the surrender clause contained therein. The other is as to whether the defendant had actual notice of them at the time he obtained his leases. They had not been lodged for record at that time. It is essential, therefore, that he should have then had such notice thereof to be affected by them. Two questions have been raised as to the Tipton lease alone. One is as to whether it was acknowledged by Tipton and his wife before a deputy clerk of the Estill county court, as it is certified to have been, and the effect thereof, if it was not. The other is as to whether it was obtained by deception practiced by Huntsman on Tipton and his wife. The agreement was that Tipton was to have one-eighth of the oil produced as royalty. The lease provides that he should have only 8 per cent., and it is in its so providing that it is claimed that deception was so practiced. Huntsman's claim is that it was by mutual mistake that the lease was different in this particular from the agreements. One question has been raised as to the Pitts lease alone, and that is whether he was the owner of the farm covered by it when he leased to Huntsman. It is claimed that the title was then in his granddaughter, Nancy Jones, and her husband, Harvey Jones from whom the defendant obtained a second lease after obtaining the one from George Pitts as hereinbefore stated. I decided all these questions, except the first one, as to the invalidity of both leases because of the surrender clause, against defendant at the hearing and then orally gave my reasons therefor. These will not be repeated here, and the opinion will be limited to the one which was not decided, and which was reserved for further consideration.

[1] The question as to whether the validity of these leases is affected by the surrender clause contained in each of them is a local one. If it has been determined by the Court of Appeals of Kentucky, this court is bound by its decision. There can be no doubt, and the parties are agreed, as to this. Guffey v. Smith, 237 U. S. 101, 113, 35 Sup. Ct. 526, 59 L. Ed. 856. They differ as to what that court has decided in regard thereto. Each side claims that it has decided its way, and that with equal sincerity and cocksureness as to the correctness of its position. Whilst, then, the only question before me is as to what has been thus decided in this particular, there is a right way of approaching that question, and that is from the standpoint, first of personal conviction, and then of authority elsewhere. It has been said by a great biblical scholar of a charming spirit that one cannot attain "to the highest truth or the highest sincerity until he can speak from personal conviction," and that until he can do so he has not yet attained to "the

vérité vraie which is the crowning stage of all." It is from that high standpoint that I would view authority. I proceed first, therefore, to a consideration of the question as to the validity of these leases on principle. What, according to fundamental notions, is the true position in regard thereto?

[2] But before coming to close quarters with this question accurate position should be taken as to certain matters. One of them has to do with an instrument which is unlike those involved here, in that it has no surrender clause, but is otherwise exactly like them. There is no question that such an instrument is valid. Opinion does not differ as to this anywhere. The matter relating thereto which I would develop is as to whether, immediately upon the execution of such an instrument, an estate of any character vests in the lessee. It is certain that none vests in him as to the oil and gas which may be in the land, notwithstanding the instrument in express terms purports to grant and convey them. This follows from the consideration that the lessor himself has no estate therein; and this is so because of the fugacious nature of such substances. That he has no estate therein is thus put by the Supreme Court, through Mr. Justice White, in the case of Ohio Oil Co. v. Indiana, 177 U. S. 190, 208, 20 Sup. Ct. 576, 583 (44 L. Ed. 729):

"Although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil, until these substances are actually reduced by him to possession, he has no title whatever to them as owner; that is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession."

It is equally certain that an estate of some character does then vest in him in the surface; i. e., the rest of the land. The owner thereof by virtue of his proprietorship, as so stated, has the exclusive right thereon to seek to acquire such substances. This right may be resolved into two successive rights; i. e., to explore therefor by drilling wells, and then, if discovered, to produce them. It is on their production that they become his. Having such right, he can transfer it, and immediately upon the execution of the transfer an estate in the land vests in the person to whom it is made, at least so far as the right to explore is concerned. Such a transfer is effected by such an instrument as I am dealing with. It in express terms demises, leases, and lets the land for the purpose and with the exclusive right to drill wells and to produce oil and gas. In Archer's Oil & Gas Cases, p. 20, this proposition is stated as a true generalization of numerous cases cited, to wit:

"A grant of the exclusive privilege to go on land for the purpose of prospecting for oil and gas is, until oil or gas is discovered in paying quantities, merely a license, and does not vest in the grantee any estate in the surface of the land or the minerals therein; but where by such a grant the land is granted with such exclusive privilege, it is a lease conveying an interest in the land, and not merely a license to enter and explore for oil or gas."

The appellate court of this circuit, through Judge Day, in the case of Allegheny Oil Co. v. Snyder, 106 Fed. 764, 766, 45 C. C. A. 604, which involved a lease which granted and demised land for such pur-

pose and with such exclusive right for the term of 2 years and as long thereafter as oil or gas were found in paying quantities, not exceeding in the whole 25 years, quoted with approval from the opinion in the case of Harris v. Oil Co., 57 Ohio St. 129, 48 N. E. 506, this statement:

"An instrument in such form is more than a mere license; it is a lease of the land for the purpose and period limited therein, and the lessee has a vested right to the possession of the land to the extent reasonably necessary to perform the terms of the instrument on his part."

That an estate in the surface of the land of some character vests in the lessee immediately upon the execution of the instrument I do not understand to be questioned anywhere. Possibly there is some question as to the exact nature of the estate which vests: but otherwise there is none. On the face of things it would seem that at least an estate in possession vests—i. e., an estate for 10 years in which to explore for oil and gas—but that no estate to produce oil and gas then vests. So far the estate is an estate upon condition precedent, the condition being the discovery of oil or gas, and does not vest until the happening of such condition. The estate in possession can, in no event, last longer than 10 years. In the case of Brown v. Fowler, 65 Ohio St. 507, 63 N. E. 76, where the lease was for 2 years and as long thereafter as oil and gas is found in paying quantities, the Supreme Court of Ohio, through Judge Burket, said:

"This clause means that the term of the lease is limited to 2 years, but that if, within the 2 years, oil or gas shall be found, then the lease shall run as much longer thereafter as oil or gas shall be found in paying quantities; but, if no oil or gas shall be found within the 2 years, the lease shall, at the end of the 2 years, terminate, not by forfeiture, but by expiration of term, and after the expiration of the said 2 years no further drilling can be done under the lease."

Possibly it is an estate upon condition subsequent; the condition being the failure to drill the test well or pay the commutation money, notwithstanding there is no express provision to that effect. Possibly the condition includes also the failure to drill a test well after notice upon the part of the lessor so to do, notwithstanding a tender of the commutation money, authority for which may be found in the case of Monarch Oil & Gas Co. v. Richardson, 124 Ky. 602, 99 S. W. 668. It would seem that there was at least an implied condition subsequent to the former extent. Possibly this estate in possession is liable to terminate otherwise short of the 10 years; i. e., by drilling a test well and its proving dry. Possibly, also, the estate upon condition precedent, i. e., to produce oil and gas, is also upon a condition subsequent; i. e., if the condition precedent happens and the estate vests, it is liable to be defeated by failure to produce or deliver or pay the royalties. The necessities of this case do not require that anything further be said as to any of these possibilities. It is sufficient for the purpose thereof that an estate in possession to explore for oil and gas does vest immediately upon the execution of the instrument, and that an estate in the future to produce oil and gas will vest on its

discovery, whatever limitations or qualifications either may be subject to.

In the case of Venture Oil Co. v. Fretts, 152 Pa. 451, 25 Atl. 732, the Supreme Court of Pennsylvania, through Judge Williams, said:

"A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite different ground. The title is inchoate, and for purposes of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract."

Substantially similar statements will be found in other cases involving oil and gas leases. It may create the impression that there is nothing vested until oil or gas is found. Such, however, is not the case, and no such thought was intended to be conveyed. What is inchoate until oil or gas is found is the right to produce oil and gas and the right to the oil and gas itself, which remains inchoate until produced. The right to explore, therefore, is at no time inchoate. It is vested, and will be protected from the time of the execution of the instrument.

If I am correct in this position, so far as the lessee's rights under such an instrument are concerned, there is nothing executory about them, except the entry under the vested right to explore and the vesting of the right to produce and to the substances produced. There is nothing more executory under it than there is under an ordinary deed or lease to land. So far as the right to explore is concerned it is an executed instrument, and it becomes executed as to the right to produce and to the substances produced upon the happening of the conditions on which they are to vest.

[3] The other matters which I would stress in this connection have to do with an instrument in which $1 is the sole consideration therefor. Such is the case if the instrument contains no covenants on the part of the lessee to explore, or to produce, or to deliver, or pay royalties. An instrument can be so worded that these things can be secured to the lessor by a condition subsequent, without any personal covenant on the part of the lessee upon which he would be liable. Those matters having to do with such an instrument are these: The instrument is valid. The payment of the $1 is sufficient consideration to uphold it. That $1 is a sufficient consideration to render valid a contract, executed or executory, is as well settled as can be. The authorities to this effect will be found in the note to the case of Lovett v. Eastern Oil Co., 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B, 360, 363.

In the case of Toncra v. Henderson, 3 Litt. 235, the Kentucky Court of Appeals held that the recital of a consideration of five shillings was sufficient to validate a deed to a stranger. Again, the instrument being valid, estates vest in the lessee just the same as in a case where the instrument contains covenants on the part of the lessee and they constitute a part of the consideration as just indicated. Again, the con-

sideration of $1 for the rights conferred by such an instrument is not so insignificant as it might at first blush appear to be. It is in such a case, not the consideration for an absolute grant, but for a grant on condition subsequent; the condition securing to the lessor the thing which could have been secured by a personal covenant, the condition possibly being the more effective of the two. So far as it is the consideration for the grant of the right to explore, it is for the right to incur the expense of the exploration, which may result in nothing.

In the case of Guffey v. Smith, supra, 237 U. S. 116, 35 Sup. Ct. 530, 59 L. Ed. 856, the Supreme Court, through Mr. Justice Van Devanter, thus expressed itself as to the consideration for the instrument there involved:

"Whether the lease is unfair and inequitable must be determined in view of the circumstances in which it was given. * * * They were these: Whether the leased tract contained oil or gas was not known. It was in an undeveloped district, in which there was no oil or gas well and no pipe leading to a market. Drilling wells was attended with large expense, the cost of each well being upwards of $1,000, according to the testimony of one of the defendants. No fraud, deception, or overreaching was practiced in procuring the lease. The parties were competent to contract with each other, and entered into the lease because in the circumstances its provisions were satisfactory to them. Under its terms the cost of the drilling was to be borne by the lessee. If the undertaking was unsuccessful, he alone was to stand the loss, and if it was successful the lessor was to share in the results by receiving substantial royalties, the reasonableness of which is not questioned. The consideration for the lease, viz., $1 paid to the lessor and the covenants and agreements of the lessee, cannot be pronounced unreasonable."

It is true that he was not dealing with a case where $1 was the sole consideration, but where covenants and agreements as to exploration and payment of royalties constituted a part of the consideration. But what was said has equal application to a case where the exploration and royalties are secured, not by covenant, but by condition subsequent.

[4] Again, the $1 paid relates to all the rights that the lessee obtains thereunder, so that it upholds any one of them that may be in question. The appellate court of this circuit, through Judge Day, in the case of Allegheny Oil Co. v. Snyder, supra, said:

"The lessee is given 2 years within which to drill, which privilege he may extend by the payment for further delay at the rate of $1 per acre at or before the end of the following year. It is claimed that the consideration of $1 may support the grant of the 2-year term, but the privilege of extending the same beyond the term of 2 years is supported by no consideration and is entirely at the option of the lessee, and, before it can become a binding agreement, requires an engagement upon the part of the lessee to pay the stipulated sum of $1 per acre. * * * This construction undertakes to divide the lease into independent parts, and annuls the effect of the privilege granted to the lessee of continuing the right to drill a well upon payment of the annual sum stipulated. We are of opinion that this lease constituted an entire contract, and that the consideration recited supports, not only the grant of the 2-year term, but as well, the privilege of extending the time of drilling, by paying the stipulated price therefor. * * * This instrument is a contract. Assuming, now, that it is free from fraud, and between parties capable of contracting, it can be supported by the consideration of $1 as well as any other valuable consideration. It is an indivisible agreement. Each part of it must be given effect. We can add nothing to it, and take nothing from it. For the consideration named the lessee received a conveyance of the term, as we have already stated,

with a stipulation that the lease should become void unless delay in sinking a well within the term of the lease should be paid for at the rate of $1 per acre at the end of two years. This privilege is not to be separated from the other conditions of the lease. It is one of its terms, and must be given force and effect."

[5] Again, if the instrument recites the payment of $1, it cannot be shown by parol evidence that it was not in fact paid, and thereby invalidate it. Whatever right there is in equity to show by parol evidence the true consideration for a grant, and thereby contradict its recitals on this matter, it does not go so far, no more than at law, as to enable the grantor to invalidate it by showing that it was without any consideration whatever. The Supreme Court of Illinois, through Judge Scott, in the case of Stannard v. Aurora, etc., Ry. Co., 220 Ill. 469, 77 N. E. 254, said:

"While the recital of the payment of the consideration in a deed may be contradicted for certain purposes, yet such acknowledgment of payment cannot be contradicted by proof, for the purpose of wholly invalidating the deed or impairing its legal effect as a conveyance."

This position is of no consequence here, for it was proven that the $1 was paid for the Tipton lease, and, though there was no evidence that it was paid for the Pitts lease, there was none that it was not paid, and it is quite likely that it was in fact paid.

[6] Now, there is a certain position which necessarily follows from those thus taken as to such an instrument. This is that a suit in equity brought by the lessee to protect this right from invasion, either by the lessor or a subsequent lessee, is not a suit either to enforce specific performance of a contract or to enjoin the breach of a contract. It is nothing more nor less than a suit to prevent waste. It differs from the ordinary suit to prevent waste, in that the property which is about to be converted or destroyed by the defendant is not the property of the plaintiff. It—i. e., the oil and gas in place—is, as we have seen, the property of no one. But it is property which he has the exclusive right to find, produce, and make his own. In the cases of Allegheny Oil Co. v. Snyder, supra, and of Logan Natural Gas Fuel Co. v. Great Southern Gas & Oil Co., 126 Fed. 623, 626, 61 C. C. A. 359, 362, which were suits between rival lessees in oil and gas leases, the appellate court of this circuit, through Judge Day, in the one case said:

"The equitable estate of appellees was in danger of destruction by the removal of gas and oil. In such case equity will intervene to prevent irreparable injury. Having acquired jurisdiction for the purpose of preventing waste and the destruction of the estate, a court of equity will retain jurisdiction for the purpose of granting full relief."

And, in the other, through Judge Severens, it said:

"But the immediate purpose of the suit is to restrain waste and threatened trespasses, and the court may entertain the bill for that purpose, even if the plaintiff be not in possession, and, having thus acquired jurisdiction, it may also proceed to settle the question of title and remove the cloud."

And see the case of Backer v. Penn Lubricating Co., 162 Fed. 627, 89 C. C. A. 419.

The Supreme Court, through Mr. Justice Van Devanter, in the case of Guffey v. Smith, supra, 237 U. S. 115, 35 Sup. Ct. 530, 59 L. Ed. 856, which was a suit between rival lessees, thus expressed itself on this point:

"Rightly understood, this is not a suit for specific performance. Its purpose is not to enforce an executory contract to give a lease, or even to enforce an executory promise in a lease already given, but to protect a present vested leasehold, amounting to a freehold interest, from continuing an irreparable injury calculated to accomplish its practical destruction. The complaint is not that performance of some promised act is being withheld or refused, but that complainants' vested freehold right is being wrongfully violated and impaired in a way which calls for preventive relief. In this respect the case is not materially different from what it would be if the complainants were claiming under an absolute conveyance rather than a lease. In a practical sense this suit is one to prevent waste."

In taking the interest of the lessee which was sought to be protected as a "vested freehold interest," possibly Mr. Justice Van Devanter was doing no more than accepting the view of the Supreme Court of Illinois, which was to that effect, and by which he was bound. The statement, however, is no less true if the vested interest were less than a freehold.

And a certain other position follows from this. It is that the doctrines applicable to suits to specifically enforce contracts and suits to enjoin breaches of contracts have no pertinency whatever to a suit to protect such an interest as is involved in the present discussion from invasion by a wrongdoer. The only doctrines applicable thereto are the doctrines applicable to a suit to prevent waste.

There is a vague doctrine, applicable to suits to specifically enforce contracts, that equity will not grant relief where there is not mutuality of obligation and of remedy. I dealt with this doctrine somewhat in the case of Blanton v. Kentucky D. & W. Co. (C. C.) 120 Fed. 318, 350. It is also a well-recognized doctrine applicable thereto that equity will not so do if the consideration for the obligation sought to be enforced was inadequate, or otherwise it was unfair to hold him to it.

As these doctrines have applicability to suits for specific performance, and a suit to so protect is not such a suit, they cannot have application thereto. But in passing it may be noted that in the case of such an instrument there is no want of mutuality. Each party to the agreement has done his part, and what the other has done is the consideration for what he has done. There is no more want of mutuality than there is in a swap of horses. The lessor has parted with the right granted, and the lessee has parted with his $1. The instrument is an executed one on both sides. Nor can there be said that there is any real inadequacy of consideration for the right granted by the lessor for the reason heretofore indicated. There is no unfairness on either side.

[7] Viewing a suit to so protect as it really is—i. e., a suit to prevent waste—the only consideration that could possibly affect its maintainability is whether there is an adequate remedy at law. But as to this there can be no question. There is no adequate remedy at law. There would be none, even if the lessee could sue in ejectment, which

he cannot do. Kelly v. Keys, 213 Pa. 295, 62 Atl. 911, 110 Am. St. Rep. 547. That he cannot so sue is not because he has no vested interest. The reasons why he cannot sue were set forth by Judge Lurton in the case of Petroleum Co. v. Coal, Coke & Mfg. Co., 89 Tenn. 381, 18 S. W. 65.

[8] So viewing it, the right to maintain it is not affected by the adequacy of the consideration given for the interest sought to be protected, even though it was inadequate, and the party against whom it is sought to be protected may be the one from whom the interest was acquired. I do not understand that, if one is the owner of land covered by valuable timber, it is any answer to his suit against another to enjoin him from cutting it down and converting it to his own use that he did not give an adequate consideration for it when he acquired it. The fact that the person sought to be enjoined is the person from whom he acquired it can make no difference. Nor is the right to maintain it affected by the fact that the interest sought to be protected is liable to be forfeited by a failure to explore, or to produce, or to deliver, or to pay royalties. Property held upon condition subsequent is just as much entitled to protection from destruction as that held absolutely.

[9] We have thus cleared the way for a consideration on principle of the question as to the validity of the leases involved here and plaintiff's right to the equitable relief which they seek. Those leases contain covenants by the lessee, which, apparently at least, constitute a part of the consideration, and a surrender clause. In the light of the position which we have taken, does that clause affect their validity or plaintiffs' right to such relief? Here we must beware lest we be "captured by formulas and epigrams," and must, as always, "think things through." This caution is called for because the position that the effect of such clause is to so invalidate the leases as to disentitle plaintiff to such relief is built upon two formulas or epigrams. One of them is that contracts unperformed, optional as to one of the parties, are optional as to both. The way in which it is claimed that this rule finds application here is this: The effect of the surrender clause was to render the performance by the lessee of his covenant optional with him. It is only on this basis that it can be claimed that the rule has application. As, then, it was optional with the lessee whether he would perform his covenants, it was optional with the lessors to terminate the leases at any time before anything was done under them, and this they did by making the rival leases. But this rule has application only to a contract which is wholly executory and unperformed, in that it consists of mutual promises, each the consideration of the other, and by which it is optional with one of them whether he will perform his promise. If it is, it is optional with the other whether he will perform his. In such a case there is, as it is put, a want of mutuality. And this is the only want of mutuality in matter of obligation which affects the validity of a contract or the right to its specific performance. It is thus referred to in 9 Cyc. 327:

"There are many cases in which, although the offer is definite enough, yet the acceptor by mere accepting has really himself promised nothing in return, has not made himself liable for anything, so that, although one is bound,

the other is not, and the engagement lacks what is called mutuality. In such a case there is not an enforceable agreement. The most frequent example of this principle is when one offers to supply another with such goods of a certain kind as he may choose to order or may 'wish' during a certain time, and the other accepts the offer. Here there is no consideration for the promise or offer, for the promisee has not bound himself to anything and has incurred no legal liability at all. The correct view of the case is that there is no agreement binding on the promisor, but simply an offer on his part, which may be accepted by giving an order until such time as it is actually withdrawn or expires by limitation of time."

But these leases are not wholly executory contracts and unperformed. They do not consist of mutual promises, each the consideration of the other. So far as the lessors were concerned, they were wholly executed. Thereby, as we have seen, there was granted an estate in possession, which vested immediately upon its execution, to wit, an estate for 10 years in which to explore for oil and gas, and was terminable possibly sooner; i. e., upon drilling a dry well, or upon failure to drill a test well or pay the commutation money as provided, or upon failure to drill such well after notice from the lessor so to do. Thereby also was granted an estate in the future, which would vest upon the discovery of oil and gas, without more, to wit, an estate to produce oil and gas as long as they might be found, terminable possibly sooner; i. e., upon failure to produce, or to deliver, or pay royalties. Possibly they were wholly executed, also, so far as the lessee was concerned; this upon the idea that the effect of the surrender clause was to make it optional with the lessee whether he would perform his covenants, and that this made it the same as if the leases contained no covenants at all on the lessee's part, and the exploration, production, and delivery, and payment of royalties, were secured only by a condition subsequent, in which case the sole consideration was the $1. Possibly, as the right to surrender was only upon the payment of $1, the case was not the same as if the leases contained no covenants on the part of the lessee and they constituted a part of the consideration. At any rate the lease was executed on the lessee's part so far as the payment of the $1 was concerned. And under the case of Allegheny Oil Co. v. Snyder, supra, as we have seen, the payment of the $1 was the consideration, not only for the grant, but for the surrender clause; i. e., for the option on the lessee's part to return to the lessor the rights granted to the lessor and be relieved of the obligation to perform the covenants, and a sufficient consideration to uphold such option. An option, for which a consideration has been given, is enforceable against the person giving the option, though he cannot compel the one to whom it is given to accept it. In 9 Cyc. p. 334, it is said:

"When there is an agreement founded on a consideration, it is not invalid for want of mutuality, because one party has an option while the other has not, or in other words because it is obligatory on one and optional on the other."

Options in leases to the lessee to purchase are valid, and there is no reason why an option in a lease based upon a valuable consideration to the lessee to turn the property back to the lessor and be released of further responsibility should not be equally valid. Besides, in a

case where $1 is the sole consideration, and the lease contains no covenant on part of the lessee, but it secures the benefits to the lessor by a condition subsequent, in which case there can be no question as to the validity of the lease, the lessee can effect a complete surrender at his option by not performing the condition. The mere fact that it is provided that at any time he may surrender the lease can make no difference.

[10] The other formula or epigram had in mind is after the same order, but more specific. It is that a tenancy at the will of one party is at the will of the other. The position is that by virtue of the surrender clause the holding by the lessee under these leases was a tenancy at will; i. e., at the will of the lessee, and hence at the will of the lessor as well. But such was not the nature of the holding of the lessee thereunder. He was not a tenant at will. He had no right to hold thereunder, as long as he willed. In no contingency could he hold for the purpose of exploration longer than 10 years or, if oil and gas were found, for a longer time than they could be produced. If either holding was subject to a condition subsequent, it might be terminated short of the period for which it was to last by the happening thereof, and possibly the holding for the purpose of exploration might be terminated by the test well proving dry. The surrender clause merely provided another contingency for terminating the holding short of such period. So far, then, the estates granted were not estates at will, but estates on limitation. That for the purpose of exploration was an estate for years on limitation. In 2 Reeves on Real Property, § 659, it is said:

"Estates at will are such as are to be ended at the will of either party; the intent to have them so may be clearly expressed or reasonably implied, and making an estate terminable at the option of the landlord, without more, shows that intent."

In note 3 thereto it is said:

"When a greater interest is first created, as for years or life, etc., and then made terminable at the election of either party, the law's preference makes the larger estate, and not one at will, and a conveyance by A. to B. for life, or for 10 years, to be ended, however, at the will of either A. or B., or both, makes an estate for life or for years, as the case may be. Section 648, supra."

In section 648 it is said:

"An estate for years on limitation is one that may terminate naturally before the entire period has elapsed. * * * An illustration is found in a lease for 10 years, to be terminated, however, at any time within that period at the option of either party."

Nor is it true that every tenancy at the will of the lessee is at the will of the lessor. Blackstone, vol. 1, book 2, p. 144 (Sharswood's Ed.), defines an estate at will as one—

"where land and tenements are let by one man to another, to have and to hold at the will of the lessor."

And he adds (page 145):

"But every estate at will is at the will of both parties, landlord and tenant, so that either of them may determine his will and quit his connection with the other at his own pleasure."

The estate at will which he says is at the will of both parties is an estate at will, as theretofore defined, to wit, an estate at the will of the lessor. Kent, vol. 4, p. 110 (6th Ed.), is to the same effect. Neither of these authorities, therefore, recognizes an estate at the will of the lessee as an estate at will, which is at the will of both parties. It is not to be gathered from either one of them that there is such a thing as an estate at will, constituted by creating an estate at the will of the lessee. But in Co. Litt. 55a, it is said:

"And so it is when the lease is made to have and to hold at the will of the lessee, this must also be at the will of the lessor."

It is said, however, as to this statement, in 1 Leake, Land Law, p. 206, note (b), as follows, to wit:

"But, as to the lease at the will of the lessee last mentioned, Coke must be understood as meaning a lease without livery or other sufficient conveyance of a freehold estate."

This implies that, if an estate at the will of the lessee is created by lease with livery of seisin or other sufficient conveyance of a freehold estate, it is not also at the will of the lessor. The reason, therefore, why at common law, in the case of a lease purporting to grant an estate at will of the lessee, the estate was one at the will of both parties, was this: An estate at the will of the lessee was the equivalent of a life estate, and an estate at the will of the lessee, his heirs and assigns, was the equivalent of a fee-simple estate. Each estate was a freehold estate and could not be created without livery of seisin. Possibly there could be no livery of seisin under a lease. It was not such an instrument that there could be livery of seisin under it, though Leake seems to imply that there could be. In case, therefore, of a lease, at least one without livery of seisin, purporting to grant an estate at the will of the lessee, no estate whatever passed to the lessee. As a sequence, he held it at the will of the lessor, and his estate came within the strict definition of Blackstone and Kent of an estate at will; i. e., an estate at the will of the lessor. It does not follow, therefore, from this position of the common law, that an estate at the will of the lessee, created by an instrument by which such an estate can be created, is also an estate at the will of the lessor. And it has been held that such an estate, so created, is not such. In the case of Effinger v. Lewis, 32 Pa. 367, it was so held. The Supreme Court of Pennsylvania, through Lowrie, C. J., there said:

"This lease is for 100 years, with the right in the lessee, his heirs and assigns, to hold the premises at the same rent as long thereafter as he or they shall think proper; and the counsel insists that, after the hundred years, this becomes a lease at the will of one party, and therefore of either. He urges that such was, for several centuries, the common law of England, and that, therefore, it is now a part of our common law, and that we have assumed legislative functions in setting it aside."

To this position answer was made as follows, to wit:

"Now, if the law relied on here depended on a custom that has passed away, it is not we, but the people themselves, that have set aside the law; and it would be mere usurpation in us to declare that it is still in force. That law did depend on a custom that has passed away. An estate at the will of the

grantee, his heirs and assigns, is equivalent to a fee simple, and such an estate could not, by the old customs, be conveyed without livery of seisin. By the same customs there could be no livery of seisin under a lease, but a mere taking of possession. Land granted by livery of seisin, without defining the quantity of the estate, was treated as a life estate. Where there was merely a delivery of possession, without defining the term, there arose only a tenancy at will. For want of livery of seisin, and the form of conveyance proper to that ceremony, it was necessary to treat an estate at the will of the grantee as being also at the will of the grantor, else a fee simple might be granted in a form that pertained to the lowest order of estates; and this the customs of that day did not allow. Now and here it is otherwise. With us a fee simple may be granted without livery of seisin, as well as a lease for years or at will."

And it was concluded:

"There is nothing, therefore, to prevent us from giving effect to this contract according to the intention of the parties. If they meant to create an estate that should endure so long as the grantee, his heirs and assigns, should desire to keep it at the rent agreed upon, then such is its character; and this silences all the minor objections brought to bear on the title. That they did mean such an estate is quite plain from their agreement. * * * The parties have so contracted, and the law does not forbid it."

The case of Delhi School District v. Everett, 52 Mich. 314, 17 N. W. 926, involved a lease to a school district, to hold the property "during the time it is used for school purposes," which had been given for a present money consideration. The Supreme Court, through Judge Cooley, had this to say as to this instrument:

"It is fully conceded by the defendant that the understanding was that the district should have the land so long as it should be occupied for school purposes; and the instrument which he gave shows this intent very conclusively. The instrument was therefore at the very least a lease in perpetuity at the will of the lessee."

These two decisions may appear to be to the contrary, to wit: Cheever v. Pearson, 16 Pick. (Mass.) 266; Doe v. Richards, 4 Ind. 374. In the Massachusetts case, liberty was granted by a Congregational society to certain persons to erect a seminary on the parsonage land, with liberty to remove the same at pleasure. The building was erected. Thereafter the lessor gave notice to quit and brought ejectment. It was held that it was entitled to recover. In the Indiana case a mother granted to her son certain land held by her for life, to occupy so long as he desired; he agreeing to allow her to live in the house and to support her. After the lapse of 2½ years from the making of the grant she left the house, having deeded the premises to another and given her son notice to quit. It was held that her grantee was entitled to recover. The decision in the Massachusetts case was based upon Coke's statement quoted above, and the Indiana case on that and the Massachusetts case. But in each case the grant was gratuitous. The only consideration for the grant in the Massachusetts case was the benefit to the public from the erection of the seminary. In the Indiana case, though the grantee agreed to support the grantor, this agreement was not a binding obligation, because of his right to surrender the property whenever desired.

Possibly, however, these cases cannot be distinguished on this

ground. Whether so or not, it would seem clear that in the case of a grant of an estate at the will of the grantee, without consideration being given therefor—i. e., a grant which is invalid for want of a consideration—the grantor has the right at his will to reclaim the property at any time. This is not because the estate is held by the grantee at his will, but because the grant is invalid for want of consideration. So in case of a grant of an estate on limitation, the grantee having the right to terminate it at his will without consideration being given therefor, and hence invalid, the grantor has the right to reclaim the property, not because the estate may be terminated at the will of the grantee, but because the grant is invalid for want of consideration. But where either estate is granted for a consideration, so that the grant is valid, and particularly for a valuable consideration, consisting of cash paid or a binding obligation then entered into by the grantee, no such reason for the grantor having the right to reclaim the property exists. And why should he have such right because, in the one case, the grantee holds at his will, or, in the other, has the right at his will to terminate the estate? Why cannot the owner of property for value grant to another the right to hold it as long as he wants, or at his will to terminate an estate granted without himself having the right to terminate the estate at his pleasure? What conceivable reason is there for the position in either case that the grantor can go back on his bargain and reclaim what he has so granted?

Such is the case we have here. Possibly because of the surrender clause the covenants and agreements on the part of the lessee were not binding obligations on him, and hence not sufficient to uphold the leases. Possibly, also, as the lessee did not have an absolute right of surrender, but only right so to do on the payment of $1, they were binding obligations and constituted part of the consideration of the leases. However it may be as to these matters, there was, apart from such covenants and agreements, a valuable consideration for the leases sufficient to uphold them and every privilege therein granted to the lessee, to wit, the payment of the $1. Such small consideration should not prejudice one against the grant of an estate at the will of the lessee in relation to oil and gas, in view of the conditions subsequent which the courts are keen to imply to protect the grantor. We come here, therefore, to the same point which we reached in considering the other formula or epigram. The privilege in the lessee to surrender the estates in him at his will is an option in the lessee. And in case of an option, for which value has been paid, the one giving it is bound to submit to the exercise thereof by the other to whom it is given, though he has no right to compel its exercise by him.

[11] Our conclusion, therefore, is that on principle the leases in question are valid, and plaintiffs are entitled to the relief which they seek. We see no possible room of escaping from it.

We are now in position to determine how the matter stands upon authority elsewhere than in Kentucky. It is claimed by defendant that it has been held that an oil and gas lease containing a surrender clause is invalid in eight states, to wit, Indiana, Virginia, West Virginia, Texas, Tennessee, Louisiana, Oklahoma, and Colorado. The decisions

relied on as so holding are as follows, to wit: Knight v. Indiana Coal & Iron Co., 47 Ind. 105, 17 Am. Rep. 692; Cowan v. Radford Iron Co., 83 Va. 547, 3 S. E. 120; Eclipse Oil Co. v. South Penn Co., 47 W. Va. 84, 34 S. E. 923; Trees v. Eclipse Oil Co., 47 W. Va. 107, 34 S. E. 933; Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12; Reese v. Zinn (C. C.) 103 Fed. 97; Federal Oil Co. v. Western Oil Co. (C. C.) 112 Fed. 373; Federal Oil Co. v. Western Oil Co., 121 Fed. 674, 57 C. C. A. 428; Roberts v. McFadden, 32 Tex. Civ. App. 47, 74 S. W. 105; Guffey Pet. Co. v. Oliver (Tex. Civ. App.) 79 S. W. 884; Tennessee Oil Co. v. Brown, 131 Fed. 696, 65 C. C. A. 524; Logansport Gas Co. v. Null, 36 Ind. App. 503, 76 N. E. 125; Murray v. Barnhart, 117 La. 1023, 42 South. 489; Superior Oil Co. v. Mehlin, 25 Okl. 809, 108 Pac. 545, 138 Am. St. Rep. 942; Kolachny v. Galbreath, 26 Okl. 772, 110 Pac. 902, 38 L. R. A. (N. S.) 451; Goodson v. Vivian Oil Co., 129 La. 955, 57 South. 281; Long v. Sun Co., 132 La. 601, 61 South. 684; Witherspoon v. Staley (Tex. Civ. App.) 156 S. W. 557; Davis v. Riddle, 25 Colo. App. 162, 136 Pac. 551. This is a formidable array of decisions. What they stand for and what is their value call for a careful consideration of each one of them.

The Indiana decisions come first. They are that of the Supreme Court of the state in Knight v. Indiana Coal & Iron Co., decided in 1874; that of the United States Circuit Court for that district and the Circuit Court of Appeals for that circuit in the case of Federal Oil Co. v. Western Oil Co., decided in 1902, and that of the Appellate Court of that state in the case of Logansport Gas Co. v. Null, decided in 1905. The instrument involved in the Knight Case was a grant of a mining right in land. The substances, the right to mine which was granted, were coal, limestone, iron ore, fire clay, and oil. The duration of the right was not specified. The consideration for the grant was $1 in hand paid and the agreements therein mentioned. These agreements were to search for those substances, and, if found, to produce them and pay certain royalties. It contained a provision that the grantee should have the right at any time to abandon the lands and mining and remove all his buildings and fixtures. The suit was by the grantor to quiet his title against the claims under the grant. It does not appear whether anything had been done under the grant, or how long a time had elapsed since it was made, until the suit was brought. It was held that plaintiff was entitled to relief. The instruments involved in the other two cases were oil and gas leases. That in the Federal Oil Company Case was made February 22, 1901. It recited that it was made in consideration of the sum of $1, the receipt of which was acknowledged. No time was specified within which the exploration was to be made. It provided that in case no well was commenced within one day from its date it should be null and void, unless the lessee should thereafter pay at the rate of $8.75 for each month such commencement was delayed in advance, and further that the lessee might cancel and annul the contract at any time. Thereafter the commutation money was regularly paid in advance for eight months; i. e., to October 22, 1901. On October 19th the installment

due October 22d was tendered and refused. Thereupon the lessor made another lease, and the lessee thereunder entered and began drilling, and prevented the first lessee from so doing. And on November 18, 1901, the latter brought suit against the lessor and the second lessee for an injunction. It was held both by the Circuit Court and the Circuit Court of Appeals that the lease was invalid and the plaintiff was not entitled to relief.

The instrument involved in the Null Case was made January 5, 1899. It recited that it was made in consideration of $1 and the agreements and covenants therein contained. Amongst these was an agreement to drill a well within 3 months, or thereafter pay for further delay a yearly rental of $75 until a well was drilled. No time was prescribed in which a well was to be drilled. It provided that a refusal to pay the rental when due should be a surrender by the lessee of the rights granted, and further that he might at any time reconvey the grant, and thereupon the instrument should be null and void. Payment was made of the rental up to July 1, 1901, and it was understood that it was to be paid thereafter annually from July 1st. No payment was made on or before July 1, 1902, but a year's rent was tendered and refused July 7, 1902. Thereafter the lessor brought suit to quiet his title against claim of the lessee under the lease. It was held that he was entitled to relief. Clearly this case is without pertinency here. The failure to pay the commutation money when due terminated all rights under the lease by its very terms.

The other two cases must be conceded to be pertinent. In each case the instrument involved contained a surrender clause. This clause was the basis of the decision in the Knight Case and was not without its effect on that in the Federal Oil Company Case. Three things may be said as affecting the value of the decisions in these two cases. In the Knight Case two of the judges of the court dissented. The decision was based upon the authority of Blackstone and Kent and the prior one in Doe v. Richards. The quotations from Blackstone and Kent were to the effect that an estate at will is at the will of both parties, that from Blackstone being the one heretofore made. No note was taken of the definition of either as to what constituted an estate at will, to wit, an estate at the will of the lessor. As to Doe v. Richards no note was taken of the difference between it and the case in hand, in that in the latter there was a valuable consideration for the grant, to wit, $1, in hand paid, and in the former there was no such consideration therefor. It might be noted, further, that for aught that appears there was room in the facts of the case for the position that there had been a forfeiture of the lease by reason of breach of an implied condition subsequent, which was calculated to prejudice one against it. In the Federal Oil Co. Case the suit was regarded as one for the specific performance of a contract, and therefore governed by the principles applicable to such a suit, and not, as it really was, a suit to prevent waste, and governed only by the principles applicable to such a suit. The fact that the lessee had a vested estate in possession for exploration purposes for a reasonable time, no specific time being prescribed, and the consequences following therefrom, seem not

to have been fully appreciated and realized. That he had such an estate is involved, but not clearly brought out in this statement of Judge Jenkins in his opinion on behalf of the Appellate Court, to wit:

"The legal effect of the instrument here in question is therefore the grant of a mere use for the purpose of prospecting. The title is inchoate, and for purposes of exploration only until oil or gas is found. If not found, no estate vests in the lessee, and his title, whatever it is, ends with the abandonment of the unsuccessful search. If found, the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract."

We find recognition of the fact that he had such an estate in the statement that the legal effect of the instrument was the "grant of a mere use for the purpose of prospecting," and that, if oil or gas is not found, the lessee's "title, whatever it is, ends." But it is obscured by the further statements that the "title is inchoate" until oil or gas is found, and that if it is not found "no estate vests in the lessee," and by the emphasis placed on the fact that, if oil or gas is found, the lessee has a "vested right" which will be protected. What is inchoate, and not vested until oil or gas is found, is the right to produce them. The title to the oil or gas itself remains inchoate, and not vested, until it is actually produced. But the estate in possession for exploration purposes was at no time inchoate or not vested. It vested immediately upon the execution of the instrument, and, as no time was specified for it to endure, it was for a reasonable time. And this estate was entitled to as much protection as the estate to produce would have been, had it vested by the finding of oil or gas. It seems to me that it is in the failure to fully appreciate and realize the fact that the lessee in such instruments has an estate in possession for exploration purposes, and the consequences which flow therefrom, that such a suit has been treated as a suit for specific performance of a contract. It is not clear whether it was considered that the instrument was invalid at law or subject to concellation in a suit in equity; and the doctrines applicable to a suit to enforce specific performance of a contract, which it was held were against plaintiff's right to relief, were two. They were unfairness and want of mutuality. The only possible basis of the position that the instrument was unfair to the lessor was that under it the lessee had an unlimited time in which to explore. If he only had a reasonable time in which so to do, it is hard to see wherein the unfairness came in. The position that there was want of mutuality was based on the absence of an express agreement to explore or to pay anything for delay in exploration. It consisted in the fact that the lessee had the right to exercise the rights granted to him if he chose, but he could not be compelled to exercise them. But there was no want of mutuality here, no more than in the case of any valid option. The lessor had received the $1 consideration in return for this privilege.

Not much emphasis was placed in either court on the surrender clause, but more in the lower court than in the appellate court. In both courts the Knight Case was cited in support of the conclusion reached. Possibly, as the question was a local one, in view of that decision, the result could not have been otherwise than it was. The lower

court was in the grip of the last of the two formulas or epigrams to which I have referred. Judge Baker said:

"It is a well-settled rule of law that a lease which is determinable at the will of one party is equally determinable at the will of the other party."

The appellate court was in the grip of the other. Judge Jenkins said:

"Contracts unperformed, optional as to one party, are optional as to both."

The real question in the case seems to have been whether at the end of the eighth month a reasonable time in which to explore had elapsed. If so, the lessor was not bound to accept the tender of the ninth installment, and was free to make the other lease. If it had not, the lessee was entitled to the relief which he sought. But neither this decision nor that in the Knight Case represent any longer the law of Indiana as to the effect of a surrender clause. This is because of the decision of the Supreme Court thereof in the case of New American Oil & Mining Co. v. Troyer, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739. The recited consideration for the lease there involved was $1 and the covenants and agreements therein contained. No time was fixed for the duration of the rights granted. The lessee agreed to drill a well within two months, or thereafter pay in advance for further delay a quarterly rental of $20 until the well was drilled. It was provided that, if the lessee should refuse to pay a quarterly rental when due, this refusal should be construed as his act for the purpose of surrendering the rights thereby granted, and further that the lessee might at any time reconvey the grant, and thereupon the instrument should be null and void. The lease was made April 10, 1899. Quarterly rents were regularly paid in advance up to June 10, 1901. On June 9th the rental for the quarter that then began was tendered and refused. Thereafter the lessor sued to have the title to the land quieted against the claim under the lease. It was held that he was not entitled to the relief sought. The case was exactly like the Federal Oil Company Case, except in that the lessor, after refusing to accept the rental, made another lease, and the lessee sued for an injunction against the lessor and the lessee in the second lease. Concerning the time in which the lessee had the right to drill, the Supreme Court, through Hadley, J., said:

"There being no definite time limit within which the well must be constructed, the law intervenes and directs that it shall be accomplished within a reasonable time. This means within a reasonable time at the option of the landowner."

On the original hearing no point was made of the surrender clause. It was put forward on a petition for rehearing, and the Knight Case was relied on as fatal to the lessee's claim under the lease. Notwithstanding this, the court adhered to its former ruling in sustaining that claim. It distinguished the Knight Case on the ground that the instrument there involved related to the mining of coal, and held that it was "not an authority in an oil and gas contract of the character under consideration." I am unable to see that the Knight Case was

not applicable on the ground stated. But, however this may be, since the decision of this case an oil and gas lease is no longer invalidated in that jurisdiction by a surrender clause. Nor is the decision of the Circuit Court of Appeals for the Seventh Circuit in the Federal Oil Company Case of any value as a federal authority. The decision of that court in the case of Smith v. Guffey, 202 Fed. 106, 120 C. C. A. 436, was based upon its previous decision in the Federal Oil Company Case, and the decision in the latter case was reversed by the Supreme Court in Guffey v. Smith, supra.

Next comes the decision of the Supreme Court of Virginia in Cowan v. Radford Iron Company, decided in 1887. That was a suit brought by the lessor in January, 1884, to cancel a mining lease made June 22, 1880. The substance claimed to be covered by it was iron ore. No time was specified for the expiration of the rights granted. The sole consideration for the grant was the agreement to pay royalties for all ores taken from the land. It provided that the lessee might, at any time, remove the improvements made by him on the land. The lessee entered in the summer and fall of 1880, removed a small quantity of ore, paid the royalty on it, and then abandoned the enterprise. It was held that the plaintiff was entitled to the relief sought. The decision might have been based on the ground that the lease was without consideration, or that the rights granted had been forfeited by breach of an implied condition subsequent, but was not. It was based upon the idea that the lease created an estate at will. The court, through Lacy, J., said:

"If this estate is at the will of one of the parties, it is equally at the will of the other"

—and cited in support of its conclusion the Doe and Knight Cases from Indiana and the quotations from Blackstone and Kent made in the opinion in the Knight Case. The decision is of no value upon the question we have here, even in that jurisdiction.

The West Virginia decisions come next. They are those of the Supreme Court of the state in Eclipse Oil Co. v. South Penn Co. and Trees v. Eclipse Oil Co., decided in 1899, that of the United States Circuit Court of Appeals for the Fourth Circuit in Huggins v. Daley, decided in 1900, and that of the United States Circuit Court for that district in Reese v. Zinn, also decided in 1900. The instruments involved in these cases were all oil and gas leases. The rights granted by that involved in the two Eclipse Oil Company Cases was "for and during the term of 3 years from the date thereof and so long thereafter as oil and gas can be produced in paying quantities." The consideration recited therefor was the "covenants and agreements hereinafter mentioned." Those agreements were to give a part of the oil and pay $200 per annum per gas well as royalties and one in relation to the matter of exploration. It was to drill one test well within six months, or in lieu thereof thereafter pay $1 per acre per annum until the well was completed. It provided that, if the test well was not so completed or rentals paid, it should be null and void, and further that the lessee should have the right to, at any time, surrender the

lease and be released from all moneys due and conditions unfulfilled. The lease in the first of the two cases was made May 11, 1897. No test well was drilled. June 18, 1898, the lessor made another lease, under which entry was made. Thereafter, to wit, on November 10. 1898, the lessee in the first lease paid the first year's rental to the lessor, which was in time to keep the lease alive if valid. He then sued the second lessee and sought an injunction against him. It was held that he was not entitled to the relief sought. The lease in the other one was made August 16, 1898. No test well was drilled here. Within the 18 months the lessor died and his representatives made a lease to another. Thereafter, and before the lapse of the 18 months, the lessee in the first lease paid the rental to such representatives and entered. Thereupon the lessee in the second lease sued him and sought an injunction. It was held that the plaintiff was entitled to the relief sought. In Huggins v. Daley the lease was made March 12, 1897. The rights granted were for the term of 5 years and as much longer as oil or gas was found. The consideration recited for the lease was $1. It contained a "provided" clause to the effect that a well should be commenced within 30 days and completed within 90 days, and in case of failure to do so that lessee should pay to the lessor a forfeiture of $50. The lease did not contain a surrender clause. No well was begun, and on November 6, 1897, the lessor made another lease under which entry was made. The first lessee sued the second lessee for an injunction. It was held that the plaintiff was not entitled to the relief sought. The facts of the case of Reese v. Zinn are not given in the opinion therein. It was a suit by the lessor against the lessee for a cancellation of the lease, and it was held that plaintiff was entitled to such relief. Judge Jackson thus stated the reasons for his conclusion:

"First, because the parties who claim under the lease * * * have, by the terms and provisions of that lease, * * * not only forfeited their rights, but have abandoned the lease; second, because the contract is void for want of mutuality, for the reason that it puts it in the power of the lessee to terminate the lease at will, and thereby confers the same power upon the lessor. This principle is well settled by numerous decisions, both in our own courts as well as courts of other states."

The only decision cited as tending to support the second reason is the first of the Eclipse Oil Company Cases, above referred to, and is evidently based upon it. It goes with that case so far as it is pertinent here. The case of Huggins v. Daley has no pertinency here. The lease there involved contained no surrender clause, and no question was made therein as to the validity of the lease. The sole question was whether the lessee had forfeited his rights under the lease by the failure to drill the test well as therein provided. It is well to bear this in mind, for this case has been much cited in later cases involving the question we have here.

The decisions as to the validity of the leases involved in the Eclipse Oil Company Cases were based on several grounds. One of them has no bearing whatever here. It was that the lease was without consideration. The sole consideration therefor recited therein was the cove-

nants and agreements therein. This it was held was not a sufficient consideration because of the surrender clause, which made of it no binding obligation. The court, through Dent, P., said:

"This clause apparently destroys this lease, or renders it invalid, at least until some consideration has passed from the lessee to the lessor. * * * This renders it, to this extent, nudum pactum, by which the lessor is not bound any more than the lessee."

The other reasons do have pertinency here. One was that the estate granted was, by virtue of the surrender clause, at the will of the lessee, and hence also at the will of the lessor. In support of this position Blackstone and Kent and the decisions in the Doe and Knight Cases from Indiana, and the case of Petroleum Company v. Coal, Coke & Manufacturing Co., supra, to which further reference will hereafter be made, were cited. The others were based upon the assumption that the suit was a suit in part, at least, for specific performance. It was recognized that the suit at bottom was a suit to prevent waste, but thought that to a certain extent, at least, it was also a suit for such relief. Being so, it was held that plaintiff was not entitled thereto, because the lease was unfair, in that the lessee could hold for 18 months without drilling a well or paying commutation money; it not being provided that it was payable in advance of the beginning of the last 6 months, though in the opinion on petition for rehearing it seems to have been thought that it was so payable, and the lease forfeited for not so paying it, and further because of a want of mutuality. That these reasons were not good reasons for holding the leases invalid we have already indicated. And that court in later decisions has held that they were not. It has limited the soundness of the decision to the first one considered, to wit, the want of a valuable consideration therefor, and has expressly held that where there was other consideration than the covenants and agreements in the lease it is valid, notwithstanding the surrender clause. This it has done in the cases of Lowther Oil Co. v. Guffey, 52 W. Va. 88, 43 S. E. 101, Pyle v. Henderson, 65 W. Va. 39, 63 S. E. 762, and Lovett v. Eastern Oil Co., 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B, 360.

In the Guffey Case the lease provided that the lessee had the right to remove his property at any time, which amounted to a surrender clause. The recited consideration was $1, the receipt of which was acknowledged. It provided that, in case no well was completed within two years, the grant should immediately become null and void, provided that the lessee might prevent such forfeiture from year to year by paying annually in advance $18.75, until such well was completed. It was held that after the expiration of the 2 years the lease became one from year to year, at the option of the lessee, until a well was completed, against the unfair exercise of which privilege equity might relieve. The opinion was by Dent, P., who delivered the opinions in the Eclipse Oil Company Cases. He said:

"This lease is very different from the one passed on in the case of Eclipse Oil Co. v. South Penn Oil Co., 47 W. Va. 84 [34 S. E. 923]. While $1 is a small consideration, yet it is a valuable consideration, and the court cannot say that it was inadequate under the circumstances, as the lessors did not

consider it so. It was only intended to hold the grant for two years, and after that time a further consideration to prevent forfeiture was provided. During the two years the lessors did not object to the adequacy of the consideration, and it is too late to do so now. Such consideration for a similar lease has been held sufficient. * * * Inadequacy of consideration is not alone sufficient to invalidate a lease, although where it is grossly inadequate it is regarded as proof of fraud."

And again he said:

"The manacles were forged by the lessors themselves with their eyes open, and the court cannot remove them unless fraud can be shown, or the contract is so unfair and uneven as to render its enforcement equivalent to the perpetuation of fraud upon the lessors. It is claimed that this is a case of such character, because the lessee, by the prompt payment of the nonforfeiture sum could perpetually prevent the development of the land for oil and gas. It is not, however, probable that he would do so, and he is already actively engaged in drilling. If it could be shown that such was his purpose, it would amount to fraud, which equity might relieve against."

In the Pyle Case that court, through Brannon, J., said:

"One argument made for the second lease is that the first has no covenants binding the lessees to do anything, unless they wished; that it binds the lessees for nothing, until they should get oil, either to drill a well or pay money; that the lessor could have no suit for money or to compel operation of development of oil. It is thence contended that the contract wants an essential of a binding contract, namely, mutuality. Under this view the lessor could renounce or revoke the lease at any time, because, if not binding the lessee for anything, neither would it bind the lessor, and hence the second lease would be an election by Bunfill not to be bound and would confer good title. * * * We differentiate the present case from the Eclipse Case from the fact that no money was paid as a bonus in that case, whereas, one of $55 was paid for the lease in this case. We cannot see that when a lessee pays a money consideration for the right or privilege of boring for oil within a fixed time, and in default of so doing, or paying money as alternative, he has no vested right of exploration, but his privilege may be revoked at any moment, whether the limited time has expired or not. If that be the true view, the clause of cesser is needless, because a revocation could be made for want of mutuality only. It would seem to me that a lease of this character, the lessor receiving valuable consideration for the privilege of exploration for oil, would confer a valid right of exploration for the time and on the terms spoken of in it. Such would seem to be the intent of the parties, and the justice of the matter, notwithstanding the contract imposed no obligation on the lessee to drill or pay. The lessor has been paid his price for giving such privilege. It seems that this was the construction of the Eclipse Case in the opinion by Judge McWhorter in Harness v. Eastern Oil Company on page 250 of 49 W. Va. [38 S. E. 662]. Denying the aptness * * * of the Eclipse Case, he said: 'In that case the lessee paid nothing, had done nothing.' In Lowther v. Guffey, 52 W. Va. 88 [43 S. E. 101], Judge Dent, who prepared the opinion in the Eclipse Case, differed the two cases because of $1 paid as a bonus. That lease imposed no obligation on the lessee. In Tibbs v. Zirkle, 55 W. Va. 49 [46 S. E. 701, 104 Am. St. Rep. 977, 2 Ann. Cas. 421], a point held is: 'An option given for a valuable consideration cannot be revoked until the time limit therein has expired. If such option is without consideration, it may be withdrawn or revoked at any time before acceptance.' So we cannot say that from mere want of mutuality Bunfill could ignore the first lease."

In the Lovett Case the lease was for a term of 10 years and for as much longer thereafter as oil or gas should be found in paying quantities. It provided that the lessee should drill a well within 3 months, or thereafter pay $90 per annum in advance until a well should be drilled, and further that the lessee might surrender the lease at any

time upon notice to the lessor of his intention so to do, and notice of such intention might be given by a failure to pay rent when due. No well was ever drilled; six annual installments of rent were paid to the lessor and accepted by him. Thereafter he refused to accept any other installments, and the lessee deposited three of them in bank to the lessor's credit as provided in the lease. After the lapse of 9 years the lessor brought suit to cancel the lease, and it was held that he was not entitled to such relief. The court, through Brannon, J., said:

"He knew of these payments into bank. Lovett bases his claim to repudiate this lease on the theory that it is but a mere option, which he could revoke at any time because of the failure of the lessee to develop oil and gas. He claims that, as the lease gives the oil company right to surrender the lease at any time, he has the correlative right of cancellation. He claims that as the oil company had the right to surrender the lease, either expressly or by failure to pay the rental and be released from obligation, there is no mutuality of obligation, no consideration binding, and that he had the right to declare the lease at an end. We are cited for this contention to the cases of Eclipse Oil Company v. South Penn Oil Company, 47 W. Va. 84, 34 S. E. 923, and Trees v. Eclipse Oil Co., 47 W. Va. 107, 34 S. E. 933. I dissented in both those cases, as will appear in 34 S. E. 932, 934, though my dissent was omitted in the official state report from negligence of some one connected with the publication. But this is not material. Those cases proceed upon the idea that there was no binding leases; that there was no obligation, no promise on the part of the lessee to pay money or to do anything, and a privilege to surrender the leases without payment of anything, at mere will; that they conferred only an estate at the will of the lessee, and that, the estate being one at will, it might be terminated by either party; that there was no consideration for the lease. Those cases do not control this case. Why? Reference to Judge Dent's opinion in Lowther Oil Co. v. Guffey, 52 W. Va. 91, 43 S. E. 101, will show the difference between the leases in those cases and the lease involved here. So will the opinions in Harness v. Eastern Oil Co., 49 W. Va. 250, 38 S. E. 662, and Pyle v. Henderson, 65 W. Va. 42, 63 S. E. 762. In the lease before us we find a valuable consideration paid, as it recites the payment of $1 down. Will it be said that that small sum is not a sufficient consideration to support the lease? We said that it was sufficient, as consideration, to make the lease good in Lowther Oil Co. v. Guffey, supra. 'The mere inadequacy of a consideration does not render it insufficient, except as a circumstance bearing on the question of fraud or undue influence. A valuable consideration, however, small and nominal, if given or stipulated in good faith, is, in the absence of fraud, sufficient to sustain a parol contract. Accordingly, a grantor who has been tendered $1 as a consideration for his deed, cannot have it set aside for want of consideration, where it does not appear that he expected any other.' 1 Beach, Modern Law of Contracts, § 5. Look back at hundreds of deeds through hundred of years, and you will find them stating $1 as a valuable consideration. To say that such a consideration, acknowledged under seal, is not good, would be to overthrow myriads of deeds. The parties have chosen to treat it as a sufficient consideration; they have contracted that it shall be such; and no court, in the absence of fraud, can nullify their contract. The fact that it is so small a consideration will not render the lease a mere option. The fact that a valuable consideration was paid for such a lease differs this case from Eclipse Oil Co. Case, above cited, as was stated in Lowther Oil Co. v. Guffey, 52 W. Va. 91, 43 S. E. 101, and in Pyle v. Henderson, 65 W. Va. 41, 63 S. E. 762. But that $1 is not the only consideration; for the lease provides that the lessee shall drill wells, and from them pay royalty, or on failure to do that pay $90 per year. Lovett thus had the chance of getting returns in royalties, or in lieu of them, $90 each year. Until the lessee should exercise the right of surrender the rental was payable. The mere fact that this right of surrender existed does not deprive the lease of having a valuable consideration on which to rest. The oil company did not exercise that right, but year after year paid this rental. So that the lessee,

not exercising the privilege of surrender, paid large amounts as yearly rental, accepted by Lovett, and this was valuable consideration, in addition to the $1, and would bar Lovett from holding the lease a mere option without consideration, a mere estate at will determinable whenever Lovett chose. I say that the promise to develop and pay royalty is also valuable consideration, because trouble on the part of the lessee, damage of loss from failure to find oil, chance of development which might yield Lovett returns, and promise to pay money made consideration. Jackson v. Hough, 38 W. Va. 240, 18 S. E. 575. But aside from this there is valuable consideration."

Clearly, then, the Supreme Court of West Virginia is strongly against the defendant's contention, instead of on its side, as contended by him. Before proceeding with consideration of the other decisions relied on, it should be noted that they are, except those from Louisiana, largely built on the decisions relied on, which have already been considered. These latter decisions, as we have seen, do not support defendant's contention. The former, therefore, are without basis, so far as they are built on them.

We come, now, to a consideration of the Texas decisions. They are those of the Court of Civil Appeals in the cases of Roberts v. McFadden, decided in 1903, Guffey Petroleum Co. v. Oliver, decided in 1904, and Witherspoon v. Staley, decided in 1913. It is not necessary to go into any detail in stating the facts of these cases. It may be conceded that they support defendant's contention. The leases involved in the Roberts and Oliver Cases contained a surrender clause. That in the Witherspoon Case seems to have contained such clause, but it contained no agreement to explore, which is treated as the equivalent of an agreement to explore with a surrender clause. The surrender clause in the Oliver Case was not absolute, but only on payment of $2. The consideration recited in the lease in the Roberts Case was $1, the receipt of which was acknowledged, and in the Oliver Case $1 and the covenants and agreements therein contained. In the Witherspoon Case it was $25 cash paid. The decisions in these cases were based upon the Knight and Federal Oil Co. Cases from Indiana and the Eclipse and Daley Cases from West Virginia. In the Roberts Case it was held that parol evidence was admissible to show that the $1 consideration, recited as paid, had not in fact been paid. The court, through Gill, J., said:

"We can imagine no more glaring instance of a unilateral contract."

In the Oliver Case, through Garrett, C. J., it said:

"The provision in the lease that it may be surrendered by the defendant upon the payment of $2 makes it terminable at the will of the defendant, since the sum named is only a nominal consideration, and will not deprive the lease of such character. When the great value of the lease of the premises as oil-bearing land is considered, the trifling sum mentioned cannot be considered more than nominal. It is a well-established principle of law that, when it is provided in the lease that it is terminable at the will of one of the parties, it becomes terminable at the will of either."

And again:

"The only distinction observable between the cases just cited and the one under consideration is that the cited cases do not require the payment of a consideration for the exercise of the right to terminate the lease. But, as

above stated, the consideration named in the lease in this case is only nominal, and cannot be regarded as a valuable consideration."

In the Witherspoon Case, through Rice, J., it said:

"This contract was likewise a unilateral one, in that it did not bind or obligate the lessee to perform any of the conditions thereof, and was therefore lacking in mutuality."

Then comes the Tennessee decision relied on, to wit, Tennessee Oil Co. v. Brown, decided in 1904. It was a decision of the United States Circuit Court of Appeals for the Sixth Circuit, and went there from Tennessee. It is because of this that it is thought to lay down the rule for that state. In this connection there should first be considered the case of Petroleum Co. v. C. C. & Mfg. Co., supra, a decision of the Supreme Court of Tennessee, rendered in 1890, which is cited in some of the cases relied on by defendant as upholding his contention as justifying the position taken by them. The opinions in these two cases were each delivered by Judge Lurton. The instrument involved in the earlier case was a coal-mining lease for 99 years. The lessee agreed to commence testing the land within 3 years and to pay the lessor a certain royalty on coal discovered and worked in and upon said lands deemed advisable to be tested and worked by the lessee. The lessee did not do anything under the lease within the three years, and thereafter brought suit against the owner, who had opened up valuable coal mines on the land, to recover the coal right. It was held that he was not entitled to recover. The decision was placed upon the ground that, if there was an absolute agreement on the part of the lessee to test and work the land, he had lost his right by reason of an implied condition subsequent, and, if there was no such agreement he could not recover, because there was no consideration for the agreement. Concerning the latter position the court, through Judge Lurton, said:

"A fair construction of this lease would leave it optional as to whether the lessees should make any effort whatever to discover the mineral value of any particular lease, and, if 'tested' and minerals developed, it seems to depend upon their judgment as to whether such mines shall be worked. If they deem it advisable to 'test' a particular tract, they bind themselves to do so within three years. No other consideration for these leases is pretended than a share in the net profits resulting from such mines as they shall deem it 'advisable' to test and work. No penalty is agreed upon if they shall fail to 'test,' and no rent or other compensation is provided if they shall fail to work developed mines of minerals. If this construction be the right one, then these contracts, where actual mining has not been begun, are void for want of any consideration to support them. Some consideration must be either expressed or implied, or a lease, as any other contract, is void. If the compensation to be paid the lessor depends upon the profit to result from the development and working of a mine, and the lessee is not bound, either expressly or impliedly, to explore and discover, or, when discovered, to work such mine, then no consideration for the lease exists. It is a mere option, based upon no consideration, and may be withdrawn at any time before money is expended in doing what is optional upon the part of the lessee."

This implies that if there is consideration for such a grant—i. e., if the option is based upon consideration—it is not void, but is valid. This case, therefore, in its implication, is against the defendant.

The instrument involved in the Brown Case was a mineral lease.

The consideration therefor was $1, the receipt of which was acknowledged, and the agreements therein contained. The lessee agreed to make search, and, if mineral were found, to pay the lessor, within 5 years after the completion of a railroad to the lands, $10 a year until mining was commenced or during the continuance of the agreement. He also agreed to pay a certain royalty on minerals mined. It provided that the lessee should have the right to abandon the lands and mining at any time and remove all buildings and fixtures from the lands. No search was made until after the lapse of 15 years, and when made it was extremely superficial and valueless from any reasonable view, and nothing else was ever done under the lease. The lessee still claiming thereunder, suit was brought to remove the cloud from the title by virtue of this claim. It was held that the plaintiff was entitled to the relief sought. The only claim which the defendant asserted was that the lease was an outright conveyance of the mineral, and hence the title thereto could not be lost by mere nonuser or abandonment. It was held that it was not such a conveyance, but was a grant of the right to explore for minerals, and, if found, to produce and own them, and that all rights thereunder were lost by reason of a breach of an implied condition so to do. Judge Lurton concluded his opinion with these words:

"But, independently of any other ground, the general provision of this lease, authorizing the lessee to abandon whenever he should see fit, makes it a lease at the will of the lessee. An estate terminable at the will of one of the parties is determinable at the will of either, though it purports to be terminable at the will of one only. 1 Washburn, Real Property, 371 (side paging); Taylor's Landlord & Tenant, § 14; 18 Am. & Eng. Ency. of Law (2d Ed.) 182."

I do not have access to Washburn. There is nothing in Taylor, so far as I can find, to the effect that a grant for a valuable consideration to one of an estate to be held at his will is at the will also of the grantor. In the Am. & Eng. Ency. of Law it is said:

"A lease at the will of one of the parties is equally at the will of the other party. The law does not recognize a tenancy at the will of one of the parties merely, but implies that it shall be also at the will of the other party."

The decisions cited in support of this statement are largely certain of those heretofore considered. In view of what I have said, it is not a discriminative presentation of the law on the subject. What Judge Lurton thus said indicates that he, too, great judge though he was, under the spell of a formula or epigram. The case did not really call for any such position; and his statement was in conflict with the implication of what he had said when a member of the Supreme Court of Tennessee. It cannot, therefore, be justly claimed that defendant's position is favored by decisions from Tennessee.

The Louisiana decisions, which come next, are the cases of Murray v. Barnhart, decided in 1906, Goodson v. Vivian Oil Company, decided in 1912, and Long v. Sun Co., decided in 1913. These decisions are clearly to the effect that a surrender clause invalidates an oil and gas lease. But they are without value here. This is because the civil law prevails there, and under that law a contract cannot be upheld by any

valuable consideration. To uphold it the consideration must be a serious one. In the Murray Case, the Supreme Court of that state, through Provosty, J., said:

"At common law 'the slightest consideration is sufficient to support the most onerous obligation. The inadequacy, as has been said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.' 9 Cyc. 365. But under our law the consideration 'must be serious'; 'it must not be out of all proportion with the value of the thing.' Article 2464, Civ. Code."

And again it said:

"This difference between the common and the civil law, with reference to the sufficiency of a mere nominal consideration for supporting a contract, distinguishes this case from that class of cases to be found in the reports of other states, of which the case of Brewster v. Lanyon Zinc Co., 140 Fed. 801 [72 C. C. A. 213], cited in defendant's brief, is an example, in which contracts like the present one have been held to be valid, notwithstanding the faculty accorded to the lessee to retire from the contract at any time, with or without a nominal payment. At common law, the $1 consideration being of itself sufficient to support the contract, it can make no difference that the lessee is allowed to retire at any time. The situation is precisely as it would be under our law in the case of a lease, where the lessor had paid the rent in advance for the entire term of the lease, when it could make no difference whether he was allowed the privilege of throwing up the lease at any time he pleased, so long as he did not demand the return of any part of the payment he had made."

In the Goodson Case, through Land, J., it said:

"In the case at bar, there is no obligation on the part of the lessee to exploit the land for oil and gas, and there is no consideration for the reserved right to terminate the lease at any time, in the event of the finding of oil and gas in paying quantities. The plaintiff had the legal right to treat the agreement as a nudum pactum, and to refuse the gratuity tendered by the defendant. * * * The Louisiana cases cited by the learned counsel for the defendant do not cover a case of this kind, where there is no obligation to exploit the land, and no consideration for the right to terminate the contract at any time. The civil law requires a serious consideration, while the common law is content with a nominal consideration."

These Louisiana decisions, therefore, instead of favoring defendant's contention, are inferentially against it. They recognize clearly that, if the common law prevailed in that state, the Supreme Court thereof would hold that an oil and gas lease with a surrender clause in it is valid.

We come, then, to the Oklahoma decisions. They are the decisions of the Supreme Court of that state in the cases of Superior Oil Co. v. Mehlin and of Kolachny v. Galbreath, both decided in 1910. In the Mehlin Case no oil and gas lease was directly involved. What was involved therein was a contract to make such a lease. It was a suit to enforce specific performance of such a contract, brought by the lessee in the proposed lease against the lessor therein. Being such a suit, of course, the principles applicable to such a suit applied there. The consideration for the contract to make the lease was $600 of the capital stock of the lessee and $300 which had been expended in drilling a well, which would seem to have been a past consideration. The lease which had been agreed to be made recited as the consideration

therefor $1 and the covenants therein contained. The right granted was for the term of 15 years and as long thereafter as oil or gas was produced. The covenant to begin exploration was within 15 years, and if it was not commenced within that time the lessee was to pay the lessor $——— in advance for each additional year such commencement was delayed from the end of the term until a well was completed. The specific performance of the contract was denied, because the lease was considered an unfair one, in that the lessee could postpone exploration for 15 years without paying anything for such postponement, and thereafter by the payment annually in advance of an unspecified sum. This decision, of course, has no pertinency here. In the Kolachny Case an oil and gas lease was involved. It was a suit by the lessee thereunder against the lessor and the lessee in subsequent lease for an injunction. It contained a surrender clause. The relief sought was denied because of such clause. The court, however, did not hold that the lease was invalid because of such clause. Assuming that the suit was one for the specific performance of a contract, the court denied the relief because of a principle applicable to such suits. The Supreme Court, through Williams, J., said:

"It is not essential to determine in this case as to whether such an option would be valid at law; it being obvious that under authorities heretofore cited, which seem to be supported by reason, equity will not decree that one party specifically perform a contract which the other party at its option may refuse to carry out. After the relief by decree should be granted to each party, he then, under the cancellation clause of the lease, would have it within his power to nullify the decree by exercising his right thereunder not to proceed further. A court of equity will not do a vain and useless thing by rendering a decree settling the rights of the parties which one of them may at will set aside."

In taking this position, it followed the Supreme Court of Illinois, which, as we shall see, holds that an oil and gas lease with a surrender clause is valid at law and not subject to cancellation in equity, but because thereof refuses to grant any relief in equity to the lessee against the lessor, which position it has taken on the assumption that such a suit is one for the specific performance of a contract. This decision, of course, has no pertinency here. The question is whether the lease is invalid because of the surrender clause. These Oklahoma decisions, therefore, do not favor defendant's contention.

There remains to consider the decision of the Court of Appeals of Colorado in the case of Davis v. Riddle, decided in 1913. It is without pertinency here. The lease was canceled because rights under it had been forfeited, and it was not, properly speaking, a lease, but a lease option, for which no consideration had been given.

The result, then, of the extended consideration of the decisions relied on by defendant is that in none of the eight states referred to can it be said that it is now the law that an oil and gas lease with a surrender clause is invalid, except in the states of Texas and Louisiana, whereas in Indiana and West Virginia it is certainly the law that they are valid. There is no ground whatever for claiming that it is invalid in the states of Virginia, Tennessee, Oklahoma, and Colorado. And though it is invalid in Louisiana, it is clearly recognized by

the Supreme Court thereof that, if the common law prevailed therein, it would have to be held that it is valid. So far as the state of Texas is concerned, the decisions of its Court of Civil Appeals show that the matter has not been gone into very deeply.

On the other hand, we find that, in addition to its having been held in the states of Indiana and West Virginia that such a lease is valid, it has been so held in the states of Pennsylvania, Ohio, Illinois, and Kansas, and by the Supreme Court of the United States. The Supreme Court of Pennsylvania upheld a lease containing such a clause in the case of Marshall v. Forest Oil Co., 198 Pa. 83, 47 Atl. 927. This was also done by the following Ohio decisions, to wit: Allegheny Oil Co. v. Snyder, supra; Brown v. Fowler, 65 Ohio St. 507, 63 N. E. 76; Central Ohio Nat. Gas & Fuel Co. v. Eckert, 70 Ohio St. 127, 71 N. E. 281. The first of these decisions was by the Circuit Court of Appeals for this circuit in 1900. The case went there from Ohio. The lease there involved, which was held to be valid, contained a surrender clause. No point was made of the clause as rendering the lease invalid. The other two, by the Supreme Court of Ohio, were rendered in 1902 and 1904, respectively. In the Brown Case that court, through Burket, J., said:

"This surrender clause is an option, intended to enable the lessee to terminate the lease before the end of the term, if it shall appear that there is no oil or gas in that territory. Under this clause the lessee can terminate the lease before the end of the term by surrendering the lease, and under the defeasance clause he can do the same by failing to drill a well and failing to pay for further delay. The right to terminate the lease in either of said ways is a valuable right to the lessee, and he paid for both by paying the $1 mentioned as the consideration for the whole lease. Such options in contracts are sustained by courts. Thayer v. Allison, 109 Ill. 180; Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62. The error of construing a condition subsequent, or an option, as creating the term of the lease, when that has been created by the granting and habendum clauses, has caused many decisions to be rendered whose soundness may well be doubted. This clause gives the lessee his option, and for which he has paid, to hold the lease to the end of the term, or surrender it sooner. It is always the right of a person holding an option for which he has paid to surrender it before the expiration of the time, or to hold it for the full time; but the person who gave the option cannot compel a surrender before the expiration of the full time."

And again:

"It is also urged by counsel for defendants in error in both cases that the lease is void for want of mutuality. Granting that the lease was made for the purpose of operating thereon for oil and gas, and that an exclusive right to so operate was granted to the lessee, there is no want of mutuality. The lessee on his part paid $1, of which the lessor acknowledged receipt, and the lessee on his part made the demise, and because the lessor has performed his part in full, and does not promise to do anything further, it is claimed that there is no mutuality—the claim being that mutuality requires that an obligation must rest on each party to do, or permit to be done, something in consideration of the act or promise of the other. This is too narrow a definition of mutuality. One party may perform his part in full at the making of the contract and thereafter have nothing to do, or permit to be done, having already done his part, and the other party, in consideration of what has thus been done, binds himself to do, or permit to be done, something in behalf of the party who has thus fully performed. A promise to perform can be no stronger than performance itself; and where one party promises to perform

his part of a contract, and the other performs his part at the making of the contract, both are bound, and there is mutuality. The one who has performed is bound to permit his performance to stand, and the one who has not performed is bound to perform his part, so that both are mutually bound. Performance on part of one will sustain a promise to perform on the part of the other. Where there is no performance and no promise to perform on one side, a promise to perform on the other side is without consideration and without mutuality, and such a contract can be held void on either or both grounds. In this lease the lessee paid $1 for the lease, for the exclusive right to operate for oil and gas, and thereby fully performed his side of the contract; and the lessor granted that right under the terms and conditions of the lease, and thereby a contract was made, and the party on one side received the $1 in full, and the party on the other side received the demise, and then both were mutually bound, and both had to trust to the future for the realization of the purpose for which the lease was made. So that there is no want of mutuality, and in that respect the lease is valid."

The Supreme Court of Illinois held such a lease valid in the case of Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46. That was a suit in equity, and the relief sought was a cancellation of the lease. The court, through Cartwright, J., said:

"Another ground upon which it is contended that the circuit court came to a correct conclusion is that there was a want of mutuality between the parties, because the lease contained a surrender clause by which appellees were permitted, upon the payment of $1 to appellants, to surrender the lease for cancellation. It is argued that this provision made the lease a tenancy at will, and also one-sided, harsh, unjust, and therefore void. So far as the charge that the contract was harsh and unjust is concerned, it may be said that the parties were competent to contract with each other, and neither side can be relieved from their agreements on the ground that they did not use good business judgment in entering into the contract. There is no question of fraud, and no charge or evidence of fraud, in the case, and where parties, who are competent in law and in fact to enter into contracts, freely and voluntarily contract with each other, it is of the utmost importance to them, and the public as well, that their agreement shall be respected and enforced by the courts, and that neither shall be relieved from the obligation of his contract except upon some certain ground deemed valid by the law. The surrender clause in this lease gave to the lessee an option to surrender it before the expiration of the term, but it did not give to the lessors any option to compel a surrender. Such options and contracts are not invalid in the law (Thayer v. Allison, 109 Ill. 180), and they do not create a tenancy at will."

That court, however, holds that the lessee in such a lease is not entitled to relief in equity, at least as against the lessor, before he has performed, or come under obligation to perform, his part of the contract. This is because of such want of mutuality, and this is because the nature of such a suit is taken to be a suit for specific performance, and hence subject to the doctrines applicable to such a suit. This it did in the cases of Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 N. E. 53, 122 Am. St. Rep. 144; Ulrey v. Keith, 237 Ill. 284, 86 N. E. 696. In the Supreme Court, through Vickers, J., it said:

"The option of appellant to terminate the lease at any time upon payment of $1 deprives appellant of the right to specific performance, directly or indirectly, until it has performed the contract or placed itself in such position that it may be compelled to perform the contract on its part. If the relief here sought should be granted, appellant, under the cancellation clause of the lease, may nullify the decree by exercising its option not to proceed further. A court of equity will not do a vain and useless thing, by rendering a

decree settling the rights of parties which one of them may set aside at his will."

It reiterated its position that the lease was valid, notwithstanding such clause, in these words:

"While the power of revocation reserved in this lease has the effect of depriving appellant of equitable remedies in the nature of a specific performance, still the contract is not void for want of mutuality. The reservation of the right to cancel is not an infirmity which renders the contract void ab initio, but it deprives the party for whose benefit it is made of relief in equity in the nature of a specific performance."

The position that the suit was one for specific performance of a contract was an error. It was due to the failure to recognize that, so far as the grant for exploration purpose was concerned, the lease was an executed instrument. It granted an estate in possession for such purpose. Hence the suit was not a suit for specific performance, but one to prevent waste; and the right to maintain it depended solely on whether there was an adequate remedy at law. That the lessee has the right to turn his interest back to the lessor is no reason why equity should not protect it, so long as he holds onto it, and that even as against the lessor. That court so viewed the suit in case of Gillespie v. Fulton Oil & Gas Co., 236 Ill. 188, 86 N. E. 219. The suit there was against a rival lessee. The lease involved did not contain a surrender clause, unless the provision that the lessee had the right to remove all its property at any time amounted to one, and the court took no note of it as such. It was held that the plaintiff was entitled to equitable relief. The court, through Vickers, J., said:

"The contention that appellant has a complete remedy at law is untenable. Ejectment will not lie. * * * Equity has jurisdiction to prevent waste and irreparable injury at the suit of an assignee of an oil and gas lease against an adverse lessee."

That this position was erroneous, and the federal court for that state was not bound by it, was held by the Supreme Court in the case of Guffey v. Smith, supra. Suffice it to say that the position of the Supreme Court of Illinois is that such a lease is valid, and that is the sole ground upon which it is relied on here.

The Kansas decisions are those in the cases of Brewster v. Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213, and Pittsburg V. P. & B. B. Co. v. Bailey, 76 Kan. 42, 90 Pac. 803, 12 L. R. A. (N. S.) 745. The Brewster Case, decided in 1905, went to the Circuit Court of Appeals for the Eighth Circuit from Kansas. That court, through Judge Van Devanter, in referring to the instrument there involved, said:

"True, it was made and accepted upon certain conditions, one of which is that the premises may be reconveyed at any time at the option of the lessee; but that does not make the estate which it creates a mere tenancy at will within the operation of the common-law rule that an estate at the will of one party is equally at the will of the other. That rule is without application to a lease for a defined and permissible term, but which reserves to the lessee an option to terminate it before the expiration of the term. * * * The option reserved to the lessee was not designed to convert the estate, as otherwise defined, into a mere tenancy at will, or to make it determinable at any time at the option of the lessor. The lease expresses the intention of the

parties, and, no rule of law forbidding, that intention is controlling. The consideration of $1, the receipt of which was acknowledged, although small, was yet sufficient to make the lease effective and to support every stipulation in it favorable to the lessee, including the option to surrender it at any time. * * * Resting, therefore, upon an executed and valuable consideration, the lease was not wanting in mutuality merely because it reserved to one party an option which it withheld from the other."

In the Bailey Case, decided in 1907, the Supreme Court of Kansas, through Smith, J., said:

"It may be conceded that it is an option contract, yet it does not follow that it can be revoked at pleasure by either party thereto. It is of the very essence of an option contract that one party has the choice of concluding or not concluding the proposed transaction, while the other party has no choice. He undertakes for a certain consideration to do a certain thing, or to permit the other party to do a certain thing, within a certain time on the demand of the other. This right of choice is what the other pays for."

And again:

"Considered as an option, it was bought and sold for a valuable consideration, and the purchaser is entitled to what it bought."

The decision of the Supreme Court of the United States is that of Guffey v. Smith, heretofore referred to, and quoted from. It is true that, as the validity of the lease there involved was a local question, the Supreme Court was bound by the position of the Supreme Court of Illinois, from which state the case came, that the lease was valid. But it is clear from the opinion, which was written by Mr. Justice Van Devanter, who wrote the opinion in the Brewster Case, that the Supreme Court had no doubt as to the validity of the lease on the merits of the question.

We approach, then, the question as to how the matter stands in this state under the decisions of the Court of Appeals of Kentucky as to the validity of the leases here involved, which decisions are controlling, with the personal conviction that, on the merits of it, there can be no possible doubt as to their validity, and with the showing made that authority elsewhere overwhelmingly sustains their validity. In view of this, one would be loth to find it otherwise here. This consideration, however, should not blind him as to the true state of things. The decisions which have been cited as having a bearing on the question are those in the following cases, to wit: Litz v. Goosling, 93 Ky. 185, 19 S. W. 527, 21 L. R. A. 127; Steinwender v. Guenther Gro. Co. (Ky.) 80 S. W. 1170; Lowe v. Ayer-Lord Tie Co. (Ky.) 97 S. W. 383; Schamberg v. Farmer (Ky.) 37 S. W. 152; Armitage v. Mt. Sterling Oil & Gas Co. (Ky.) 80 S. W. 177; Berry v. Frisbie, 120 Ky. 337, 86 S. W. 558; Bay State Pub. Co. v. Penn L. Co., 121 Ky. 637, 87 S. W. 1102; Monarch Oil & Gas Co. v. Richardson, 124 Ky. 602, 99 S. W. 668; Flanagan v. Marsh (Ky.) 105 S. W. 424; Young v. McIllhenny (Ky.) 116 S. W. 728; Breckenridge A. Co. v. Richardson, 147 Ky. 834, 146 S. W. 437; Eastern Ky. M. T. Co. v. Swann Day L. Co., 148 Ky. 82, 146 S. W. 438, 46 L. R. A. (N. S.) 672; Killebrew v. Murray, 151 Ky. 345, 151 S. W. 662; Soaper v. King, 167 Ky. 121, 180 S. W. 46.

The cases relied on by the defendant are the cases of Litz v. Goosling, Steinwender v. Guenther Gro. Co., and Lowe v. Ayer-Lord Tie Co., which did not involve oil and gas leases, and are cited only for the general principles of law which they recognize and apply, and the cases of Berry v. Frisbie, Young v. McIllhenny, Killebrew v. Murray, and Soaper v. King, which did involve such leases. The cases of Steinwender v. Guenther Grocery Company and Lowe v. Ayer-Lord Tie Company are but illustrations of the proposition stated in 9 Cyc. 327, heretofore quoted, which amounts to this, to wit, that in case of a contract made up of mutual promises, each the consideration for the other, i. e., a bilateral contract, where one of the promises is not absolute, but to be performed only if the party making it so wills, or one with a promise on but one side and no consideration therefor, the one who makes the absolute promise in the one case and the sole promise in the other is not bound to perform. In giving the reason why he is not so bound, it is frequently said that it is because of want of mutuality of obligation. The real reason therefor is that there is no consideration for such promise. This is so as much in the one case as in the other, for the promise in that case which purports to be the consideration for the other is really no promise at all, as it depends on the will of the promisor whether or not he will perform it. And it is unfortunate and misleading that the reason is said to be want of mutuality of obligation. For there are cases of want of such mutuality where a promise is binding, as, for instance, in the case of an option given for a valuable consideration and a valid unilateral contract. This matter is dealt with in 6 R. C. L. p. 686. These two cases have no application here, because there is no such want of mutuality as was fatal therein.

The case of Litz v. Goosling seems to have been based on the same ground, and hence so far is not applicable here. But there were two aspects of that case which were not considered. One was that there was a binding contract between the parties by reason of the fact that the offer of the vendor—if it be treated that he did no more than make an offer, which was not binding on him—was accepted before the offer was withdrawn. In so far as the case can be construed as holding to the contrary of this, it was disapproved in the case of Murphy-Thompson Co. v. Reed, 125 Ky. 585, 101 S. W. 964, 10 L. R. A. (N. S.) 195, 128 Am. St. Rep. 259. The other is that there was a binding option on the part of the vendor to permit his offer to remain open during the time specified in the contract, the consideration for which was $1. No more notice was taken of this aspect of the case than of the other. But there was no real occasion for taking notice thereof, if in fact the offer was accepted before it was withdrawn. That rendered it immaterial whether the option was binding. Though withdrawable as not binding, it had not in fact been withdrawn before it was accepted. This aspect of the case may have some bearing here. Because thereof it may be thought to indicate that it is the position of the Court of Appeals of Kentucky that $1 is not a sufficient consideration to render a contract valid. It will be noted that there was no recital that the $1 had been paid. But this may be of no consequence. The most, then, that can be claimed that this case stands for which is applicable

here is that $1 is not a sufficient consideration to uphold an option for the sale of real estate. What was agreed to be sold there was the coal in 1,000 acres of land for $1 per acre, and the suit was brought to enforce specific performance of the contract of sale. The following cases would seem to be in line with this, to wit: Murphy-Thompson Co. v. Reed, supra. Noble v. Mann (Ky.) 105 S. W. 152; Stamper v. Combs, 164 Ky. 733, 176 S. W. 178.

The Murphy-Thompson Co. Case was also a suit to enforce specific performance of a contract for the sale of coal for $5 an acre, claimed to have grown out of an option, the consideration for which was $1, paid by the acceptance of the offer to sell. It was held that the contract had been entered into, and the relief sought was granted. The court, through Judge O'Rear, had this to say concerning the $1 being a sufficient consideration to uphold the option:

"The consideration for the agreement to give the optionee the definite time within which to exercise his choice, called the 'option,' is in these cases the $1 recited. It might have been more, or an entirely different consideration. Though there are authorities holding a consideration of $1 as sufficient to uphold such an agreement, we are not disposed to go so far. Such consideration is so flagrantly disproportionate to the value of the privilege in these cases—the options extending over a year—that it is merely nominal. It is not substantial, and the parties could not have regarded it as in any sense an equivalent of the privilege which was being contracted for. While upon demurrer the courts will be slow to say that a recited consideration is no consideration, if it has any appearance of having been regarded by the parties as the agreed value of the thing contracted for, where the stated consideration is so manifestly inadequate and disproportionate to the value of the thing being sold (the privilege or option) as to represent no value, or only a nominal value, it will be construed on demurrer, as a matter of law, as not having a consideration at all. If there is doubt about the matter, then the question of its value or adequacy is a defense to be pleaded. An option, to be binding upon the owner, in the sense that it is irrevocable upon him during the period for which it was given, must be upon a valuable and sufficient consideration. It may consist in money paid or to be paid for it, or in property, services, or counter benefits accruing to the owner, or disadvantage incurred by the optionee. In short, it may be such consideration as will support any other sort of contract. In this view of the matter, the options in these cases were not supported by sufficient consideration to have bound the owners not to withdraw them during the term for which they were given. They could have been withdrawn before acceptance, without liability to the givers of the options. But, as they were not withdrawn, they constituted, instead of binding options, voluntary offers to sell, which, like any other valid offer, were, when accepted, binding upon the person making them."

It will be noted that what is said on this subject is purely obiter. As the offer had been accepted before it was withdrawn, it was immaterial whether there was a consideration for the offeror's agreement to keep it open, which constituted the option, as the opinion itself notes in its criticism of the Litz Case. In view of this it is no more than that case a controlling authority on the point.

The Noble Case was an action to recover damages for breach of an option to purchase a tract of land for $3 per acre, the consideration for which was recited to have been $1 paid. It was held that plaintiff was not entitled to recover. The court, through Judge O'Rear, said:

"The contract sued upon was an option without consideration. Mann had the right, at any time before its terms were complied with by the optionee

[appellant], to withdraw the proposition contained in it. His sale and conveyance to Little was a repudiation of his option, and, as he had the right to withdraw it, it does not matter what his motive was, nor as to Little's knowledge of its terms."

The case involved the question whether $1 was a sufficient consideration to uphold such an option, and it held that it was not.

The Combs Case was an action to set aside a conveyance of the timber on a 300-acre tract of land, the consideration for which was $150 cash and the delivery up of an option to purchase the tract of land for $5 an acre, which had been given in consideration of $1 actually paid, on the ground of fraud. Concerning the option the court, through Hurt, J., said:

"This is no substantial consideration to support a contract giving one six months' time in which to determine whether he will accept an offer to purchase 300 acres of land in a community where values are rising rapidly. It is merely nominal."

And again:

"The option being a mere offer to sell, and the contract to keep the offer open for acceptance for six months being without substantial consideration, the appellees could withdraw the offer and repudiate it at any time, by conveying notice of their repudiation of it to the holder of it, before its acceptance, and thereafter the holder would be without authority to accept or exercise it."

Possibly it may be said that the question of the $1 consideration for this option was necessarily involved in the case, but it is not entirely certain.

These four cases then—i. e., the Litz, Murphy-Thompson Co., Noble, and Combs Cases—justify, perhaps, the position that $1 is not a sufficient consideration to render valid an option for the purchase of real estate. They certainly go no farther than this.

Coming, then, to the Kentucky cases involving oil and gas leases relied on to support defendant's contention, the first to be considered is the Frisbie Case, decided in 1905. The instrument involved in that case, considered by itself, was a mere option. By it the landowner offered to grant the oil prospectors the right for 2 years to explore for oil and gas, and, if found, to convey to them by deed the right to produce and make their own the oil and gas so found, paying him certain royalties, and, in consideration of $1 paid, the receipt of which was acknowledged, agreed to keep this offer open for acceptance for 4 months thereafter. Assuming the $1 to be a sufficient consideration to make such agreement binding upon the landowner, the prospectors had the option for 4 months in which to accept the offer, and during that time the landowner had no right to withdraw it. By an acceptance thereof within the 4 months, without more, the prospectors would have the right for 2 years to explore for oil and gas, and, if found, to such a deed, and the prospectors would come under an obligation to explore and to produce. And even though the $1 was not sufficient consideration to make such agreement binding, if in fact the offer was accepted within the 4 months before it was withdrawn the same result would follow as held in the Murphy-Thompson Co. Case. In either

contingency, by the acceptance of the offer within the required time the parties would come into a binding contract relation between themselves. So far as the right to explore was concerned, the contract would be executed. Thereupon the prospectors would become vested with the right to explore for 2 years. So far as the right to produce and make their own oil and gas which should be found, it was purely executory. The instrument contemplated and provided that another instrument, to wit, a deed, should be executed conveying such right. The offer was accepted in the 4 months and the result stated followed. Before the expiration of 2 years thereafter the prospectors demanded the deed called for by the contract, and, the landowner refusing to execute it, they brought suit to compel him to do so. The suit, therefore, was a suit for specific performance of this contract so entered into. By the terms of that contract the prospectors were not entitled to the deed unless they had explored the land and found oil or gas in paying quantities. As a matter of fact they had done no exploration on the land covered by the contract whatever. They had sunk five wells on an adjoining tract of land, and claimed to have found there oil and gas in paying quantities, and one of them claimed further to have satisfied himself that there was oil in the land by the use of a forked hazel switch, called a "water witch," through the means of which he could unerringly determine the presence of oil in the land. But this did not meet the condition precedent, whose happening was essential to entitle the prospectors to a deed under the contract. That was that oil or gas should be found in the land by exploring it, and that had not been done. Besides, the deed itself, if given, could do no more than convey a right to explore which the prospectors already had. There could be no vested right to produce and make their own until those substances, or either of them, were found by exploration to be there. The court held, and that properly so, that the plaintiffs were not entitled to the relief sought, and this on the ground that the condition precedent, on the happening of which they were to be entitled to the deed, had not happened.

All the case stands for, therefore, all that it is possible for it to stand for, is that, if a landowner binds himself by an executory contract to make a deed to another for the right to produce and make his own oil and gas, which he may by exploration find therein, such other person will not be entitled to such deed until he has in this way found such to be the case. The court, however, did not confine itself to this, the only question really in the case, but considered another one. It was whether, if by the acceptance of the offer the prospectors did not come under an obligation to explore and produce, what would be their rights in that contingency. This question was outside of the case, for the court held that they did come under such obligation. Seemingly it was held that they would have none. And it would seem that the question was really, if not actually, so treated, the same as if it had been whether a lessee in an oil and gas lease has any enforceable rights under a lease, the sole consideration for which is $1 in cash paid, granting him the right to explore and to produce and make his own, where there is no agreement on his part to explore and produce, but

which benefits it would have to be held were secured to him by a condition subsequent, and that effectively. Two reasons were given by the court, through O'Rear, J., for this negative answer—one in these words:

"Such contracts lack the mutuality essential to their validity. A unilateral executory contract is in law a nudum pactum, and is unenforceable. Where it is left to one of the parties to an agreement to choose whether he will proceed or abandon it, neither can specifically enforce its execution in equity."

This quotation consists of three sentences. Take the first one: What mutuality is essential to the validity of contracts? This question is answered by Judge O'Rear in the Murphy-Thompson Company Case, where the court, through him, said:

"It is generally said that one essential of every executory contract is mutuality of obligation and remedy. That there must be mutuality of obligation, by which is meant an undertaking on one side and a consideration upon the other, is true always."

In other words, wherever there is an undertaking on one side and a consideration for it on the other, there is mutuality. If so, where there is no undertaking on either side, and the contract is executed on both sides, there must be mutuality, if not mutuality of obligation. In such a case there is no mutuality of obligation, because there is no obligation on either side. Such is the case as to a lease of the kind supposed. The lessor on his side grants the lessee the right to explore and produce, and the lessee on the other pays him $1 therefor. It is not true that in such a case the mutuality essential to the validity of the lease is lacking.

Take the next sentence. It is not true that every unilateral executory contract is in law a nudum pactum and is unenforceable. Binding executory contracts are divided into two classes, bilateral and unilateral. And a unilateral contract may be as binding as a bilateral one; i. e., if it has a consideration to support it. That is recognized in the quotation made from the opinion in the Murphy-Thompson Co. Case and in this additional quotation therefrom:

"An option to sell is a standing offer to sell to the person and upon the terms named in the option, and an agreement to keep the proposition open for acceptance for the time stated. If its terms are fair, and have been understandingly entered into [it may be added if a valuable consideration is given therefor], there appears no reason why it should not be enforced, if accepted and offered to be complied with by the payment of the consideration within the time stipulated."

And such an option is an instance negativing also the correctness of the third sentence. The case of Bacon v. Kentucky Central Ry. Co., 95 Ky. 373, 25 S. W. 747, is a case where an agreement coming within the terms of that sentence was specifically enforced. In support of this statement there was cited the Litz and Federal Oil Company Cases, both of which have already been considered and their value determined, concerning which, therefore, no more need be said here, and the case of Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955, a case which figures a great deal in cases elsewhere and in Kentucky relied on by the defendant. That was the case of a bilateral contract,

and doctrines applicable to the enforcement of a bilateral contract have no place whatever in determining the rights of a lessee under such a lease.

The other reason referred to is put in these words:

"Nor is the recited consideration of $1 sufficient to uphold an action for the specific enforcement of a contract otherwise unsupported by consideration."

In support of this the Federal Oil Company Case is cited. As in the case supposed a suit to protect the lessee's rights is not a suit for the specific enforcement of a contract, but a suit to prevent waste, this statement has no relation to such a suit, even if it be true, which it seems to imply, that in no case will a contract be specifically enforced where $1 is the only consideration therefor.

I have given so much space to this case because it is the principal one of the cases relied on by defendant, and in so far as the other three tend to support his contention it is largely due to this case. We have found that, in so far as the discussion in the opinion has bearing on the question involved here, it had nothing to do with any question involved in the case, is inaccurate in its statements, as appears from a close consideration of them, and as shown by the later Case of Murphy-Thompson Co., and is based upon decisions that either have no relation to the question discussed or have been discredited in the jurisdiction where rendered.

The next case for consideration is the Young Case. The leases there involved contained surrender clauses. They were made in consideration of $1 and the covenants and agreements therein contained. There was no provision prescribing how long the rights granted were to last. The only express agreements on the part of the lessee which they contained was as to the payment of royalties. There was no such agreement to explore. The sole provision as to exploration was that, if no well was commenced in one year, the grant should become null and void unless the lessee should pay an annual rental for each year thereafter commencement thereof should be delayed. The lessee did nothing under the leases, and the lessor sued him for 2 years' rent. It was held that he was not entitled to recover. The ground of the decision was that the lessee had not agreed to pay the rental. The court, through Judge Lassing, said:

"But the plain language of the leases shows that, if no well is commenced within one year, the leases become null and void. Thus the failure of the lessee to commence operations within a year cancels the leases, and the only way their cancellation can be avoided is by the lessee paying $125 to continue them in force for another year; or, expressing it in another way, these leases are simply options given by the lessor to the lessee for one year, with the right to renew the options at the end of the year upon the payment of $125, if the lessee has not commenced operation thereunder within the 12 months. There is nothing in either the leases or the contract binding the lessee to do anything. He has the exclusive right to bore for oil or gas upon the premises described in the leases for 12 months, and if he fails to exercise this right, such failure, of itself, operates to cancel the leases. The right to bore for either oil or gas is purely optional with the lessee; the lessor is bound, but the lessee is not. There is nothing in the leases or the contract upon which the lessor could base an action for specific performance; under neither the leases nor the contract could he compel the lessee to commence operations, or to continue them after he had commenced."

The case, therefore, did not involve the question whether the lessee had the right to drill a well during the year, or thereafter, if he paid or tendered the annual rental, or anything as to the validity of the leases. No such question was in the case. Notwithstanding this, it was held that the leases were void for want of mutuality, and the Litz, Steinwender, Lowe, and Frisbie Cases were cited in support of this position, which decisions, as has been shown, have no bearing whatever on the validity of the leases.

Then comes the Murray Case. The instrument involved there was a phosphate lease. It was made in September, 1908. The grant was for the term of 10 years and so long as phosphate or phosphate rock should be found in paying quantities. The consideration therefor was $1 and covenants therein contained. It contained no agreement as to exploration. The covenant as to royalty was to pay 25 cents per ton for the phosphate when mined and removed, and to pay a minimum of $5 per annum, whether the lands were mined or not, to be considered an advance on royalty due for phosphate thereafter mined. The lease contained no surrender clause, strictly so called. But the fact that there was no agreement on the part of the lessee as to exploration, and that it was provided that he might terminate the lease any time he determined that the land did not contain phosphate in paying quantities, would seem to have been treated as the equivalent of such a clause, and the case will be valued as if it did contain it. Nothing was done under the lease by the lessee, except to pay the first year's installment of minimum royalty. Subsequent royalties were tendered, but refused, because of the lessee's failure to begin work under the lease. After the lapse of 3½ years the lessor brought suit to cancel the lease, and it was held that she was entitled to that relief. It was clear that she was entitled to the relief on the ground that all rights under the lease had been forfeited by reason of breach of an implied condition subsequent, to wit, that work under the lease should be commenced in a reasonable time. It was shown in evidence that at the time the lease was executed the lessor was assured that the work of getting out phosphate would be begun within a year or 18 months. But even if the lessee had 10 years in which to commence work by paying the $5 a year royalty, nothing else appearing, under the decision in the case of Monarch Oil & Gas Co. v. Richardson, supra, the lessor had the right at any time to call on the lessee to begin work, and, if he did not thereupon promptly do so, his rights under the lease would be forfeited, and this she did when she refused to accept payment of any minimum royalties after the first one. The court held that she was entitled to relief on this ground. It held, also, that she was entitled thereto on the ground that the lease had been obtained by fraudulent representations; and it noted the fact that it had been shown in evidence that the $1 consideration was not recited to have been paid, and it was proven that in fact it had not been paid. The court, however, did not stop here. It held that the lease was void for want of mutuality, and that, as it was terminable at the will of the lessee, it was also terminable at the will of the lessor. It ad-

vanced the opinion that it was not an executed contract. Through Judge Settle it said:

"We do not concur in the conclusion of appellants' counsel that the contract in question is an executed contract. In our opinion it must be classed as an executory contract merely. Under it nothing had been done; everything required by its terms of appellants was to be thereafter done. All that it required of appellee was that she should furnish the land, and this was done when the lease was executed. On the other hand, what it required of the appellants—payment of the consideration, mining of the land for phosphates, accounting to the appellee for the royalties—was to be thereafter done in fulfillment of the contract. The insignificant $5 per year it obligates appellants to pay appellee, whether the land is mined or not, is not of itself sufficient to place the lease in that class of contracts known as executed contracts."

The fact that nothing had been done under the lease did not render it executory, no more than the fact that nothing has been done under an ordinary lease renders it executory. But it was said that, whether executed or executory, it was void for want of mutuality. In support of this position—that it was void for want of mutuality—the Frisbie and Young Cases were cited. And in support of the position that the lease was terminable at the will of the lessor, because terminable at the will of the lessee, the Brown Case from the Appellate Court of this Circuit was cited. The statement heretofore quoted from Judge Lurton's opinion therein to this effect was quoted, and the authorities relied on by him were also cited. These positions were all clearly unsound, as I have heretofore endeavored to show, and it is not necessary that what has been said along this line be repeated here.

Finally comes the King Case. It involved an oil, gas, and mineral lease made June 5, 1902. The consideration therefor was $1 recited to have been paid and agreement to pay certain royalties. There seems to have been no provision as to the duration of the rights granted, nor any express agreement as to exploration. It was provided, however, that the lease should be void if one or more wells were not drilled within two years, but not that the drilling could be delayed by the payment of commutation money. The lease contained no surrender clause. Within the two years a well was drilled to the depth of 200 feet and a vein of coal 5 feet thick was found. No further work was thereafter done. Suit was brought August 25, 1914, by the lessor for a cancellation of the lease. It was held that the plaintiff was entitled to the relief sought. There could be no question as to the right of plaintiff thereto, and this on the ground that there was a breach of an implied condition subsequent that if mineral was found it should be produced with reasonable diligence. The excuse given for the delay in production was that it was to the advantage of the lessor as well as the lessees that it be delayed, and that the delay was with his acquiescence and approval. By the latter was meant no more than that the lessor had never demanded or notified the lessee to produce. This, of course, was not sufficient to prevent a forfeiture. There is, therefore, really nothing whatever tending to support defendant's contention in the case. There is nothing in it which he can claim has this

tendency, except two statements of the court, through Miller, C. J. One of them is in these words:

"The royalty is the only consideration for the lease."

Point can be made that thereby the payment of the $1 was ignored as constituting part of the consideration of the lease. But no more need to have been intended than that the payment of the royalties was the moving cause for making the lease, which is so often expressed in such cases. By the other the reason for the conclusion reached was set forth. It is in these words:

"Such contracts have been held by this court to be unenforceable, on the ground that they are unilateral, and lack mutuality of obligation, which is essential to the validity of contracts."

In support of this the Frisbie, Young, and Murray Cases, and numerous cases from other jurisdictions, were cited. I have heretofore endeavored to show that such consideration has no application to such a case, and the decisions relied on from other jurisdictions do not hold that it does. The real and only ground for the decision was, not that the lease was invalid, but that the rights granted thereby had been forfeited by the breach of an implied condition subsequent. This comes out in a quotation made from the opinion of the Court of Appeals of Kentucky, to wit, Eastern Kentucky M. & L. Co. v. Swann-Day Lumber Co., yet to be considered here. Indeed, the case, as I shall presently show, is to a certain extent, at least, against the defendant's contention.

This exhausts the consideration of the decisions of the Court of Appeals of Kentucky relied on by defendant as supporting his position. There is nothing, as we have seen, in the Steinwender and Lowe Cases which has any tendency whatever to support it. They do not deal with cases which in any of their aspects are like the case we have. This would seem to be true, also, of the Litz Case; but possibly it is to be gathered therefrom that $1 is not sufficient consideration to validate such a contract as was involved there. Whether so or not, it is possible, if not probable, that this is to be gathered from the Murphy-Thompson Co., Noble, and Combs Cases, to which I have called attention. So far as the Frisbie, Young, and Murray Cases are concerned, there is that in them which does give occasion for the claim that they are authorities for the position that such a lease as we have here is invalid. And the King Case may be said to have this tendency, in that it approves the reasoning on which those cases, so far as they justify such a position, was based.

Before considering whether, because of those decisions, I should hold the lease in question here invalid, I proceed to a consideration of the other Kentucky decisions heretofore referred to as having a bearing on the question before me. And I would consider first the Armitage v. Mt. Sterling Oil & Gas Co., Bay State Pub. Co. v. Penn L. Co., Flanagan v. Marsh, Breckenridge Asphalt Co. v. Richardson, and Eastern Ky. M. T. Co. v. Swann-Day Lumber Company Cases. The first three involved oil and gas leases, the fourth one an asphalt lease, and the last one a mineral and timber lease. No one of them

contained a surrender clause. The suits in the first four were suits to cancel the leases. The relief sought was denied in the first of the four, and granted in the other three. The suit in the last one was brought by the lessee, asserting rights under the lease. The relief sought by him was denied. In no one of the last four cases was the lease held invalid. The plaintiff, in the first three of them, was granted the relief sought, and in the last one denied such relief, because he had forfeited the rights granted him by breach of an implied condition subsequent as to exploration and production. These four cases witness how keen the Court of Appeals of Kentucky is to imply a condition subsequent in such instruments that reasonable diligence shall be used in exploration and production, in the absence of an express provision on the subject, by which to secure to the lessor the benefits to accrue to him under them, and which were the moving cause for the making of the lease, and to enforce such condition. The Armitage Case witnesses that, if the parties have made an express agreement on the subject of exploration and production, that court will uphold and enforce it. In that case the agreement was that the lessee was to commence operations in the county in which the land lay in 6 months, and sink a test well on that land in 3 years, and that if such well was not so sunk the lease should be void. It was held that the lessee had 3 years in which to sink a well, and his rights under the lease were not forfeited by a failure to so begin operations in 6 months; it not being provided that they should be forfeited if he failed so to do.

This brings us to the other two cases, to wit, Schamberg v. Farmer and Monarch Oil & Gas Co. v. Richardson. They are alike, in that in each the lease, which was an oil and gas lease, contained a surrender clause, and notwithstanding such clause the lease was held valid. The Farmer Case was a suit by a vendor of land by deed of general warranty to recover part of the purchase money. The defense was based on an outstanding oil and gas lease made by the vendor before the execution of the deed. The question in the case was whether the lease was valid. It was treated as an incumbrance upon the land, if valid. The grant was for a term of 15 years and as long as production continued, and it was provided that the lessee had the right to annul the lease by failure to comply with its terms and to remove all machinery and fixtures. The report states that the consideration for the lease was a "sufficient consideration." An examination of a copy of the lease, procured from the records of the Court of Appeals, discloses that the consideration was $1, the receipt of which was acknowledged, and certain agreements on the part of the lessee. Those agreements were to drill one or more test wells in 12 months, to commence operations and complete one well within 2 years after finding oil in paying quantities in one of the test wells, or thereafter pay as rent 10 cents per acre yearly in advance until such well was completed, or lessee elected to cancel the lease by nonpayment of rent, and to pay certain royalties. It was claimed on behalf of the plaintiff, who was appellee in the appellate court, that the lease was invalid, and hence not an incumbrance upon the land. To this the court, through Landes, J., said:

"We do not concur in the contention of counsel for the appellee that the lease was invalid for the want of mutuality, and that for that reason it created no incumbrance on the land. It was a valid contract, and created an incumbrance. But, defense having been made on the ground that the incumbrance was still existing, it devolved upon the appellants to properly allege it, and prove it, if denied. Provisions were made in the lease, which we have quoted, for a termination of it by the lessees, by electing not to pay rent for the land, when the conditions existed requiring them to pay rent, and for a forfeiture of it by the failure of the lessees to complete one of the test wells stipulated for within 12 months from the date of the lease. The facts of the case affecting the lease in such a way as either to put an end to or to prolong its existence must have been within the knowledge of the appellants, one of whom, at least, was in possession of the land. And if, under the facts, the lease was still in force, in order to avail themselves of it as a defense to the action it devolved on the appellants to allege the facts, and to prove them if denied by the appellee. The general statement, made in their pleadings, that the lessees had fulfilled the conditions of the lease, and that the incumbrance still existed, was not sufficient, as it was but a conclusion of the pleader. Besides, the general statement that the conditions had been fulfilled being denied, no proof was introduced to sustain it. And so the record contains nothing upon which the court below would have been justified in granting any relief to the appellants against the note sued on."

This case was cited with approval in the Armitage Case.

In the Richardson Case the grant, which was made October 10, 1898, was for 20 years or so long as oil, gas, or other minerals were obtained in paying quantities, and it was provided that the lessee should have the right at any time to surrender the lease and thereby be fully discharged from any and all damages arising from any negligence or nonfulfillment of the contract. The consideration for the grant was $1 in hand paid and covenants and agreements contained therein. Amongst his agreements was one to commence a well within one year or pay thereafter an annual rental of $16 payable annually. No well was ever commenced, but the lessee had paid the annual rental for 7 years, paying it up to October 10, 1906. Suit was brought prior to this time by the lessor to cancel the lease, and it was held that the lease was valid, and he was not entitled to such relief. No question was made as to whether the validity of the lease was affected by the surrender clause, and hence the question was not directly passed on, but the necessary result of the conclusion reached was that it was not affected thereby. The court, through Carroll, C. J., said:

"This contract, however, can be so construed as to effectuate the intention of the parties in a manner that will do justice to the lessor, as well as the lessee, without arbitrarily canceling it, as was done by the judgment of the lower court, and this result may be accomplished by requiring the lessor to give notice to the lessee that he will not accept the annual rentals and permit his land to remain idle and undeveloped, but will require the lessee to execute the contract according to the intention in the minds of the parties at the time it was made by commencing in good faith its development, and, if the lessee does not, within a year from the notice, in good faith commence a well on the premises, the lessor at the expiration of that time may have the lease forfeited. The lessor in this contract did not at any time exact or demand of the lessee that it commence operating for oil or gas, but accepted the annual rentals paid in full discharge of the obligations of the contract, although at the end of any rental period he might have declined to accept rent and required the lessee to begin operations for oil or gas. We therefore conclude that, under the facts stated in the answer, which are to be accepted as true, the court erred in canceling the lease. The rent paid and accepted uncondi-

tionally by the lessor satisfied the demands of the contract up to that date, and the lessee had the right to assume that the lessor was satisfied to receive the annual rentals in lieu of the development of the land."

And in the King Case, the last of the cases in Kentucky dealing with oil and gas and similar leases, this Richardson Case was distinguished therefrom, and not only was it not disapproved, but it was expressly approved. The court, through Miller, J., said:

"The cases sustaining the ruling in the Richardson Case are collected in the note in 11 L. R. A. (N. S.) 419."

And again:

"In the Richardson Case the lease provided for a royalty of one-tenth of the profits to the lessor, or an annual rental of $16 in lieu thereof; and the rental was regularly paid and accepted as a satisfaction of the requirements of the lease. Under those facts the court held that, if the lessors in that case preferred to require the lessees to develop the land instead of paying the annual rental, they had the right to do so upon giving a reasonable notice of their election. That ruling was entirely proper under the facts of that case."

It is true that no more there than in the Richardson Case itself was note taken of the existence of the surrender clause, but notwithstanding its existence the lease was held valid in that case, and this ruling was approved in this.

We have now covered all matters preliminary to the decisive question in this case, in the light of which it should be disposed of, and are now ready to come to close quarters with it. That question is: What is the law of this state, as determined by the highest court thereof, as to the validity of the leases involved herein? Does, or not, according thereto, the surrender clause contained in them render them invalid, as contended by defendant? If it were not for the Farmer and Richardson Cases, just considered, possibly one should hesitate to say that the law of this state, as so declared, is not as defendant contends it to be. I am not persuaded that, even in that contingency I would have to say that it is. We have seen that upon principle such a clause does not render the lease invalid, and that the overwhelming weight of authority, to wit, that in the great oil and gas producing states of Pennsylvania, West Virginia, Ohio, Indiana, Illinois, and Kansas, is to this effect, and the Supreme Court of the United States has given its sanction to this position. In addition to this, the Supreme Court of Louisiana has taken note of the fact that such is the law where the common law prevails. Nowhere is it held otherwise, except in the state of Texas, and that in the opinions which show on their face, as I have said, that the question was not gone into deeply. The only decisions which can be relied on as holding in this state that such a lease is invalid are the Frisbie, Young, and Murray Cases. In the Frisbie and Young Cases the question did not belong in them. It was gotten into the Frisbie Case by assuming a fact which it was held did not exist, to wit, that the lessee, by accepting the option, had not agreed to explore and produce. In the Young Case the sole question was whether the lessee had agreed to explore, and, if he had not, pay rental—not what rights the lessee had under the lease because he had not so agreed. And in the Murray Case, though the question was in

it, it was overshadowed by the fact that beyond all question the lessee had forfeited all rights under the lease by failure to explore and produce, and the lease had been obtained by fraudulent representation.

The position taken was in all three cases based upon the proposition that in the case of such leases there was a want of mutuality of obligation, and in the Murray Case upon the additional proposition that a valid lease, terminable at the will of the lessee, is likewise terminable at the will of the lessor. Neither of these two propositions were true, as heretofore shown. The court in neither one of the cases had the considerations favoring the validity of such a lease or the state of authority on the question elsewhere presented to it, and I recoil from the idea that upon a presentation thereof it would hold that the lease was invalid. Then upon the question involved in that as to the validity of such a lease, to wit, as to whether $1 is a sufficient consideration to meet the requirement of the common law that a valuable consideration is essential to the validity of a contract, I am not disposed to think that the Court of Appeals is finally committed to the position that it is not, thereby constituting this state the only jurisdiction in which the common law prevails where such is the case. I have heretofore directed attention to the note in Ann. Cas. 1912B, 360, 363, to the case of Lovett v. Eastern Oil Co. setting forth the law on this subject elsewhere. On the same subject see 6 R. C. L. 678.

The question is not whether a court of equity will refuse to specifically enforce a contract where $1 is the sole consideration therefor, but whether in a court of law an executed contract will be held invalid solely on the ground that such is the case. The Court of Appeals of Kentucky, in the early case of Toncra v. Henderson, supra, held that it would not. The Litz and Murphy-Thompson Co. Cases were suits for specific performance, and the question as to whether the validity of the option was affected by the consideration being only $1 was not involved in either, as, conceding that it was not, the option had been accepted before it was withdrawn. In the Combs Case, though it was not a suit for specific performance of the option there involved, it was sufficient that it could not be specifically enforced because of inadequacy of consideration in its bearing on whether the deed for the timber which was sought to be canceled had been obtained by fraud. It is true that in the Noble Case the suit was at law to recover damages for breach of the option. But it was based on the Murphy-Thompson Co. Case, without noting that in that case the suit was for specific performance.

[12] The most, however, that these cases can stand for is that $1 is an inadequate consideration for an option to purchase real estate, and that to such an extent as to invalidate the option. They do not go the length of justifying the position that $1 is not an adequate consideration for an oil or gas lease, where there is no covenant on the part of the lessee to explore and produce. Such a lease calls for a considerable expenditure of money on the part of the lessee in exploration, all of which will go for nothing in the event of a failure to find oil or gas. The lessee takes the whole of this risk. The lessor takes none of it. The lessee pays the $1 for the privilege of taking

this risk. That there is no covenant on the part of the lessee to explore or to produce adds nothing to the value of the right, save in giving the lessor a right to sue for damages if he does not so do. But what the lessor is after is, not damages, but the finding and producing of oil and gas, and, though this is not secured to him by a covenant, it is by an implied condition subsequent. In addition to this $1 is the recognized consideration for such leases everywhere. So it is that, if the Farmer and Richardson Cases had never been decided by the Court of Appeals, I would hardly feel constrained to hold that the law in Kentucky on the question involved here is other than it should be, and than it is in almost every other jurisdiction. But, in view of those decisions, the first of which was cited with approval in the Armitage Case, and the second in the King Case, the last decision of that court involving an oil and gas lease, there is no room for possible doubt as to how I should hold. I therefore hold that the Huntsman leases are valid, and the plaintiffs are entitled to the injunction sought.

There is also involved in this case the question as to the ownership of the surface of the Pitts land. I have considered this matter carefully, and conclude that plaintiffs are the owners thereof. It is not necessary that I do more than state my conclusion as to this.

The plaintiffs will prepare and submit a decree.

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## EUSTIS MINING CO. v. BEER, SONDHEIMER & CO., Inc.

(District Court, S. D. New York. February 17, 1917.)

1. SALES ⇐59—CONSTRUCTION—SEPARATE INSTRUMENTS.

A contract between the parties for the sale of a specified quantity of products, and a later agreement modifying the former with respect to the quantity of the products, must be read together, in so far as they can be reconciled; but, where they cannot be reconciled, the later must prevail.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 159.]

2. SALES ⇐71(4)—CONSTRUCTION OF CONTRACTS—QUANTITY—MODIFICATION OF AGREEMENT.

A mining corporation and the owner of a smelter made a contract, whereby the former agreed to deliver to the latter the cinders produced from the ores it mined, not to exceed certain specified quantities each year, the lump and fine cinders to be in the same proportion as produced by the works burning the ore. A subsequent clause provided that it was the essence of the agreement that the mining company should ship cinders within the tonnage as specified as a first agreement, but should not be required to ship them from such a distance as would leave less than a stated profit per ton, and could sell its ore at such distances as to make shipment unprofitable, if it maintained at all times a supply sufficient to sell to burners from whom the cinders could be shipped to the smelter. Another clause provided that, if the mining company was unable to sell to the burners enough ore to produce the specified tonnage, it should be obliged to ship only such cinders as were produced from ores actually sold. Subsequently the contract was modified, so as to provide that the smelting company purchase the mining company's total product of lump cinders, estimated at 12,000 tons per year, and 700 tons per month of fine cinders. It appeared that the cinders were the product obtained by burning the ore to extract the sulphur, and the quantity depended on the

demand for sulphur. Because of the war the demand for sulphur greatly increased, so as to increase the quantity of cinders produced; but the smelting company refused to receive more than 12,000 tons of lump cinders per year, and plaintiff sued for breach of the contract. *Held*, that the later contract, standing alone, required the smelting company to take the mining company's entire output, and the provisions of the earlier contract did not indicate a contrary intention, since they were, at most, rendered merely ineffectual or operative only as to the fine cinders, or, if they were conflicting, they were superseded by the later provision.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 192, 193.]

3. EVIDENCE ⊜215(1)—ADMISSIONS—SALES—CONSTRUCTION OF CONTRACT—INTENTION.

In a suit involving the construction of two contracts for the sale of mineral products, the later of which modified the earlier, a subsequent proposal by one of the parties for a new contract, in which were embodied certain provisions of the first contract, is inadmissible as an admission that those provisions were not superseded by the second contract, since it is the intent expressed in the words used by the parties, and not what their subsequent admissions show their unrevealed intent to have been, that governs the construction of a contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 754.]

4. EVIDENCE ⊜448—PAROL EVIDENCE—PRELIMINARY NEGOTIATIONS.

Evidence of the negotiations between the parties leading up to the execution of a written contract, which was expressly intended to embody the agreement reached, is inadmissible, though the language of the written contract is ambiguous, since the parties by their agreement excluded the consideration of such evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066–2082, 2084.]

5. EVIDENCE ⊜448—PAROL EVIDENCE—SITUATION OF THE PARTIES.

Where the language of a written contract is ambiguous, evidence as to the situation of the parties when it was entered into is admissible, to the extent that it assists in determining the meaning of the language used.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066–2082, 2084.]

6. SALES ⊜87(3)—CONSTRUCTION OF CONTRACTS—EXTRINSIC CIRCUMSTANCES.

Where defendant purchased the output of lump cinders, produced by burning the ores from plaintiff's mine, estimated at 12,000 tons per year, and 8,400 tons of the fine cinders, which were more expensive to handle, and it appeared that defendant desired to use the cinders for reducing an equal quantity of the ore from its mine, the output of which varied, and which defendant claimed could produce 3,000 tons per month, the extrinsic circumstances tended to confirm the construction of the contract as one for the purchase of the entire output of lump cinders, regardless of quantity, rather than as a purchase of only 12,000 tons per annum.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 245–247.]

7. SALES ⊜71(4)—CONSTRUCTION—ENFORCEMENT—CHANGED CONDITIONS.

Defendant cannot be relieved from his contract to purchase the entire output of certain by-products from plaintiff's ores by the fact that the outbreak of the war caused a demand for the principal product, which increased the output of the by-product to a point far beyond the estimates of the parties.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 192, 193.]

8. SALES ⊜384(1)—REMEDIES OF SELLER—DAMAGES FOR BREACH OF CONTRACT.

Where defendant refused to accept any more cinders from plaintiff during the then current year, in violation of his contract to purchase the entire output, plaintiff cannot recover damages for refusal to accept cin-

ders produced within the year, but so late that they could not have been delivered to defendant until after the beginning of the next year.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098, 1102–1104.]

9. SALES ⟸71(4)—CONSTRUCTION OF CONTRACT—PURCHASE OF OUTPUT—ESTIMATES.

In a contract for the purchase of the entire output from plaintiff's mines, a provision that plaintiff shall make yearly advance estimates of the output only requires a bona fide estimate, and does not relieve defendant from its obligation to purchase the entire output, though it exceeded the estimate.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 192, 193.]

In Equity. Suit by the Eustis Mining Company against Beer, Sondheimer & Co., Incorporated. On defendant's motion for reargument after decree for plaintiff. Decree vacated, and cause ordered to stand for further hearing as to damages.

This is a suit in equity to obtain the construction of a contract and to recover for damages for its partial breach. The ground of equitable jurisdiction need not be considered, as both parties assent. The turning question is the construction of the contract; the plaintiff claiming that the defendant was obliged to take the "total production" of its cinders in any one year, regardless of the amount, and the defendant claiming that the obligation on both sides is limited to 12,000 tons. The contract was in two parts: First, a formal contract, executed on February 11, 1914; and, second, a letter between the parties on June 30, 1914, which was preceded by certain oral negotiations. The two contracts are as follows:

"This agreement, made and entered into this 11th day of February, 1914, by and between Beer, Sondheimer & Co. (American Branch), party of the first part, and the Eustis Mining Company, a corporation duly organized and existing under and by virtue of the laws of the province of Quebec, Canada, party of the second part, witnesseth:

"Whereas, the party of the first part has entered into a final agreement with the Virginia Smelting Company for a lease of its plant at West Norfolk, in the state of Virginia; and

"Whereas, the contract contemplates the improving of the plant of the Virginia Smelting Company for the purpose of combining their ores and the ores of Beer, Sondheimer & Co., for treament in said plant; and

"Whereas, it is to the advantage of the Eustis Mining Company to have Beer, Sondheimer & Co. use certain of the ores of the Eustis Mining Company in conjunction with their own ores in the operation of said plant, and that said use would be to their mutual advantage and profit:

"Now, therefore, in consideration of ten dollars ($10) lawful money of the United States by each of the parties hereto to the other in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of the execution by the party of the first part of the final agreement with the Virginia Smelting Company, and for other good and valuable considerations, it is agreed as follows:

"First. The party of the second part agrees to deliver to the leasing company, which under the final agreement between Beer, Sondheimer & Co. and the Virginia Smelting Company is to take a lease of said smelting plant, during each year beginning with February 1, 1914, and ending with January 16, 1924, the copper cinder resulting from the pyrites produced from pyrites ores from the mines of the party of the second part, situated at Eustis, Quebec, in the quantities as requested by said leasing company, but not exceeding:

| | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 26,500 | tons | per | year | from | January | 17, | 1914, | to | January | 16, | 1917 |
| 25,500 | " | " | " | " | " | " | 1917, | " | " | " | 1919 |
| 18,200 | " | " | " | " | " | " | 1919, | " | " | " | 1924 |

"The lump and fine cinder to be in the same proportion as produced by the acid works burning Eustis ore, and so located geographically that they can ship to Norfolk.

"Second. It is agreed that the said leasing company (or during 1914, if said leasing company shall not have been organized, Beer, Sondheimer & Co.) shall as soon as reasonably possible give notice of the leasing company's reasonable requirements for the period from January 17, 1914, to July 31, 1914, and shall prior to March 1, 1914, and thereafter prior to February 1st in each year, give notice in writing to the party of the second part of the tonnage to be shipped hereunder during the six (6) months beginning with the 1st day of the succeeding August, and in like manner notice prior to August 1st in each year of the tonnage to be shipped during the six (6) months beginning with the 1st day of the succeeding February, and the party of the second part, upon receipt of such notice from the said leasing company, agrees to ship such tonnage as far as is practical in regular monthly installments. It is further agreed that the said leasing company shall accept this contract and agree to pay for all of the cinder which it may request the party of the second part to deliver, and payments to be made under the terms hereinafter mentioned.

"Third. It is agreed that the price to be paid for the cinder is to be based on the value of the copper contained as shown by the battery assay, less one (1) unit, figured at the average quotation for electrolytic copper as quoted by the Engineering and Mining Journal for the week during which the material is delivered at West Norfolk, Va., less one and one-half cents (1½¢) per pound. Payments are to be made in cash sixty (60) days after the sampling, and shall, at the option of either party, be discounted at the rate of five per cent. (5%) per annum.

"Fourth. It is understood and agreed that the weighing and sampling of the cinder are to be done at the receiving works, and settlement for the same shall be made after each cargo or consignment, based on samples put up at the said receiving works immediately on the arrival of the cinder, and submitted to Ledoux & Co., or other mutually satisfactory chemists, whose assays shall be final. Eustis Mining Company shall have the right to verify the correctness of the weights and samples by such examination of books, records, and accounts, and in such other ways, as it deems proper. Incorrect weights shall be settled for forthwith upon the basis of the corrected weights. Delivery to be made f. o. b. ship West Norfolk, Va., except that the party of the second part has the option of making delivery at West Norfolk by rail, in which event they shall be credited with the actual saving in cost as given by the manager of the works as compared with shipments arriving in vessels. In the matter of settlements for cinder arriving by rail, the material arriving in each calendar month shall be considered as one lot, and payment for the same shall be made sixty (60) days from the average date of receipt. Discharging to be done by the leasing company at its own cost and expense, and at the rate of at least six hundred (600) tons per working day. Demurrage incurred by failure to unload at the above rate shall be paid for by the leasing company. The said leasing company has the right to take deliveries of the cinder f. o. b. producing point, and in the event that said leasing company takes such deliveries at the producing point the party of the second part shall pay to the said leasing company the actual freight thus saved.

"Fifth. It is mutually understood and agreed that it is of the essence of this agreement that the party of the second part shall ship cinders to the Norfolk plant, within the tonnages specified in paragraph 2, as a first obligation. It is understood, however, that the party of the second part shall not be obligated to ship cinders from such a distance that the charges upon the same, after allowing for sulphur and copper values, shall leave less than fifty cents (50¢) per ton profit to the party of the second part after producing and selling the ore. It is understood and agreed that the party of the second part may sell ore at distances too great to allow the resulting cinder to be shipped to the leasing company, provided it maintains at all times during the term of this contract a supply of ore sufficient to sell to consumers from whom the cinders can be shipped to the leasing company at West Norfolk, Va.

Sixth. It is mutually understood and agreed that in the event that the party of the second part is unable, during the life of this contract, to sell, in

addition to the contracts now in force, sufficient ores to pyrite burning concerns to produce the tonnages of cinder agreed to be shipped to the said leasing company in paragraph 2 herein, then the party of the second part shall only be obligated to ship to the said leasing company such cinder as is produced from the ores of the party of the second part which are actually sold and burned; excepting, however, that the party of the second part shall not be obligated to ship hereunder cinder covered by a certain contract between the Nichols Copper Company, ending about March 28, 1913, and the party of the second part, and the contract with Beer, Sondheimer & Co. and the party of the second part, dated May 15, 1912, mentioned in paragraph 7 herein.

"Seventh. It is understood and agreed that fine cinder covered by existing contracts with the party of the first part shall hereafter be shipped to the leasing company at West Norfolk, under the terms and conditions hereinbefore mentioned and as a part of the tonnage stipulated herein. It is distinctly understood and agreed, however, that the contract between the parties of the first and second parts herein, dated May 15, 1912, for fourteen thousand (14,000) tons of lump cinder, shall not be in any way altered or amended hereby. If said lessor terminates said lease for breach of condition, Eustis Mining Company may terminate this agreement. If the lessee gives notice to terminate said lease as, therein provided, then Messrs. Beer, Sondheimer & Co. may terminate this contract by twelve (12) months' notice. If the lessee gives notice to terminate said lease under clause (d) of the cancellation clause therein, then Messrs. Beer, Sondheimer & Co. may terminate this contract by one (1) month's notice. This contract shall bind and insure to the benefit of the heirs, legal representatives, and assigns of the party of the first part and the successors and assigns of the party of the second part. It is expressly agreed that the Eustis Mining Company may reorganize as a partnership, association, or corporation under other laws; the new concern assuming the obligations of the old hereunder. It is mutually agreed that this contract is in substitution for an agreement between the same parties made and entered into February 17, 1913, which agreement is hereby canceled.

"In witness whereof, the party of the first part has set its hand and affixed its seal, and the party of the second part has caused this instrument to be executed and affixed its corporate seal by its duly authorized officers the day and year first above written. Beer, Sondheimer & Co.,

"By [Signed] O. Frohnknecht.

"The Eustis Mining Company,

"In Witness: By [Signed] F. E. Eustis.

_____

_____"

"New York, June 30/14.

"The Eustis Mining Company, Boston, Mass.—Gentlemen: Referring to our contract of February 11, 1914, it has been agreed between us that we purchase from you for a period of ten (10) years beginning from July 1, 1914, and ending July 1, 1924, your total production of lump cinder, estimated to be twelve thousand (12,000) tons per year, at the terms and conditions of our contract of February 11, 1914. We also purchase from you seven hundred (700) tons per month of fine cinder for the same period of ten (10) years at the terms and conditions of our contract of February 11, 1914. We have the right, any time after July 1, 1919, to cancel this contract for lump and fine cinder.

"In case your production of lump cinder should be decreased for any reason beyond your control to such an extent that the seven hundred (700) tons per month of fine cinder would amount to more in tons than the lump cinder produced during the same period, then we shall not be obliged to buy from you more tons of fine cinder per year than you give us of lump cinder. You will advise us first of every year as to the approximate amount of lump cinder to be expected during that coming year.

"It is further agreed, in regard to fine cinder, that you estimate your production two thousand (2,000) tons per month; that we have agreed to release from our option seven hundred (700) tons per month, which you are entitled

to have for leaching and sintering. Seven hundred (700) tons are to go to us as above. In regard to the balance of six hundred (600) tons, we are to advise you first of each year whether we desire to buy these six hundred (600) tons during the coming year at the terms of the above-mentioned contract, or whether you are at liberty to use it yourselves or dispose of it elsewhere; and it is further agreed that in case you should be unable to produce full two thousand (2,000) tons per month, as estimated, you are to be entitled to one-third (⅓) for your leaching, we to one-third (⅓) of the amount actually produced for our purposes, and one-third (⅓) to be subject to our option, to buy it or decline it as we see fit.

"The above arrangement cancels both our contracts with you for fine cinder, dated April 4, 1912.

"Yours very truly, Beer, Sondheimer & Co., A. B.,
"[Signed] O. Frohnknecht.

"Accepted: ————— "

To an understanding of the case it is necessary to say that the cinder in question is the end product of a process of burning the plaintiff's ore to extract from it the sulphur. Its amount, therefore, depends in the first instance upon the ore produced, and in the second upon the demand for ore by the sulphur burners. The demand for sulphuric acid was slack during the year 1914, and the first half of 1915; but the demand for munitions caused by the Great War greatly stimulated the business during the second half of the year 1915. The plaintiff tried to make the defendant take all the resulting cinders and thus the dispute arose. In February, 1914, the Virginia Smelting Company mentioned in the contract was substantially owned by the plaintiff, or those who controlled it, and had been let to Beer, Sondheimer & Co. at about the time of the contract itself. Beer, Sondheimer & Co. also controlled large copper ore deposits in the island of Cuba, known as the Cobre mine, and it was these ores which it proposed to use in conjunction with the cinder covered by its contract for the purpose of extracting the copper from the Cobre ore. Other facts are stated in the opinion.

Richard W. Hale, of Boston, Mass., and Arthur C. Patterson, of New York City, for plaintiff.

Henry N. Arnold, of New York City, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). The form in which this case is now presented is embarrassing to its disposition. Being dissatisfied with the decision of Judge Sheppard, who tried the cause and entered a decree for the plaintiff, the defendant moved before him for a reargument, which he found it impossible to grant, owing to his immediate departure for Florida. He suggested that, in place of such a reargument, application for reargument be made to a local District Judge, and the defendant thereupon applied to me. The plaintiff consents that I may hear the application for a reargument, though the motion is certainly anomalous, but refuses to consent that the cause be reargued, unless as a condition I find that, under the rules governing such motions, the cause is proper for reargument. This is the reason for my embarrassment, because I have obviously nothing to go on in determining whether Judge Sheppard omitted to consider some of the points raised, except his opinion, and every one knows that a judge disposes of much matter which he does not put in his opinion. Before I could, therefore, undertake to make a new decision, especially one different in result from Judge Sheppard's, I should have to reach a conclusion upon that preliminary matter.

Although it therefore upsets the proper order of consideration, I shall nevertheless first take up the points really at issue, and indicate my own opinion upon them, since it so happens that I agree with Judge Sheppard. This cannot prejudice the plaintiff, and, if it does not satisfy the defendant, at least it achieves that reconsideration of the case which is its present object.

The main controversy turns upon the meaning of the letter of June 30, 1914, especially as to whether the phrase, "estimated to be 12,000 tons per year," effects a limitation upon the general undertaking to accept the plaintiff's "total production." The defendant does not, indeed, urge that, standing alone, the clause would protect it; its position rather is that, taken in conjunction with the preceding and formal contract of February 11, 1914, either it becomes apparent that the intent was to limit the defendant's obligation to 12,000 tons, or at the least that the resulting contract was so ambiguous as to admit extrinsic evidence of the meaning of the parties, as set forth below. Its chief reason for insisting upon a reargument is because it insists that Judge Sheppard showed in his opinion a failure to apprehend this position in detail.

[1] The defendant is, of course, on solid ground in saying that the two instruments must be read together, in so far as they may be reconciled with each other. It is equally solid ground to say that, in so far as they cannot be reconciled, the later must prevail. We start, moreover, with the assumption, which is not disputed, that, broken from the earlier contract, the second would have bound the defendant to accept the total output, regardless of its amount. Brawley v. U. S., 96 U. S. 168, 24 L. Ed. 622. In judging how far this naked meaning may be changed by its setting, however, we must recognize, not only that there is a critical breaking point, as it were, beyond which no language can be forced, but that in approaching that limit the strain increases. To reconcile two clauses, whose native meanings conflict, we must therefore find the resultant of their several opposing forces. With this premise I may begin the detailed consideration of the contracts.

[2] In the earlier contract, the tonnages were maximums inserted for the plaintiff's protection, and the fifth and sixth articles, the chief reliance of the defendant, were in further execution of that purpose. The fifth article may be paraphrased as follows:

"While the plaintiff is to give preference to the defendant's deliveries, still it need not ship cinders where the profits are less than 50 cents. Yet, although it may ship ore to such points, nevertheless, in justice to the preference so acknowledged, it must keep in reserve enough ore to supply all sulphur burners within the 50 cent radius. In short, it must not allow the distant sales to trench upon its local cinder market, upon which the defendant shall have the right absolutely to rely without impairment."

The sixth article is only complementary to the fifth; indeed, it is hardly necessary:

"If the plaintiff fails to sell to sulphur burners out of the reserve ore kept on hand enough to fufill the tonnages of cinders specified, then it need ship only so much cinders as arise out of the ore actually sold. In short, it does not guarantee its market with the sulphur burners."

Together these articles provide that, while the plaintiff is bound to fill all sulphur burners' orders within the zone of cheap shipment up to the defendant's possible orders, it was not liable for the absence of such orders.

Coming, now, to the application to the later contract of these articles, we need not be troubled by the reconciliation of the fifth. If we assume that the clause called for the acceptance of an unlimited production, it was even more necessary that the defendant's calls should be preferred. It was proper, therefore, to provide that, if any sales were to be made beyond the 50 cent radius, they must not be at the possible expense of the local market. Such a clause fits as well upon the plaintiff's interpretation of the second contract as upon the defendant's. With the sixth article, however, it is different. If the clause in the later contract only binds the plaintiff to furnish its total production, it is absurd to provide against a deficiency in the sulphur burners' production. They will produce as much as they produce in any event, and the plaintiff's obligation is measured only by what they produce. On the other hand, if the plaintiff was bound to produce and the defendant to accept 12,000 tons, the clause was necessary.

If the article had occurred in the second contract itself, this might have created an embarrassment; but it does not. It is in an earlier contract, and it is one thing to have two provisions to reconcile in a single contract, and another to determine whether a provision of an earlier contract should survive. Indeed, until we have decided that it was intended to survive, no conflict can arise; we are free to select that meaning which is most natural for the later clause, and say that all earlier provisions are superseded. To raise the conflict is already to beg the question, because the conflict presupposes the survival of the earlier provision.

But, even though it be assumed that the general purpose to preserve the earlier contract, so far as possible, could be specifically extended to article 6, it would not, in my judgment, be sufficient. It must be remembered that there is no actual conflict between the two; the argument rests only upon the redundancy of the earlier clause, if it be preserved. It is not even wholly redundant, for it might be intended to provide against a possible supposition that the plaintiff was bound to fulfill its yearly estimates after they were made, or that it applied to the "fines" which were to be produced in stated quantities, though it is true the second contract carried its own excuse for failure to produce the required amount of "fines."

Yet, even though the article survived and could not be construed as above, I should still, on the balance of interpretation, not be disposed to make its redundant presence control the language of the clause. The parties showed in the first contract that they could say so, when they meant to fix the plaintiff's obligation quantitatively; and they showed it again in the second contract itself, as respects "fines." They spoke of an "estimated" total production of "fines" in that very contract, but they did not agree that the defendant should take all, or even an aliquot share, of the production. On the contrary, they provided that it should take certain proportions of the sum at which the

estimate was fixed, or less if the production was less. In short, they fixed by quantity their obligation touching "fines," notwithstanding that they were thinking of its estimated maximum. When we remember that "fines" were the less desirable part, requiring a special, or sintering, machine, it seems to me impossible to resist the conclusion that, while the defendant did not suppose that it would get much more than 12,000 tons of "lump," it was ready to take all that it could get. The surplus beyond 12,000 tons has no doubt turned out immensely greater than the defendant could have anticipated, which is a serious matter for it; but that does not change its actual purpose as expressed at the time of the contract. Article 6 I should therefore regard, if I had to reconcile it, either as applicable to "fines" only, as a protection against the statement of yearly estimates required of the plaintiff, or as a needless provision for any purpose, which did not overbear the meaning of the rest of the contract.

[3] This result the defendant resists, because of evidence dehors the writings. The evidence is of three sorts: First, the admission or declaration arising from the "Proposed Combination Agreement of April 8, 1915"; second, the contemporaneous negotiations of the parties; third, the general setting in which the contracts were drafted. The first consists of a proposed contract, proffered by the plaintiff, which it is alleged the accompanying correspondence shows to have been intended to subsume the existing contracts. The defendant's theory is that it may be used as an interpretation of those contracts, certainly to the extent of proving how much of the earlier contract survived, because it is an admission by the plaintiff of what it thought those contracts, taken together, effected. The defendant does not, of course, suppose that the "Proposed Combination" could affect any actual obligations of the parties, since it was never accepted; but it asserts that it shows which of the earlier stipulations must have been intended to endure. As articles 5 and 6 are incorporated in the "Proposed Combination," with some important modifications, not necessary to consider, the defendant insists that the plaintiff has admitted that they were meant to continue.

This evidence is, I think, irrelevant to the issues, for a reason going to the very nature of a contractual obligation. It is quite true that we commonly speak of a contract as a question of intent, and for most purposes it is a convenient paraphrase, accurate enough, but, strictly speaking, untrue. It makes not the least difference whether a promisor actually intends that meaning which the law will impose upon his words. The whole House of Bishops might satisfy us that he had intended something else, and it would make not a particle of difference in his obligation. That obligation the law attaches to his act of using certain words, provided, of course, the actor be under no disability. The scope of those words will, in the absence of some convention to the contrary, be settled, it is true, by what the law supposes men would generally mean when they used them; but the promisor's conformity to type is not a factor in his obligation. Hence it follows that no declaration of the promisor as to his meaning when he used the words is of the slightest relevancy, however formally

competent it may be as an admission. Indeed, if both parties severally declared that their meaning had been other than the natural meaning, and each declaration was similar, it would be irrelevant, saving some mutual agreement between them to that effect. When the court came to assign the meaning to their words, it would disregard such declarations, because they related only to their state of mind when the contract was made, and that has nothing to do with their obligations. This is, of course, a wholly different question from a preceding or subsequent agreement assigning an agreed meaning to any given words used in another contract. Marriner v. Luting, Fed. Cas. No. 9,104.

[4] The second class of evidence is of the negotiations which attended the execution of the contract of June 30th. As to these the rule of exclusion applies which the plaintiff invokes. Since the parties certainly intended, as appears by the mere character of the document, to make out of the writing a definitive memorial of their words, that intent the law will effect, and it can do so only by disregarding everything but the writing itself. Hence all other verbal expression must be eliminated; the writing is agreed upon as the final verbal act. The ambiguity of the written language does not determine this question in any way whatever, in spite of some occasional confusion of language in the books; but the exclusion of such negotiations depends upon their agreement to exclude, and extends so far as the parties have agreed that it shall exclude all but the written words, and no further. In the case at bar it is plain enough that the parties meant not to rely on the oral negotiations; that they wished to have a complete and final written memorial of their obligations. That purpose, being lawful, the court will fulfill by disregarding all other verbal expression, except that selected.

[5] The admissibility of the general surroundings in which the contract was written (Merriam v. U. S., 107 U. S. 437, 441, 2 Sup. Ct. 536, 27 L. Ed. 531), rests upon quite a different basis, one which can be said with a nearer approach to accuracy to turn upon the ambiguity of the written words. All the attendant facts constituting the setting of a contract are admissible, so long as they are helpful; the extent of their assistance depends upon the different meanings which the language itself will let in. Hence we may say, truly perhaps, that, if the language is not ambiguous, no evidence is admissible, meaning no more than that it could not control the sense, if we did let it in; indeed, it might "contradict" the contract—that is, the actual words should be remembered to have a higher probative value, when explicit, than can safely be drawn by inference from surroundings. Yet, as all language will bear some different meanings, some evidence is always admissible; the line of exclusion depends on how far the words will stretch, and how alien is the intent they are asked to include.

[6] There remains to consider, therefore, the general situation of the parties as disclosed to each other, as an assistance in understanding their words. Now the total capacity of the defendant's smelter was apparently about 36,000 tons of cinders, dependent in practice, of course, upon a corresponding amount of silicious copper ore which they

expected to get from the Cobre mine. Just what the prospecta of that mine were does not definitely appear; indeed, being a mine, they must obviously have remained uncertain. In the spring of 1914 apparently they were not good, but the mine had been very irregular in its production, and Frohnknecht had at one time given F. A. Eustis "the impression" that it would produce thousands of tons a month; he had told him that he expected more than he could handle, which would have been 3,000 tons a month. How much ore was actually forthcoming does not appear. The contract, article 4, perhaps gives some color to the plaintiff's position that the defendant contemplated sales of the cinders, besides use of them at its smelter, though the matter is not clear. Therefore, while the supposed "abnormal" production of the plaintiff's mine is in a sense true, because never before had there been 20,000 tons of "lump" cinders produced, yet it should be recalled that the defendant clearly contemplated the possibility of its needing 36,000 tons of "lump" and "fines" in February, 1914, else there was no conceivable reason why the plaintiff should have fixed its limit at that amount. Since by the amendment the "fines" were limited to less than 8,500 tons, that possible total consumption, if ever reached after June 30th, would have been filled by "lump" to the extent of 27,500, a more desirable situation for the defendant, had it chanced to want 36,000 tons, than under the first contract. The consumption of 20,000 tons of "lump" by the defendant does not, therefore, seem to me so completely out of the possibilities as to involve the gross injustice the defendant supposes.

[7] Still, I agree that the production occasioned by the Great War was a surprise to both sides, and that it was not within their forecast of the future. It is altogether likely that the defendant would have cried off upon the whole bargain, had they thought it probable. Contracts cannot, however, be treated so loosely; if parties wish more certainty, they must use more certain words. The case, therefore, ends where it starts, with the initial acceptance clause as the best indication of what the meaning was; it admits of no interpretation which does not distort it beyond what the words will bear. If it be necessary to treat the sixth article as superseded, I treat it so, rather than by an attempted reconciliation to wrest the words so far from their meaning. Budge v. U. S. Smelting & Refining Co., 104 Fed. 498, 43 C. C. A. 665 (C. C. A. 9), is the defendant's best case; but it turned upon the buyer's express undertaking to pay for specified amounts of timber, "about 600," "about 15,000." In addition, no doubt the seller was bound to furnish "all mining timbers required and used," if they came to more than the minimums. T. B. Walker Co. v. Swift & Co., 200 Fed. 529, 119 C. C. A. 27, 43 L. R. A. (N. S.) 730 (C. C. A. 5). Smoot v. U. S., 237 U. S. 38, 35 Sup. Ct. 540, 59 L. Ed. 829, is not without some pertinence to the subject.

[8] The remaining question relates to the measure of damages. Under the contract the buyer was bound to accept the cinder as it was delivered, and without limit as to the amount which was tendered during the course of any calendar year. The refusal of the defendant to accept any greater tonnage during the year 1915 than 12,000 ab-

solved the plaintiff from further deliveries during that year, but did not, of course, absolve it from proving by way of damages what added tonnage it would have tendered during that year, but for the refusal. The defendant's letters which contain this refusal must be understood to refer to the date of arrival; that is, to such cinders only as might arrive at West Norfolk during the year 1915. In his testimony F. A. Eustis says without contradiction that Frohnknecht told him (Q. 148, 149) that he then turned back to the plaintiff all "the production which was made in excess of 12,000 * * * produced during the latter part of the year 1915." Strictly, this might be taken as including so much as was produced during the last two weeks or ten days of 1915, too late for arrival during 1915; but obviously it should not be so understood. The proper meaning is that the plaintiff need not tender any more of the cinder than it could have tendered during 1915. There is no evidence of what it could and would have tendered during 1915, and no basis for such damages. Perhaps the parties can agree upon the amount produced before say December 15th or 20th, which it is safe to assume the plaintiff would have tendered. If not, the plaintiff may have the case reopened to present that proof. It is quite clear that to this extent the evidence needs reconsideration, and I am satisfied that Judge Sheppard would do so, if he could be consulted.

[9] The provisions that the plaintiff shall make yearly estimates, and shall ship, so far as practicable, in regular monthly installments, do not affect the result. Both these provisions endure, and the plaintiff must abide by them so far as possible; but the first only calls for a bona fide estimate, nothing more, and there is no evidence that the second was violated. The defendant's objections throughout were to that construction of the contract by which they could be compelled to accept more than 12,000 in any case, not to the irregularity of the distribution.

The decree will be vacated, because of the matter of damages, and the cause stand over for further hearing to consider the matter above specified, unless the parties can adjust their difference out of court.

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## UNITED RAILROADS OF SAN FRANCISCO v. CITY AND COUNTY OF SAN FRANCISCO et al.

(District Court, N. D. California, Second Division. January 18, 1917.)

No. 280.

1. STREET RAILROADS ⟸29—FRANCHISE—STRICT CONSTRUCTION—EXCLUSIVE FRANCHISE.

A franchise given to a street railroad company, which does not expressly grant an exclusive right to operate on the streets named, nor exclude the city from establishing a street railroad of its own, will not be construed to give an exclusive right as against the city, since statutory grants by way of franchise or property in which the government or public has an interest must be strictly construed in favor of the public, and whatever is not unequivocally granted is withheld.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 46.]

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

2. CONSTITUTIONAL LAW ⟸134—CONSTRUCTION—STATUTE.

Civ. Code Cal. § 499, which, as it existed in 1879, when a street railroad franchise, authorizing the city to grant to one other corporation the right to use the streets upon the terms stated in that section, was granted, provided that two street railroad corporations might be permitted to use the same tracks, each paying an equal portion for the construction thereof, but in no case must two railroad corporations occupy and use the same street or track for a distance of more than four blocks, must be read as a whole, not separated into two parts, and, so read the restriction in the second clause is not a prohibition against the use of the street by two railroad corporations, but a restriction on the power to grant permission for such use, which may be repealed by the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 344.]

3. MUNICIPAL CORPORATIONS ⟸682(2)—POLICE POWER—STREET RAILROAD—FRANCHISE—MUNICIPAL LINE.

While a city cannot exercise its police power to destroy the franchise of a street railroad corporation, or exercise it arbitrarily, that power cannot be so limited as to prevent the city from constructing a street railroad of its own on the same streets, when that is made necessary by changing conditions.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1468.]

4. MUNICIPAL CORPORATIONS ⟸321(2)—MUNICIPAL STREET RAILROAD—NECESSITY—DETERMINATION.

The necessity for the construction of a municipal street railroad along a street occupied by tracks of a private corporation is a legislative rather than a judicial question, where there is no showing of the exercise of an arbitrary power by the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 838.]

5. EMINENT DOMAIN ⟸75—NECESSITY FOR COMPENSATION—STREET RAILROAD CROSSINGS.

In the absence of a statute prohibiting one street railroad from crossing the tracks of another, it is not necessary that compensation be first paid by a city before laying its municipal street railroad, and Civ. Code Cal. § 469, providing that if the owners of railroads cannot agree as to the compensation to be made for cutting and adjusting the rails at a crossing, the condemnation of the right of way over the one for the use of the other may be had in appropriate proceedings, and section 500, providing that any proposed railroad track may cross any track already constructed, do not require such compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 198, 199.]

6. EMINENT DOMAIN ⟸86—"TAKING" PROPERTY—STREET RAILROAD—COMPETING MUNICIPAL ROAD.

The construction by a city of a municipal street railroad along the streets already occupied by a private street railroad is not a "taking" or damaging of the private corporation's property, contrary to the United States Constitution or the Constitution of California.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 231.

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

In Equity. Suit by the United Railroads of San Francisco, a corporation, against the City and County of San Francisco, a municipal corporation, and others for an injunction. On final hearing. Injunction denied, and decree rendered for respondents.

Garret W. McEnerney, Wm. M. Abbott, and Wm. M. Cannon, all of San Francisco, Cal., for complainant.

Percy V. Long, City Atty., of San Francisco, Cal. (Thos. E. Haven and George Lull, both of San Francisco, Cal., of counsel), for respondents.

HUNT, Circuit Judge. The United Railroads of San Francisco, a public service corporation operating street railway lines in San Francisco under certain franchises granted to its predecessors, had constructed a double track line on Market street from the ferry to Seventeenth street, a distance of more than 20 blocks. When the cars of the company reach their destination at the foot of Market street, they turn on a loop, the loop being situated on the property of the state of California; but the complainant company has the right to operate under a revocable license of the board of harbor commissioners, in which body is vested the control of the state property at the ferry. Cars belonging to the municipality have operated on Market street, between Kearney street and the ferry, since November, 1912; the municipal cars, and what are called the "Sutter Street cars" operated by the complainant under an agreement to use tracks outside of, and parallel to, the tracks used by the United Railroads corporation, operating under franchise heretofore referred to. The municipal cars and the Sutter Street cars make the turn at the ferry under an agreement to use a second or outer loop, on the state property, operating under the same license from the board of harbor commissioners. The municipality claims authority to construct and threatens to construct a line which will parallel the lines of the United Railroads from Kearney to Seventeenth street, and from Church street to Van Ness avenue by way of Market street, crossing the tracks of the complainant in a number of places. Complainant asks injunction preventing the city from constructing the proposed municipal lines upon Market street and the other streets described, and also from cutting the tracks of the complainant which form its intersecting lines with its main line on Market street. Issues were duly framed, hearing was had, and the matter submitted for decision.

At the time that the franchise under consideration was granted, on September 15, 1879, approved by the mayor of San Francisco, September 20, 1879, and accepted in writing by the predecessor of the present complainant, section 499 of the Civil Code of California provided as follows:

"Two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks."

Incorporated in the franchise are the following sections:

Section 2: "Except as herein otherwise provided, the rights and privileges mentioned in the foregoing section are granted to said Market Street Railway Company of San Francisco, and shall be possessed and enjoyed by said company, upon such terms, conditions and restrictions as are now imposed, or may hereafter be imposed, by the laws of the state of California, and especially the terms, conditions and restrictions imposed by the 498th and 500th and 502d

sections of the Civil Code of the state of California, in relation to the manner of constructing and maintaining street railroads in the cities and towns of said state and a strict compliance on the part of said company with all of the provisions of said laws is hereby required."

Section 5: "It shall be lawful for the board of supervisors of the city and and county of San Francisco to grant to one other corporation and no more the right to use either of the aforesaid streets for a distance of five blocks and no more, upon the terms and conditions specified in the 499th section of the Civil Code of this state. This section shall apply to persons and companies as well as corporations."

Section 12: "'Said railway company is hereby required to file in the office of the clerk of the board of supervisors of the city and county of San Francisco, an acceptance, in writing, of the provisions of this order, under its corporate seal, signed by its president, and countersigned by its secretary, and thereupon the provisions of this order shall be taken and deemed to be a contract between said company and said city and county. Unless such acceptance be filed within ten days after the passage of this order, this order shall become and remain null and void."

It is not necessary to set forth the specific provisions of further provisions of the statutes, and merely for convenience they may be cited as follows:

By an act of the Legislature of the state of California (St. 1869–70, p. 481, approved March 29, 1870) the board of trustees or supervisors of incorporated cities and towns were authorized to grant street railway franchises subject to certain restrictions. Among such restrictions we find, in section 1 of the last referred to statute, authority given to the trustees, city council or supervisors of incorporated cities, and boards of supervisors of the various counties outside of cities or towns incorporated, to grant to any person or corporation the right to lay down and maintain, for a term not exceeding 25 years, an iron railway upon tracks or public highways in the cities or towns or counties, outside of cities or towns incorporated, and to run cars thereon, and to carry passengers or freight: Provided that, whenever any other railroad or company shall be granted the use of the same street or any part thereof, they shall pay for the use of the rails laid an equal share of the cost and maintenance of the railroad on the street, or part of the street, thus jointly occupied, and thereupon shall be entitled to the joint use of such part of said railroad; but no such grant shall be made for more than five blocks in all.

By an act of the Legislature of April 4, 1870 (St. 1869–70, p. 786), section 1, just heretofore cited, was amended. The amendment gave the right to the trustees, city council or supervisors of all incorporated cities or towns, or the supervisors of any city or county within the limit of such cities and towns, or the boards of supervisors of such cities or counties outside of such cities or towns, to grant to any persons or corporation the right to lay down and maintain, for a term not exceeding 25 years, an iron track or tracks, upon any street or highway in said cities or towns, or in said counties outside of such cities or towns, and to run horse or other cars thereon: Provided, when any other railroad or company should be granted the use of the same street, or any part thereof, they should pay for the use of the rails already laid an equal share for the cost and construction and maintaining a railroad on the street, or part of the street, thus occupied jointly, and thereupon

should be entitled to the joint use of such part of said railroad; but no such joint grant should be made for more than two blocks in all. This section, 1, of the act just heretofore referred to was again amended on March 23, 1872 (St. 1871–72, p. 515). The amendment was substantially like the amendment of April 4, 1870, except that the joint grant contemplated was only authorized to be made in the city and county of San Francisco for not more than two blocks in all.

The Codes of California became effective January 1, 1873, and there we find the whole subject of street railroad corporations embodied in title 4, part 4, division 1, of the Civil Code (sections 497–511). Sections 497, 499, and 500 read as follows:

Section 497: "Authority to lay railroad tracks through the streets and public highways of any incorporated city or town may be obtained, for a term of years not exceeding fifty, from the trustees, council, or other body to whom is intrusted the government of the city or town, under such restrictions and limitations, and upon such terms and payment of license tax, as the city or town authority may provide. In no case must permission be granted to propel cars upon such tracks otherwise than by horses or mules, unless for special reasons, as hereinafter provided."

Section 499: "Two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks."

Section 500. "Any proposed railroad track may be permitted to cross any track already constructed, the crossing being made as provided in chapter II. title III, of this part. In laying down the track and preparing therefor, not more than one block must be obstructed at any one time, nor for a longer period than ten working days."

Thereafter, in 1876 (St. 1876, p. 76), section 497 was amended, but reference to the amendment is unnecessary, further than to say that it was for the purpose of enabling franchises to be granted to be operated by cable lines. Thereafter, February 25, 1891, section 497 of the Civil Code was again amended (Statutes and Amendments of 1891, p. 12). The essential point of this amendment was to authorize electricity to be used as motive power, and to give to municipal authorities the right to impose such terms, restrictions, and limitations on the use of the streets, and the construction and mode of operating the railroads, as might be deemed necessary for public safety or welfare.

Section 499, heretofore quoted, was amended February 25, 1891 (St. 1891, p. 13), and the section made to read as follows:

"Two lines of street railway, operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly; but in no case must two lines of street railway, operated under different managements, occupy and use the same street or tracks for a distance of more than five blocks consecutively."

Again, in 1907, section 499 was amended (Statutes and Amendments 1907, p. 837), and we find the statute reading as follows:

"Two or more lines of street railway, operated under different managements, may by lease or contract, use the same street or tracks upon such terms as may have been agreed upon between the companies operating such railways; and two lines of street railway operated under different managements may be permitted to use the same street or tracks for a distance of five blocks without such lease or contract, upon payment of an equal portion for the construc-

tion of the tracks and appurtenances used by such railways jointly; but in no case shall a company owning or operating one line of street railway be permitted to condemn the right to occupy and use the same street or tracks for a distance of more than five blocks consecutively. Where such portion of such street shall be occupied by a track or tracks of a different gauge from the track or tracks proposed to be constructed thereon by a line of street railway under a different management, such last-mentioned line of street railway may nevertheless construct its track or tracks, subject to the limitation before prescribed, over the same ground as may be occupied by such prior track or tracks, provided the same can be so constructed as not to interfere with the operation of such prior track or tracks beyond such necessary interference therewith as shall be incident to such construction with reasonable skill, care and diligence."

Thereafter, in 1911, the Legislature amended section 499 by two provisions. They read as follows:

"The legislative body of any incorporated city, city and county, or town, may permit two or more lines of street railway to use the same portion of the same street or the same tracks upon such terms as may be agreed upon by the companies operating such railways; but no permission shall be granted to one company to use the same tracks or portions of the same street for a distance of more than five consecutive blocks without the consent of the person or company occupying said portion of the street and then only upon payment of an equal portion of the cost of construction of the tracks and appurtenances used by such railways jointly: Provided, that any incorporated city, city and county, or town may own and operate street railways within or without the municipal limits, and may occupy the same street or tracks occupied or used by any street railway within its limits for any number of blocks upon payment to the owner thereof of an equal portion of the estimated cost of construction, at the time of such occupation, of such tracks or appurtenances as such city, city and county, or town may elect to use jointly with said street railway. Where such portion of such street shall be occupied by a track or tracks of a different gauge from the track or tracks proposed to be constructed thereon by a line of street railway under a different management, such last-mentioned line of street railway may nevertheless construct its track or tracks, subject to the limitation before prescribed, over the same ground as may be occupied by such prior track or tracks; provided the same can be so constructed as not to interfere with the operation of such prior track or tracks beyond such necessary interference therewith as shall be incident to such construction with reasonable skill, care and diligence." St. 1911, p. 1101.

By section 4408 of the Political Code, effective from and after January 1, 1873, the board of supervisors of the municipality has power to regulate the streets in the city and the use thereof. On January 8, 1900, the charter of the city and county of San Francisco became effective as the organic law of the city and county of San Francisco. In section 1 of chapter 22 of the charter, as adopted, it was provided in subdivision 27 that the board of supervisors should have power to regulate street railroads, tracks and cars; to compel the owners of two or more of such roads, using the same street for any distance not exceeding 10 blocks, to use the same tracks and to equitably divide the cost of construction and expense of maintenance thereof between the owners; to fix, establish, and reduce the fares and charges for transporting passengers and goods thereon; to regulate rates of speed; and to pass ordinances to protect the public from danger or inconvenience in the operation of such roads. As amended in due form, in December, 1902, the amendment being approved by the Legislature February 5, 1903, the board of supervisors has the power to regulate

street railroads, tracks, and cars to permit two or more lines of street railways operated under different managements to use the same street, each paying an equal portion for the construction and repair of the tracks and appurtenances used by said railways jointly for such number of blocks consecutively, not exceeding 10 blocks, to regulate fares and charges for transporting passengers, to regulate rates of speed and pass ordinances to protect the public from danger and inconvenience in the operation of such road.

The Constitution of the state of California (section 19, art. 11), by amendment approved October 10, 1911, provides:

"Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

The contention of the complainant is that the threatened action of the city would violate the rights granted to the complainant by its franchises and guaranteed by the provisions of the federal and state Constitutions in these respects:

First. That the complainant's franchise constitutes an irrevocable contract, the obligation of which will be impaired by the proposed action of the municipal authorities.

Second. That such proposed municipal action will deprive the complainant of its property without due process of law and without compensation, contrary to the provisions of the Constitutions of the United States and the state of California.

Third. That the proposed municipal action will, in contravention of the Constitution of California, damage the property—that is, the franchise—of the complainant, without compensation first paid.

Fourth. That the municipality has not solicited and considered offers for the sale to the city and county of the line of the complainant, and has, therefore, not complied with the provisions of section 2, art. 12, of the charter, compliance with which is a condition precedent to the acquisition of a public utility.

After careful study of the case, and of the able briefs of counsel for the respective parties, I shall, without attempt at elaboration, state the conclusions I have reached upon those points which seem to me to be the most important.

[1] In the construction of legislative enactments and of ordinances and of contractual relationships which directly concern the public, the doctrine which controls is as announced in Knoxville Water Co. v. Knoxville, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353:

"A municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or other-

wise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."

This general rule is but another form of stating a principle that statutory grants by way of franchise or property, in which the government or public has an interest are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by implication.

It is very important to note that the words of direct expression or intention to grant an exclusive franchise are not to be found in the instrument itself; nor does it appear that exclusiveness was a positive consideration for the contractual obligation. Nor is there any expression by apt words to show that the city intended to exclude itself from exercising the privilege of establishing a street railway of its own. No deliberate purpose to make a surrender of exclusive rights appearing, I accept the more reasonable interpretation of the language used, and regard the franchise as not conferring such exclusive right as against the city, unless it must be held that the law itself operates to make the franchise exclusive pro tanto.

[2] Title 4 of the Civil Code, in which is found section 499, relates to street railroad corporations. Title 4 follows title 3, which has to do with railroad corporations, in contradistinction to street railroad companies. Section 497 of title 4 contains general authority to municipal bodies to give authority to lay street railway tracks through streets of cities and towns. Section 498 restricts the city authorities with respect to granting certain manner of construction.

In San Jose, Los Gatos, etc., Railway Co. v. San Jose Railway Co., 156 Fed. 458, 84 C. C. A. 265, 13 Ann. Cas. 571, the United States Circuit Court of Appeals for this circuit, speaking through Judge De Haven, of the main purpose of section 499, said it was:

"To protect the public from the inconvenience which would result if more than two railways under different managements were permitted to use the same street, or if two railways under different managements were permitted to use the same street for a distance of more than five consecutive blocks."

In Omnibus Railroad Co. v. Baldwin, 57 Cal. 168, the Supreme Court of California held that the first clause of section 499 means:

"That a right to use the same street cannot be granted to more than two corporations in any case, and if granted to two, it must be upon the condition that both use the same *track*, and that each pay an equal portion of the cost of constructing it."

The second clause was held not to contain anything which conflicted with the first, but as simply adding another limitation that:

"In no case must two railroad corporations occupy and use the same *street* or *track* for a distance of more than five blocks."

The learned court distinguished between the right of use of the same *track* and the permission to use the same *street* under conditions prescribed, and, after making references to such distinction, added that the limitation is not at all qualified in respect to permission to use the

same *street* on the conditions prescribed by the subsequent clause, which the court said—

"simply adds a further limitation, which in no sense can be regarded as inconsistent with that contained in the preceding clause."

The argument of the learned counsel for the complainant, addressed to the proposition that the provision against the use of the same street for more than five blocks by more than two railroad companies is a provision of substantive law, which became a part of the franchise and conferred upon the complainant pro tanto exclusive rights, has received very careful attention. So, also, has the contention that the change in the phraseology made in section 499 in the course of its history must be considered to have been made for a definite purpose, and that the purpose was the putting a prohibition upon the very use and occupation of the city streets by two railroad corporations, and not merely upon the power of the city to authorize complainant to use and occupy such streets.

And yet I believe that the section should be read as a whole, and is not to be separated into two wholly independent provisions, whereby the one is to be read as appertaining only to permission, and the other as solely writing a prohibition to be regarded as a general law of the state, binding upon municipal or other corporations, and not open to repeal or modification as affecting the franchise of complainant. The interpretation I put upon the last clause of section 499 is that in no case must two railroad corporations, granted permission under the section, occupy and use the same street or track for a distance of more than five blocks. Permission is indispensable. There may be permission for joint use, but such use shall not be authorized for more than five blocks. That this was the construction put upon the provision by those directly interested at the time of the grant of the franchise is a fair inference, when we consider the language of section 5 of the franchise, which provides, in effect, that the supervisors may grant to one other corporation, and no more, the right to use either of the streets described in the franchise, for a distance of five blocks, and no more, upon the terms and conditions specified in the 499th section of the Civil Code of the state.

In Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287, 11 Sup. Ct. 301, 34 L. Ed. 967, the court declined to regard an act of the Legislature which was in force after the grantee had obtained his franchise, but which was repealed during the life of the franchise, as accompanied by any conditions that made the legislative act take the character of a contract; the court saying that it was a matter of ordinary legislation, subject to be repealed at any time that the judgment of the Legislature should require the appeal. The court said:

"An alleged surrender or suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions." Williams v. Wingo, 177 U. S. 601, 20 Sup. Ct. 793, 44 L. Ed. 906.

If I am right in my construction of section 499, the prohibition became subject to repeal at the legislative will.

[3] The argument of complainant would lead to a limitation upon the exercise of the police power which would restrict it within narrower limitations than I think is justified. It will not be disputed that definite limitations are not to be regarded as a surrender of the police power. It is accepted that the destruction of the franchise is not possible; but, even so, in the complexities of modern society, new conditions present themselves, which may call for the safeguarding of the public interests in a way which justifies the application of the doctrine that the police power may extend to all great public needs. German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; Noble State Bank v. Haskell, 219 U. S. 110, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487; Camfield v. United States, 167 U. S. 524, 17 Sup. Ct. 864, 42 L. Ed. 260; Rail & River Coal Co. v. Yaple (D. C.) 214 Fed. 273.

These principles are not antagonistic to the further familiar principle that the police power of a state cannot be arbitrarily exercised. But the trend of authority is shown in Hadacheck v. Sebastian, Chief of Police of the City of Los Angeles, 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348, where the Supreme Court held that it is to be remembered that the police power is one—

"of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. * * * To so hold would preclude development, and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community." Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499; German Alliance Insurance Co. v. Kansas, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; Rail & River Coal Co. v. Yaple (D. C.) 214 Fed. 273.

If, as in Grand Trunk Western R. Co. v. South Bend, 227 U. S. 544, 33 Sup. Ct. 303, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405, there was here a threat to destroy a franchise right, a very different case would be presented. The existence of the franchise enjoyed by the complainant is, however, not threatened, nor is an attempt being made to change or modify the provisions of the franchise.

[4] As to the need for the action contemplated by the city, but a word is necessary. The evidential showing negatives any idea of arbitrary exercise of power. Questions of traffic and of the increase of danger consequent upon increasing the number of tracks and street cars in a street being ordinarily matters for legislative rather than judicial control, the necessity for action by city authorities concerning transportation facilities is to be solved by the exercise of the judgment of the municipal authorities, proceeding within the limits of their general authority.

[5] There being no statutory rule against one street railway company crossing the tracks of another, I do not find that compensation

must first be paid for the crossing. Consolidated Traction Co. v. South Orange & Maplewood Traction Co., 56 N. J. Eq. 569, 40 Atl. 15, contains a very able discussion of the law upon this point—the court holding that, although a crossing necessitates some actual interference with tracks as constructed, and to some extent changes thereafter the exclusive use by the one company at the crossing, still such changes are the necessary result of the development of the method of operating electric roads at their points of crossing, and are such as are made necessary as the best and safest methods now attainable for the safety and convenience of the public in the operation of both roads at the point of crossing; that they are changes and burdens in the use of its tracks and trolley system, to which the original right to lay and construct them was necessarily subject. Sections 469 and 500 of the Civil Code do not affect the applicability of this general rule; moreover, it would seem that in Market Street Railway Co. v. Central Railway Co., 51 Cal. 583, a street railroad company within the state of California is properly using the streets upon which it has a right of way, and for crossing the tracks of another need not compensate that company for damages caused by the crossing, provided always the crossing is to be made in a suitable manner.

[6] Upon the point that the property of complainant will be taken or damaged, contrary to the Constitution of the United States and of the Constitution of the State of California, by interference with the exercise of the complainant's franchise, in that there will be a blanketing of the complainant's cars by the cars of the city, it is to be observed that some inconvenience will follow the construction and operation of the additional lines by the city. But complainant never has had a right by virtue of the franchise to such free and uninterrupted use of the streets as will relieve it of such inconvenience as may follow from the operation by the city of a municipal railroad, provided the right to operate such railroad was reserved to the city. Pacific Railway Co. v. Wade, 91 Cal. 449, 27 Pac. 768, 13 L. R. A. 754, 25 Am. St. Rep. 201.

Such inconveniences are susceptible to minimization by regulation, but do not authorize conclusion that there is violation of constitutional right. Competition may result injuriously, but it is not a taking. Madera Water Works v. Madera, 228 U. S. 454, 33 Sup. Ct. 571, 57 L. Ed. 915; N. Y. & H. R. R. Co. v. Forty-Second St. R. R. Co., 50 Barb. (N. Y.) 285. In Hamilton Gaslight Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963, it was held that consideration of the possible impairment of the value of plaintiff's street railway company cannot control the decision of the legal rights of the parties. Contingencies of such character, if it is desired that they should be guarded against, must be anticipated by such clear and explicit language as will take the contract out of the established rule that public grants susceptible of two constructions must receive the one most favorable to the public.

The point that the municipality has not solicited and considered offers for the sale to the city and county of the lines of the United Railroads, and therefore has not complied with section 2, article 12,

of the charter, compliance with which is a condition precedent to the acquisition of a public utility, cannot be sustained, in the light of the proceedings pertaining to solicitation for offers and the proceedings of the board of supervisors. No point has yet been reached where injunction can be asked by complainant.

My opinion being that complainant has failed to make a proper case for injunction, decree will go against it, and in favor of respondent.

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## UNITED STATES v. SOUTHERN PAC. CO. et al.

(District Court, D. Utah. March 9, 1917.)

No. 3575 (420).

1. MONOPOLIES ⇐16(1)—ANTI-TRUST ACT—EXISTING RELATIONS—NEW LEASE.
Where the relation of lessor and lessee between two railroad corporations, whose lines had been originally constructed as part of the same general system and continuously operated under one management, was reversed in 1885 by the surrender of the leases and a lease of the lines belonging to the former lessee to the former lessor, and that lease was superseded by a new lease in 1893 for the balance of the term of the lease of 1885, the new lease making only immaterial changes in the former lease, neither of those transactions affected the exemption from the operation of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209, of the proprietary relations existing prior to the passage of that act
[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12.]

2. MONOPOLIES ⇐16(1)—ANTI-TRUST ACT—EFFECT OF STATE STATUTE.
That a lease of railroad lines was not authorized by state statutes does not render it subject to the Anti-Trust Act, since that act deals with actual conditions affecting interstate commerce, whether they are authorized by state statute or not.
[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12.]

3. MONOPOLIES ⇐16(1)—ANTI-TRUST ACT—EXISTING RELATIONS—NATURALLY COMPETING COMPANIES.
Where there had been since 1870 a continuous common control of the railroads owned by two corporations, effected by leases and unquestioned by the state, so that there never had been from the time of their construction any existing competition between them, and the lessee in 1899 purchased the stock of the lessor company, the Anti-Trust Act does not apply, though two of the lines would be competing if the relationship were dissolved, since that act was not intended to create competition that had never before existed by destroying a proprietary relationship existing at the time of its passage.
[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12.]

4. STATUTES ⇐219—CONSTRUCTION—EXECUTIVE CONSTRUCTION—COMMISSION APPOINTED BY CONGRESS.
The settlement of the indebtedness of the Central Pacific Railroad Company to the United States, arranged by a commission consisting of the Secretary of the Treasury, the Secretary of the Interior, and the Attorney General, appointed by Congress to arrange such a settlement after Congress had knowledge that the lines of the Central Pacific Company had been leased to the Southern Pacific Company, in which settlement the interest of the lessee had been recognized by requiring it to guarantee the bonds given to secure the settlement notes, and which settlement had been approved by the President, is entitled to more weight than the administra-

tive construction of a statute by ordinary public officers subject to legislative restraint, as a construction of the Anti-Trust Act as not applying to the relation between the roads.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297.]

5. RAILROADS ⇐131—INCORPORATION—STATUTE—LEASE AND SALE OF STOCK. The Pacific Railroad Acts (Act July 1, 1862, c. 120, 12 Stat. 489; Act July 2, 1864, c. 216, 13 Stat. 356; Act June 20, 1874, c. 331, 18 Stat. 111), requiring the Central Pacific Railroad to maintain physical connection with the Union Pacific, to make a through line and to furnish equal advantages and facilities as to rates, time, and transportation, were not violated by the lease of the lines of the Central Pacific to the Southern Pacific, and the subsequent purchase by the latter of the stock of the former, so long as the statutory requirements were observed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 404–406.]

Carland, Circuit Judge, dissenting.

In Equity. Suit by the United States against the Southern Pacific Company and others to enjoin and dissolve an alleged monopoly and combination in restraint of trade and commerce. Petition dismissed.

E. F. McClennen, Sp. Asst. Atty. Gen., of Boston, Mass., and James W. Orr, Sp. Asst. Atty. Gen., of Atchison, Kan. (The Attorney General, C. Carroll Todd, Asst. Atty. Gen., and Edward E. Gann, Sp. Asst. Atty. Gen., on the briefs), for the United States.

Garret W. McEnerney and Peter F. Dunne, both of San Francisco, Cal. (J. P. Blair, of New York City, and Wm. F. Herrin, of San Francisco, Cal., on the briefs), for defendants.

Perry D. Trafford, of New York City, for Union Trust Co. of New York.

Before SANBORN, HOOK, and CARLAND, Circuit Judges.

HOOK, Circuit Judge. This is a suit by the United States to enjoin and dissolve an alleged monopoly and combination in restraint of trade and commerce, formed by a lease to the Southern Pacific Company until January 1, 1984, of the railroads of the Central Pacific Railway Company, and by the acquisition by the former company of all the stock of the latter, in violation of the Sherman Anti-Trust Act of July 2, 1890. It is also charged that the control so obtained by the Southern Pacific Company is contrary to the Pacific Railroad Acts of July 1, 1862 (12 Stat. 489, c. 120), July 2, 1864 (13 Stat. 356, c. 216), and June 20, 1874 (18 Stat. 111, c. 331).

The needs of the case do not require a history in detail of the origin and growth of the various railroads which the government regards as composing two independent systems that should be kept separate and competitive. It will be sufficient to refer generally to the two companies and their respective constituents and predecessors, inclusively, as the Southern Pacific and the Central Pacific, and to speak more precisely only when necessary. We may say in the beginning that the location and physical interdependence of the lines of these companies in California and Oregon give the distinct appearance of a single system of railroads. So clearly is this so of the lines in California and

Oregon north of Sacramento that when an attempt was made in 1913, in the matter of the dissolution of the combination of the Union Pacific and Southern Pacific, also to divorce the Central Pacific from the Southern Pacific, it was generally agreed they should be left with the latter company. It is equally clear as regards the Central Pacific and Southern Pacific lines in California south from Sacramento and San Francisco. Those of the Central Pacific appear on the map as natural links and parts of the Southern Pacific system. Practically all of the spurs, branches, and tributary feeders of the Central Pacific lines are the property of the Southern Pacific.

It is only when we consider the Central Pacific line from San Francisco to Ogden, Utah, on the one hand, and the Southern Pacific main line from San Francisco, through Yuma and El Paso, to New Orleans, on the other, that the propriety of their common control seems in any degree debatable. This aspect of the railroad map is confirmed in great measure by the history of the construction of the various roads. The Central Pacific Railroad Company of California, the ancestor of the present Central Pacific, was incorporated in 1861. Up to 1870 it had constructed or acquired and put in operation the lines from San Francisco to Ogden, from Niles to San Jose, in California, and from Roseville to Chico, in the same state. The Southern Pacific Railroad Company was incorporated in 1865, and in 1870 the construction of the Southern Pacific lines was actively commenced. There was not much of importance of the Southern Pacific before that year. In 1870 and prior thereto the Central Pacific was dominated and controlled by Leland Stanford, Charles Crocker, C. P. Huntington, and Mark Hopkins, and in that year, if not earlier, the same group of men were in control of the Southern Pacific. For at least 15 years thereafter, and during the most important constructive period of the Southern Pacific, a common control and dominance over both companies was exercised by them or the representatives of their estates. Parts of the lines of both companies were built by the same construction companies owned by Mr. Stanford and his associates, under the same superintendence, and with the same equipment. The primary financing of the enterprises was done by them. The Central Pacific was employed as the principal or parent company and the Southern Pacific as its subsidiary, or rather as the corporate instrumentality for the expansion of its system. Except as to corporate title and bookkeeping, there were generally the aspects of a single enterprise. In this respect the conditions were not unlike those which have characterized the growth of many of the important railroad systems of the country in which, for necessity or convenience of financing and in some instances because of local laws, separate corporate organizations were utilized. Between 1870 and 1883, as fast as the Southern Pacific lines were built from Goshen, Cal., the terminus of the Central Pacific, south to Los Angeles, thence eastward to Yuma, and across Arizona and New Mexico, and into Texas, they were turned over by completed sections to the Central Pacific for operation. Up to 1885 all the Southern Pacific railroads, including the main line to New Orleans (with an unimportant exception), were officially announced, advertised, and operated

by the Central Pacific as part of its system. The legal relation between the two companies was expressed in executed leases, and the system was known as "Central Pacific Railroad and Leased Lines."

[1] In February, 1885, the Southern Pacific having become the major factor, the relation was reversed, and the Central Pacific leased all its railroads to the Southern Pacific (Company of Kentucky) for 99 years from April 1, 1885. The old leases of the Southern Pacific lines to the Central Pacific were surrendered by the same instrument. This was five years before the passage of the Anti-Trust Act. In December, 1893, another lease from the Central Pacific to the Southern Pacific was executed, modifying the terms of the lease of 1885 in matters not important here, and though the older instrument was canceled in terms, in legal effect the relation of lessor and lessee continued unbroken. The term of this last lease is until January 1, 1984. Whatever immunity or exemption from the operation of the Anti-Trust Act attended the proprietary relations existing prior to its passage was not destroyed by the change in the position of the parties effected by the lease of 1885. Nor did the amendment of that lease in immaterial respects in 1893 create a new starting point. It is not material that the amendment was by a revision substituted for the old instrument instead of by a separate supplement. The applicability of the Anti-Trust Act cannot be made to rest on such considerations.

[2, 3] It is also argued that the leases mentioned were not authorized by the statutes of California. We need not consider that. We do not think the Anti-Trust Act picks up the laws of the states for original enforcement. It deals with actual conditions affecting interstate commerce, whether they are authorized by those laws or not. In the case before us there was from 1870 an existing, continuous, common control of the railroads of both companies created by leases executed and observed by the parties and unquestioned by the state. This was the situation when the Central Pacific debt to the United States was settled in 1899 pursuant to the act of July 7, 1898 (30 Stat. 659, c. 571), and when the Southern Pacific acquired all the stock of the present Central Pacific which was then organized to succeed the old company. In United States v. Union Pacific, 226 U. S. 61, 85, 33 Sup. Ct. 53, 57 (57 L. Ed. 124), the court said:

"We take it, therefore, that it may be regarded as settled, applying the statute as construed in the decisions of this court, that a combination which places railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act."

Prior to the stock acquisition in 1899 and since there never was a time, in our opinion, when there was in any real substantial sense "a natural and existing competition in interstate commerce" between the Southern Pacific and the Central Pacific, within the intent of the Anti-Trust Act. Prior to 1870 the Southern Pacific lines were a negligible factor as a competitor in such commerce, and thereafter the situation has been as we have described. That competition of the kind mentioned might now result from an enforced independence of the two

companies and a separation of their railroads may be true, but we do not think the statute was intended to create competition by destroying a proprietary relation formed long before its passage and by the very means of which a railroad system has been brought into existence.

[4] That the Southern Pacific control of the Central Pacific was not regarded as contrary to the statutes of the United States appears from the proceedings under the act of July 7, 1898 (30 Stat. 659). By that act a commission, consisting of the Secretary of the Treasury, the Secretary of the Interior, and the Attorney General, was appointed to settle the Central Pacific debt to the United States. The act provided that "any and all settlements" should be subject to the approval of the President. William McKinley was then President, and the other officials were Lyman J. Gage, Cornelius N. Bliss, and John W. Griggs. The settlement was effected as of February 1, 1899. At that time the Central Pacific debt to the United States for government aid in the construction of the lines between Sacramento and Ogden, and Sacramento and San Jose, amounted to $58,812,715.48. More than half of this amount was accrued interest, and it was secured by a statutory lien on the two bond-aided lines, subject to prior first mortgages. In addition, the Central Pacific bonded debt then amounted to $57,471,000, most, if not all, of which was secured by first mortgages upon its various lines of road. It had outstanding $67,275,500 of stock. Before stating the details of the settlement, the conditions in the light of which the statute authorizing it was passed may be briefly mentioned. Congress had been fully aware for many years of the relations between the Central Pacific and the Southern Pacific. As early as 1886 the President transmitted to the House of Representatives a copy of the lease of 1885, and from that time on the connection of the two companies was frequently the subject of official and legislative communications and reports. In February, 1890, a copy of the lease was laid before the senate, with the report of a committee in which it was said:

> "It is manifest from the terms of their lease that any bill for the adjustment and settlement of the debt of the Central Pacific Company must, in order to be efficacious, contain provisions by which this lease and the obligations of the Southern Pacific Company under it shall become security to the United States, and that the consent of the Southern Pacific Company shall be obtained to such provisions of the bill."

The committee was of the opinion that the existing security of the government on the Central Pacific property was inadequate, and that in case of foreclosure of the first mortgages the property would be substantially exhausted in satisfying them. They reported that among the plans suggested to them was one "that all the associated lines forming the Southern Pacific Company (and these include the Central Pacific as consolidated) become parties" to 2 per cent. bonds of the United States secured by a first lien upon the consolidated properties of all the lines. The above is but a small part of a continuous history of legislative efforts in the years preceding the act appointing the commission. Congress was fully informed of the lease and its terms, and that in any conventional settlement the Southern Pacific could not be

ignored, but had to be reckoned with. Agreement or litigation with the Southern Pacific were unavoidable alternatives, and the remedy by foreclosure of the statutory lien meant probable substantial loss. While the bills introduced in Congress to effect a direct legislative settlement did not pass, it does not appear that the failure was due to a definite opposition of that body to the relation between the two companies. But, however that may be, the whole situation in all its angles and complications was public history, and with definite knowledge of it Congress committed the settlement to the commission. The commission was given "full power to settle the indebtedness * * * upon such terms and in such manner as may be agreed upon by them, or by a majority of them, and the owners of said railroads." The power, however, was subject to the following limitations: The government was to receive not less than the full amount of principal and interest due it, in equal semiannual installments, with interest not less than 3 per cent. per annum, payable semiannually, "with such security as to said commission may seem expedient"; final payment and full discharge not to be postponed beyond 10 years, all to become due upon default in any installment or interest, and if settlement was not perfected the President should proceed at once to foreclose. No other conditions than these were prescribed.

An agreement of settlement as of February 1, 1899, was made and signed by the commissioners, the Central Pacific, and Messrs. Speyer & Co., who were managing the reorganization of that company. It was approved by the President. Contemporaneously with the consummation of the settlement the Central Pacific was reorganized under a plan that provided for a new Central Pacific Company and its issue of $100,000,000 of first refunding 4 per cent. mortgage bonds. The plan also contemplated the guaranty of the bonds by the Southern Pacific and its acquisition of the stock of the new company. There was the same publicity of the details of this plan as generally attends the reorganization of important railroad systems, and the commission was advised of them in the early stages of its preparation. By the agreement of settlement the Central Pacific was to execute to the United States 20 promissory notes, dated February 1, 1899, payable, respectively, on or before the expiration of each successive 6 months for 10 years, each for the sum of $2,940,635.48, or one-twentieth of the total debt, and bearing interest at 3 per cent. per annum, payable semiannually. Each note contained a provision for the maturity of all upon partial default, as provided in the act appointing the commission. The Central Pacific, "or its successor company having title to the aforesaid railroads," was also to make an issue of 45-year 4 per cent. gold bonds, not exceeding $100,000,000 in all, secured by a first refunding mortgage upon all its railroads, whether bond-aided or not, and all its equipment and terminals. The bonds were to be further secured by the guaranty of the Southern Pacific, and were to be, as expressed in the agreement of settlement, "prior in lien to any lease of the railroads of said Central Pacific." Of these bonds $58,820,000 were to be deposited with the Treasurer of the United States as security for the 20 installment notes. In addition, Speyer & Co.,

reorganization managers, were within one month after the execution and delivery of the notes to purchase from the United States without recourse the 4 earliest maturing and pay therefor the face amount, $11,762,543.12, and accrued interest. A proportionate amount of the collateral mortgage bonds was to go with the 4 notes. The above constituted the security which seemed expedient to the commission within the authority conferred by the act of Congress.

The agreement of settlement was carried out in all its details. The lease to the Southern Pacific was subordinated to the mortgage securing the new first refunding bonds by an indenture executed by that company, which recited as consideration "the benefits and advantages to be derived by said party of the first part (the Southern Pacific) from the carrying out of the agreement between the United States, the Central Pacific Railroad Company, and Messrs. Speyer & Co., dated February 1, 1899." On February 15, 1899, the commission reported to the House of Representatives. The report was in general terms and referred to the agreement of settlement, a copy of which accompanied it. No reference to the guaranty of the Southern Pacific appeared in the report or the agreement, but the proof is convincing that the commission regarded it as a vital feature of a settlement. In the annual report of the Attorney General to the Senate and House of Representatives in November, 1899, the completion of the settlement was set out, but the guaranty of the Southern Pacific was inadvertently stated as being upon the notes, instead of upon the bonds securing them. With the exception of some credits, which will be presently mentioned, the notes held in the treasury of the United States were paid by the checks of the Southern Pacific. That company charged the amounts to the Central Pacific upon their intercompany accounts.

The rule as to the persuasive force of an administrative construction of statutes is a familiar one, and is frequently applied, but in the case before us there was more than the ordinary acts of public officers subject to legislative restraint. Here there was a commission, composed of the very highest officials of the government, specially created and charged with the adjustment of a difficult and complicated business that had for years engaged the attention of Congress. Limitations upon their power and conditions to be observed were expressly set forth in the statute, but none remotely suggesting any obstacle in the Anti-Trust Act. Except as to those limitations and conditions, plenary power was given them. The relations between the Southern Pacific and the Central Pacific, long a matter of public history, naturally foreshadowed the engagement of the former in any adjustment of the financial condition of the latter; and additional considerations then affecting the other transcontinental railroad companies pointed the same way. So natural, if not inevitable, was the settlement that was made that the omission of limitations now urged is most significant. We do not say the commission was authorized to violate or to sanction the violation of the act of Congress, but the adjustment they effected necessarily involved the question of its pertinence to the business in hand. The acceptance of the guaranty of the Southern

Pacific was a recognition that it had sufficient corporate interest in the Central Pacific to justify it. Without such interest its accommodation guaranty of $100,000,000 of bonds of another company would manifestly have been ultra vires—a gross, indefensible excess of its corporate powers. Again, the acceptance of the guaranty implied a recognition of its possible natural result; that is to say, the enforcement of the rights of a guarantor against the property of a debtor. The addition of the stock ownership by the Southern Pacific to its long leasehold interest did not so change the situation as to make unlawful what was not so before.

With knowledge of the settlement, and, it may be fairly presumed, of the details that were public history, Congress authorized the Secretary of the Treasury to dispose of "any notes in his possession touching the indebtedness of the Central Pacific Railroad Company to the United States." Act March 3, 1899, c. 427, 30 Stat. 1245. Further, by Act March 3, 1901, c. 831, 31 Stat. 1023, the Secretary of the Treasury was authorized and directed to settle claims for interest growing out of transportation services for the government "over non bond-aided lines of the Southern Pacific Company and Central Pacific Railroad Company by crediting" the amounts upon the Central Pacific installment notes. This was done. The claims were just debts of the government, and the legislative direction to credit those due the Southern Pacific upon the indebtedness of the Central Pacific was a recognition, in some degree, at least, of a relationship between the two companies that justified it. There was no other warrant or authority than that which arose from the proprietary position of the Southern Pacific.

It is contended by both parties that the opinion and decision of the Supreme Court in United States v. Union Pacific, supra, has a decisive bearing upon the case at bar. Aside from the controlling principles of law announced by the court and a matter presently to be mentioned, we do not think so. The Central Pacific was not a party to that suit, and though the relations between it and the Southern Pacific were mentioned in the opinion the references were not condemnatory, but were explanatory of the railroad situation and the movements of traffic. The court said, however, that nothing in its opinion should be considered as preventing the court below from approving or adopting a plan providing for the retention by the Union Pacific of the Central Pacific line from San Francisco to Ogden. There is a relevance here in the necessary inference that such retention by the Union Pacific would not have been regarded as contrary to the Anti-Trust Act. On the record then before the court it appeared that the Union Pacific already controlled the line from Portland, Or., to Granger, Wyo., and was largely interested in the line from San Pedro, Cal., to Salt Lake City, Utah. The retention by the Union Pacific of the Central Pacific road from San Francisco to Ogden would have given the former company lines from the three important ports—Portland, San Francisco, and San Pedro—to connections with its main line in Utah and Wyoming. In corporate origin each of the three lines was separate and distinct from the others and from the Union Pacific, in the same sense as

the Southern Pacific and Central Pacific are corporately separate. With steamship connections with the Orient, the three lines were theoretically, at least, competitors for foreign traffic destined through those ports eastward to the interior of the United States or to the Atlantic seaboard. But the control of all of them by the Union Pacific was evidently not deemed a suppression of competition sufficiently direct and appreciable to be repugnant to the Anti-Trust Act. The situation considered by the court in that case is not greatly different in its ultimate significance from the case at bar. If the Anti-Trust Act be construed to reach proprietary relations, as distinguished from those of a mere continuous operating character, formed long prior to its passage, whereby divergent or tangential lines of road to widely separated gateways or points in the currents of traffic movement are held in a single ownership or control, its enforcement accordingly would have such a destructive effect upon established, accepted railroad systems of the country that their inclusion within the intent of Congress may well be doubted.

After the decision of the Supreme Court that the combination of the Union Pacific and the Southern Pacific was unlawful, those companies, to meet the suggestions of the Attorney General, incorporated in the plan to dissolve the combination provisions for the surrender by the Southern Pacific to the Union Pacific of all the Central Pacific lines except one from Northern California to the northern state line and a branch therefrom into Oregon. These provisions were in excess of the mandatory requirements of the Supreme Court, and their consummation depended upon the approval of the Railroad Commission of California. Upon a consideration of them the Commission expressed the belief that the arrangement would "not substantially benefit the shippers of transcontinental freight either in rates or in service," and that it would be a distinct detriment to local commerce within the state. However, the Commission made certain modifications and conditions as to features within its jurisdiction; but the railroad companies were unable to agree to them, and that part of the plan was abandoned. The failure to agree was followed by this suit to separate the Southern Pacific and the Central Pacific, but we think the doubts of the California Commission would apply with equal force to the result now sought to be accomplished. It may be observed in this connection that this case of the government, unlike others of similar character, finds little, if any, support in testimony from complaining shippers or the public generally.

[5] Finally, it is contended that the control of the Central Pacific line from San Francisco to Ogden by the Southern Pacific is in violation of the Pacific Railroad Acts. The proofs show no foundation in fact for this contention. When this suit was brought, and since, the line was being maintained and operated in every particular required as a part of a continuous railroad from the Missouri river to the Pacific Coast. In conjunction with the Union Pacific there were through rates, through billings, and through freight, passenger, and mail trains. There were no criticisms of the track, the service, or the schedules. The government and the public were being served adequately. Those

statutes require physical connection with the Union Pacific to make a through line and the furnishing of equal advantages and facilities as to rates, time, and transportation without discrimination of any kind. If those requirements are met, it does not seem material whether they are performed by the Southern Pacific as lessee and stockholder or by the Central Pacific independently.

The petition is dismissed.

CARLAND, Circuit Judge (dissenting). It is difficult to determine from the opinion of the majority exactly upon what ground or grounds the bill in this case is dismissed. The opinion states that:

"Prior to the stock acquisition in 1899 and since there never was a time, in our opinion, when there was in any real substantial sense 'a natural and existing competition in interstate commerce' between the Southern Pacific and the Central Pacific within the intent of the Anti-Trust Act. * * * That competition of the kind mentioned might now result from an enforced independence of the two companies and a separation of their railroads may be true, but we do not think the statute was intended to create competition by destroying a proprietary relation formed long before its passage and by the very means of which a railroad system has been brought into existence."

If the language first quoted means natural and existing competition in fact, then it is entirely consistent with the claim of counsel for the United States, which is that no such competition existed or could exist by reason of the common control since 1899 of the Central Pacific by the Southern Pacific. If the language means that there could be no competition between the two railroad systems, then the language is inconsistent with the language which follows, wherein it seems to be conceded that but for the common control there would be competition. As the breaking up of an unlawful combination does not create natural competition, but simply removes the barriers which prevent the free flow of interstate commerce, the concession that there might be competition if the combination was broken is also a concession that there is natural competition which is suppressed by reason of the control of the Central Pacific by the Southern Pacific.

The combination which is complained of in this case is alleged to have originated in 1899 in the acquirement of all the stock of the Central Pacific by the Southern Pacific. The fact that prior to the passage of the Anti-Trust Law there had been a practical control of the Central Pacific by the Southern Pacific through a leasing arrangement in no way validates the present combination, if it be unlawful. Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; United States v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663; United States v. Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; United States v. Delaware & Hudson Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836; Philadelphia, Baltimore & Washington R. R. Co. v. Schubert, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417; United

States v. Kissel, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168; Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681.

There does not seem to be any conflict in the authorities upon this proposition. The evidence in the record in my opinion establishes beyond question that the Southern Pacific, extending from San Francisco Bay to New Orleans, with its steamship connection with New York, is a natural competitor of the Central Pacific, both as to California-Atlantic Seaboard freight and central and western United States freight to and from California. A mere inspection of the different routes over which interstate commerce is moved through the El Paso and Ogden gateways would seem to show that the two roads are natural competitors. If they are competitors, and the Southern Pacific, as it is admitted, controls the Central Pacific, it follows that the free flow of interstate commerce is restrained. United States v. Union Pacific Railroad Co., 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124; Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679.

I do not think the evidence shows that the Central Pacific and the Southern Pacific were created originally and have always continued to be one system. They have always been and are now operated as separate systems. The settlement by the United States of the debt of the Central Pacific in 1899 cannot be held to estop the United States from insisting at this time that the combination between the two roads is in violation of the Anti-Trust Act. It is not remarkable that in the proceedings resulting in the settlement, so far as they appear of record, the Anti-Trust Law was not referred to, as little attention was given in those days to the Anti-Trust Law of July 2, 1890.

Finally, I am unable to reconcile the decision of the Supreme Court in the case of United States v. Union Pacific Railroad Co., 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124, with the conclusion reached by the majority in this case. The Union Pacific and the Central Pacific constitute one transcontinental line from Omaha, Neb., to the Pacific Coast. Of course, it would not be objectionable for the Union Pacific to control the Central Pacific, so far as anything in the record in this case is concerned, because it would simply be the same through line, with no competition involved as between these two roads; but the Supreme Court held in the case cited that the control of the Southern Pacific by the Union Pacific was a combination in restraint of commerce that should be broken up.

In this case the Southern Pacific, which the Supreme Court held was in competition with the Union Pacific, controls the Central Pacific, or another section of the through line from Omaha to the Coast. How is the decree of the Supreme Court in the Union Pacific Case to become effective, with the competitor of the Union Pacific controlling the Central Pacific? If it was unlawful for the Union Pacific, being one section of the through line, to control the Southern Pacific, why is it not unlawful for the Southern Pacific to control the other section of the through line. It is said in the opinion that there is no

evidence of complaint by shippers of the alleged unlawful combination. The Attorney General, in instituting this action, represents the public, including shippers.

For these reasons, briefly stated, I dissent from the conclusion reached by the majority.

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## CITY OF SEATTLE v. GREAT NORTHERN RY. CO. et al.

(District Court, W. D. Washington, N. D. September 17, 1913.)

No. 2531.

1. REMOVAL OF CAUSES ⟸107(5)—MOTION FOR REMAND—AFFIDAVIT.
In disposing of a motion to remand, where its decision depends upon facts not apparent of record, affidavits may be considered, for it is important that the court should, at the earliest opportunity, determine the jurisdictional fact, so that the parties may litigate the issue in proper form.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 228.]

2. REMOVAL OF CAUSES ⟸31—RIGHT TO REMOVAL—NECESSARY PARTIES.
A railroad corporation organized under the laws of Washington constructed a tunnel in the city of Seattle and conveyed its franchise and right of way, including the tunnel, to nonresident railroad corporations, completely divesting itself of all control over such property. Const. Wash. art. 12, § 8, declares that no corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred during the operation, use, or enjoyment of such franchise. After the expiration of a period longer than the period of limitations prescribed for actions for waste or trespass, the city of Seattle sued the railroad company which constructed the tunnel and the grantees for damages caused by its construction and maintenance. The suit, which was begun in the state court, was by the nonresident companies removed to the federal court on the ground of diversity of citizenship, it being claimed that the Washington company was not a necessary or indispensable party. *Held*, that as the constitutional inhibition upon transfer does not apply to a transfer relieving the corporation making it from liability, but prohibits such a transfer as will relieve the franchise or property from liability, the Washington corporation was not a necessary or indispensable party, limitations against any action against it having run, and hence the nonresident companies were entitled to remove the cause.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 71.]

3. LIMITATION OF ACTIONS ⟸55(5)—RUNNING OF STATUTE.
Where a Washington corporation which constructed a tunnel through the city of Seattle transferred its franchise and right of way, including the tunnel, to other railroad companies, no action for injuries occasioned by the construction and maintenance of the tunnel can be maintained against it more than three years after the transfer. Rem. & Bal. Code Wash. § 159, subd. 1, and section 165, respectively, declaring that an action for waste or trespass shall be commenced within three years, and that an action for relief not otherwise provided for shall be commenced within two years after accrual.
[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 303.]

4. REMOVAL OF CAUSES ⟸100—RIGHT OF REMOVAL.
Where defendant has a right to removal, the federal court will not remand a cause though plaintiff in the state court in good faith joined as a party defendant one not necessary to the disposition of the case.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 213.]

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At Law. Action by the City of Seattle against the Great Northern Railway Company and others, begun in the state court and removed to the federal court. On motion to remand. Motion denied.

James E. Bradford, Corp. Counsel, and Howard M. Findley, Asst. Corp. Counsel, both of Seattle, Wash., for plaintiff.

C. H. Winders, of Seattle, Wash., for defendant Northern Pac. Ry. Co.

F. V. Brown and F. G. Dorety, both of Seattle, Wash., for other defendants.

NETERER, District Judge. The city of Seattle brought this action against the Great Northern Railway Company, a corporation, Northern Pacific Railroad Company, a corporation, and Seattle & Montana Railway Company, a corporation. It alleged, in substance, that it is a municipal corporation organized under the laws of the state of Washington; that the Great Northern Railway is a corporation organized under the laws of Minnesota; that the Northern Pacific Railroad Company is a corporation organized under the laws of Wisconsin; that the Seattle & Montana Railroad Company is a corporation organized under the laws of Washington; that the plaintiff is the owner of block 19, situated on the northeast corner of Madison street and Fourth avenue; that upon this property is a building of stone, brick, concrete, and steel construction, known as the Seattle Public Library; that the building is used by the general public as and for a general library building, and is intended for no other purpose; that during the "year 1904 the defendants constructed a tunnel, for the purpose of laying down, constructing, maintaining and operating sundry railway tracks through the same, along, across, and beneath certain streets, avenues, and alleys, and, among others, under the surface of and in the said Fourth avenue in front of block 19, and have ever since operated and maintained the same." It is further alleged:

"That by reason of the negligent, careless, and unskillful manner in which said tunnel was constructed by said defendants, and the negligent, careless, and unskillful manner in which said defendants have operated and maintained said tunnel, the said Fourth avenue has sunk and been depressed below the established grade thereof, and the said block 19 has been undermined and deprived of its natural and lateral support, thereby causing the earth on plaintiff's said premises to cave in, slip, slide, and move, and the support and foundations of said building and the ornamental and retaining walls about and in front thereof, and the stone and concrete walks, terraces, and approaches thereto to crack, settle, become displaced, damaged and destroyed, and the bonds of said building to sever, and the walls, partitions, floors, roof, tiling, plastering, plumbing, and the entire structure to be cracked, broken, racked, damaged, and destroyed, on account of which the value of plaintiff's said premises has been greatly lessened and the use and occupation thereof impaired and diminished."

Judgment is prayed for $450,000. The defendant Seattle & Montana Railroad Company, in its answer, admits that it constructed the tunnel, and denies all other allegations in the complaint, and "specifically denies that it has, at any time since the 26th day of November,

1907, owned, operated, or maintained the said tunnel, railroad tracks, right of way, or any of the property or facilities located in said tunnel or connected therewith," and, further answering, the defendant alleges:

"That all of the matters and things complained of by the plaintiff in said complaint occurred, if at all, more than two years prior to the commencement of this action, and that the plaintiff's cause of action herein if any it had, accrued to it more than two years prior to the commencement of this action, and that none of the acts, injuries, or damage alleged in said complaint occurred or happened within the period of two years immediately preceding the commencement of this action."

The defendants Great Northern Railway Company and the Northern Pacific Railway Company presented a petition for removal to this court, in which they allege:

That the Great Northern Railway Company is a corporation of the state of Minnesota, with its principal place of business at St. Paul in said state, and the Northern Pacific Railway Company is a corporation of Wisconsin, with its principal place of business at Madison, and "that the controversy in this action and every issue of fact and law therein is wholly between citizens of different states, and which can be fully determined as between them; that is to say, the plaintiff, the city of Seattle, and the defendants Great Northern Railway Company and Northern Pacific Railway Company."

The petition further avers:

"That the defendant Seattle & Montana Railroad Company * * * is not now the owner of the railroad, or any portion of the railroad or railroad facilities, or of the said tunnel or any of the right of way, or anything pertaining thereto, mentioned in said complaint," nor has it been interested in any way since the 26th day of November, 1907, and that the "Great Northern Railway Company and the Northern Pacific Railroad Company have owned, operated, and maintained the said tunnel and the railroad therein and the right of way thereof, and that no other persons or corporations whatever have been interested or taken part in the ownership, operation, or maintenance of said railroad, right of way, or tunnel, since said date."

The petition further avers that a deed, transferring all interest from the Seattle & Montana Railroad Company in all of said right of way, railway, and tunnel property to the other defendants, was filed for record in the office of the auditor of King county, on the 28th day of January, 1908, and has been recorded therein, and further avers:

That the Seattle & Montana Railway Company has been joined as a party defendant in this action improperly and fraudulently, for the sole purpose of defeating the jurisdiction of the District Court of the United States for the Western District of Washington, Northern Division, and for preventing the removal of said action from the state court; "that said plaintiff had not at the time of the commencement of this action, and has not since had, and has not now, any reason whatever to believe, or any reasonable grounds of establishing, any facts connecting the Seattle & Montana Railroad Company with the cause of action herein, and has not now, or has it had, any reasonable grounds to believe that a cause of action against said Seattle & Montana Railroad Company exists now, or existed at the time of the commencement of this action, arising out of the facts set forth in said complaint."

A proper bond, with the said petition for removal, was filed, and an order of removal was entered by the state court. The plaintiff has filed its motion to remand the case to the state court on the ground:

That the complaint shows that the Seattle & Montana Railroad Company is a corporation organized and existing under and by virtue of the laws of the state of Washington, and is a proper, necessary, and indispensable party defendant; that there is not involved in this action a controversy which is wholly between the citizens of another state on the one side and citizens of the state of Washington on the other side which can be fully determined as between them; "that there is not a fraudulent joinder of parties defendant, made for the purpose of preventing a removal to this court; that upon the face of the record the petitioning defendants are not entitled to have said cause removed to the federal court for trial."

Upon the argument of the motion to remand, the nonresident railroad companies offered in support of their contentions, as a matter to be considered by the court in this hearing, ordinances of the city of Seattle Nos. 9116 and 10545, and also presented certified copies of deeds wherein the Seattle & Montana Railroad Company, Washington corporation, is the grantor, and the Northern Pacific Railway Company and Great Northern Railway Company, respectively, defendants, are grantees, in which properties in issue, including the tunnel, were sold to the said railway companies. These deeds are acknowledged on the 26th day of November, 1907. They also presented a certified copy of assignment of the franchises, which were granted, under the ordinance referred to, to the Northern Pacific Railway Company and the Great Northern Railway Company. These assignments were filed in the city comptroller's office of the city of Seattle on the 30th of March, 1908, and June 1, 1908, respectively. The said defendants also presented affidavit of F. S. Guthrie, who swears:

That he has, since the month of January, 1910, been superintendent of terminals for the Northern Pacific and Great Northern Railways; "that as such superintendent he has been directly in charge and control of the railway tunnel under that portion of Fourth avenue passing in front of the Seattle Public Library Building and referred to in the pleadings in the above-entitled action; that as such superintendent, and at all of said times, affiant has had charge of the maintenance of said tunnel and of all repairs to said tunnel, and with the operation of all trains in or through the same; that as such superintendent affiant has been employed and paid by the Great Northern Railway Company and Northern Pacific Railway Company alone, and has reported to and acted under the direction of officials of said companies only, and that all bills for the maintenance, repair, and operation of said tunnel have been paid by said companies; that during said time the Seattle & Montana Railroad Company has not directly or indirectly operated any train or trains in or through said tunnel or taken part in the maintenance or repair of the same, and has not exercised any control whatever over the same."

L. C. Gilman deposes and says:

"That in the month of November, 1907, he was attorney for the Seattle & Montana Railroad Company and the Great Northern Railroad Company in Seattle, Wash.; that during said month said Seattle & Montana Railroad Company conveyed to the Great Northern Railway Company and the Northern Pacific Railway Company all of its property of every kind whatever in the state of Washington, including all its right, title, and interest in or to the Seattle tunnel referred to in the pleadings herein, and the franchises under which the same was constructed; that affiant was then, and ever since has been, familiar with the affairs of said Seattle & Montana Railroad Company as its attorney, or one of its officers, and that said company has not since the month of November, 1907, operated as a railroad company in the state of

Washington, nor maintained any business whatever in the state of Washington, nor maintained any office therein; that since said date all of the business formerly transacted by the Seattle & Montana Railroad Company, including the maintenance and operation of said Seattle tunnel, has been carried on by and in the name of the Great Northern Railway Company or the Northern Pacific Railway Company, and that it is a matter of common knowledge and notoriety that said Seattle & Montana Railroad Company has not been operating or maintaining said tunnel, or otherwise engaged in business in the state of Washington since the month of November, 1907."

F. V. Brown swears:

"That for more than three years last past he has been employed as attorney for the Seattle & Montana Railroad Company in every action which has been brought against said company in the state of Washington, and in any other legal matters which have arisen in said state affecting said company, and that he has been familiar with the affairs of said company in said state during said time, and that said company has not maintained an office or engaged in business in the state of Washington during said time, and has had no connection whatever during said time with the operation or maintenance of the Seattle Tunnel referred to in the pleadings in this action, and that it has been a matter of common knowledge and notoriety that said tunnel has been maintained and operated during said time exclusively by the Northern Pacific and Great Northern Railway Companies, and not either wholly or in part by the Seattle & Montana Railroad Company."

No affidavits or proof controverting these affidavits were filed or offered. Formal objection was made to the consideration of the affidavits by the court.

[1] There seems to be some diversity of opinion among courts upon the question of the consideration of affidavits upon the hearing of a motion to remand, or objection to the jurisdiction of the court. I think the greater weight of authority is in favor of such practice. The better reason is that it should be done. It is a matter of much importance and a court should at the earliest opportunity determine such jurisdictional fact, so that the parties may litigate the issue in the proper forum, and frequently save much time and money and not needlessly consume the time of the court in a fruitless investigation in order to find what could have been ascertained at the inception of the inquiry; and, if reasonable minds could not differ as to the fact, a court should not hesitate to retain jurisdiction. The Supreme Court, in Wecker v. National Enameling Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757, recognizes such practice.

[2, 3] The only question for the court to determine in this case is whether the Seattle & Montana Railroad Company is an indispensable party to the controversy in this action, and made a party in good faith, or was it improperly and fraudulently joined as a party defendant for the purpose of depriving the Great Northern Railway Company and the Northern Pacific Railway Company, citizens of other states, from seeking the forum of the federal courts in this controversy. The plaintiff contends that the Seattle & Montana Railroad Company, being a corporation of the state of Washington, and the original grantee of franchises (copies of the ordinances of which were admitted upon the hearing of the motion to remand and are a part of the record), is precluded by the provisions of article 12, § 8, of the Consti-

tution of Washington from relieving itself of liability, because of the acts complained of, by transfer and sale. This section reads:

"No corporation shall lease or alienate any franchise, so as to relieve the franchise, or property held thereunder, from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or any of its privileges."

The ordinances which were offered upon the hearing, and the transfers and assignments which were introduced, conclusively establish to my mind that the Seattle & Montana Railroad Company, a corporation, divested itself of all interest of every kind and character in the franchises granted under the ordinances, and all of the railroad lines and interests, including every interest in the tunnel in issue in this case, in November, 1907, and that since that time it has had no interest in the tunnel, or the railroad lines operated through the tunnel, had nothing to do with the operation of the road, contributed nothing to the maintenance of the tunnel or the operation of the line of railway, had divested itself of all and every obligation so far as the maintenance of the tunnel or any relation to it is concerned, and that plaintiff knew such fact at the time of bringing this action and had known it for a long time prior thereto. A reading of section 8, art. 12, will force the conclusion that it places no burden upon the railroad company as an entity. The inhibition is placed upon the franchise, and no transfer shall be made in such a way as to "relieve the franchise, or property held thereunder, from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or any of its privileges." While no action could be maintained against the Seattle & Montana Railroad because of the statute of limitations, the property and franchises are liable for every obligation charged or incumbrance which can inure to or result from the operation of the lines of railway or the tunnel, and no attempt has been made to transfer the franchises or railway in such a way as to defeat or change the purpose of the original grant or to lessen the beneficiary interest that would naturally and necessarily result to the public by reason of the granting of the franchise. The case of Illinois Cent. Ry. Co. v. Sheegog, 215 U. S. 309, 30 Sup. Ct. 101, 54 L. Ed. 208, is not applicable here, because the court there discusses the relation of lessor and lessee, rather than that of grantor and grantee. A reversionary interest in the road in the other company was still subject to execution. To the same effect was the holding of the Supreme Court of the United States in Chicago & Northwestern Railway Co. v. Crane, 113 U. S. 424, 5 Sup. Ct. 578, 28 L. Ed. 1064. The allegations in the complaint against the Seattle & Montana Railroad Company are in general connection with the other defendant companies; there is no allegation showing any special liability either because of any act of omission or commission.

It must be conceded that the liability, if any exists against either of the defendant companies, is for some act either done or omitted where a duty is imposed within the period of limitation within which an action could be prosecuted under the laws of the state of Washington.

Section 159, Rem. & Bal. Code, subdiv. 1, provides that "an action for waste or trespass upon real property" shall be commenced within three years. Section 165 provides:

"An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

Either the two or the three year limitation would apply in this case. In an action to recover damages resulting from the consequences of the construction and operation of the tunnel in issue in this case, in the case of Welch v. Seattle & Montana Railroad Co., 56 Wash. 97, 105 Pac. 166, 26 L. R. A. (N. S.) 1047, the Supreme Court of Washington held that the period of limitation within which the action must be commenced is two years. The Seattle & Montana Railroad Company having transferred all of its interest in the railway and tunnel in 1907, cannot be held for damages for negligent operation or any act of omission in providing lateral support, or in the operation of the railway lines through the tunnel, which would injuriously affect the property of the plaintiff. 29 Cyc. 476; St. Louis, I. M. & S. Ry. Co. v. Dooley, 70 Ark. 389, 67 S. W. 1012; Upp v. Darner, 150 Iowa, 403, 130 N. W. 409, 32 L. R. A. (N. S.) 743, Ann. Cas. 1912D, 574.

[4] While the plaintiff may, in good faith, proceed in the state court upon a cause of action which it alleges to be joint, it is equally true that the federal court will not sanction devices intended to prevent a removal to the federal court where one has a right to such removal, and should be equally ready to protect the right to proceed in the federal court as to permit the state court in a proper case to retain its own jurisdiction. Clark v. Chicago, R. I. & P. Co. (D. C.) 194 Fed. 505; Wecker v. National Enameling Co., supra; McGarvey v. Butte Miner Co. (D. C.) 199 Fed. 671.

From a consideration of the record in this case the conclusion is inevitable that the Seattle & Montana Railroad Company is not a "necessary or proper party to this controversy," and that such fact was known to plaintiff prior to bringing this action, and was made a party defendant for the purpose of preventing the nonresident defendants from entering the federal forum with this litigation.

An order may be entered denying the motion to remand.

## In re UNITED GROCERY CO.

(District Court, S. D. Florida. January 16, 1917.)

1. BANKRUPTCY ⟸47—VOLUNTARY PROCEEDINGS—OBJECTIONS—RIGHT OF CREDITORS.

Creditors of a corporation have no right to contest the adjudication in voluntary bankruptcy of the corporation on the ground that the directors had no authority to file the petition and that their purpose was to avoid liability in a suit by stockholders.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 41, 42.]

2. BANKRUPTCY ⟸43—VOLUNTARY PROCEEDINGS—RIGHT TO INSTITUTE—DIRECTORS OF CORPORATION.

Under Comp. Laws Fla. 1914, § 2663, providing that the business of a corporation shall be conducted by certain officers and the board of directors, the directors have authority to file on behalf of the corporation a voluntary petition in bankruptcy, notwithstanding the provisions regulating the dissolution of corporations, since the bankruptcy of a corporation is not the equivalent of its statutory dissolution, and the proceedings for such dissolution have no application to bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 38.]

3. BANKRUPTCY ⟸43—VOLUNTARY PROCEEDINGS—REQUISITES—INSOLVENCY.

The solvency or insolvency of a corporation petitioning for voluntary bankruptcy is not material.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 38.]

4. BANKRUPTCY ⟸20(1)—CONCURRENT JURISDICTION—STATE AND FEDERAL COURTS.

In cases of concurrent jurisdiction, where the state court has acquired possession of the res, the United States court will not exercise jurisdiction to disturb such possession, and in such cases actual corporeal possession through an officer is not necessary.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 1331.]

5. BANKRUPTCY ⟸51—VOLUNTARY PROCEEDINGS—VACATING ADJUDICATION—PENDENCY OF SUIT AGAINST DIRECTORS.

An adjudication in voluntary bankruptcy proceedings by a corporation will not be set aside on petition by stockholders, alleging that the proceedings were fraudulently instituted by the directors to avoid liability in a suit begun against them by the stockholders, in which the corporation was a nominal party, to recover assets of the corporation, wasted by the directors, in which the appointment of a receiver was asked, where no receiver had yet been appointed, since the creditors of the corporation, for whose benefit the bankruptcy proceedings are conducted, are not interested in the management of the corporation, unless the other assets prove insufficient to pay their claims, and the pendency of the bankruptcy proceedings will not interfere with the prosecution of the stockholders' suit against the directors, in view of Bankr. Act July 1, 1898, c. 541, § 4, 30 Stat. 547 (Comp. St. 1913, § 9588), providing that the bankruptcy of a corporation shall not release its officers and directors from any liability under the laws.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 49.]

In Bankruptcy. In the matter of the voluntary proceedings for the adjudication of the United Grocery Company as a bankrupt. On motion to dismiss a petition by minority stockholders and creditors to vacate the adjudication. Motion granted, and petition dismissed.

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

H. L. Anderson, of Jacksonville, Fla., for petitioners.
Marks, Marks & Holt, of Jacksonville, Fla., for respondents, officers and directors of United Grocery Company.

CALL, District Judge. On January 3, 1917, the bankrupt filed its petition to be adjudged a bankrupt; the petition being signed by the bankrupt, through its president and secretary, and the seal of the corporation affixed. The petition alleges the jurisdictional facts, and has attached to it as an exhibit a copy of a resolution passed by the board of directors authorizing the filing of the petition by the officers. On January 4, 1917, an adjudication in voluntary bankruptcy was made by the judge of this court, upon this petition, a receiver was appointed, and reference made to the referee. On January 11th a petition was filed by certain of the stockholders of the corporation, joined by three creditors, praying that the adjudication upon said petition and all proceedings thereunder be vacated and dismissed, etc.

This petition alleges that the petitioners are stockholders owning 833 shares of the capital stock of the corporation, of the par value of $83,300; that the corporation is not insolvent; that certain of the petitioners on December 27, 1916, filed a bill in chancery in the state court of Duval county, Fla., charging mismanagement and fraudulent conduct on the part of the officers and directors of the corporation, and praying for a receiver of the property of the corporation and other relief; that the hearing upon the application for a receiver had been, by one of the circuit judges of Duval county, set for hearing on January 6, 1917, and subpœnas issued and served upon the officers and directors to appear and bring the books and records of the corporation before the circuit judge on said day; that said directors met in special session on January 3, 1917, and passed the resolution attached to the voluntary petition, in order to defeat action commenced in the state circuit court and avoid the discovery there sought; that the action was not authorized by the shareholders, and that the notice of the meeting of the stockholders in annual meeting had been called for January 16, 1917; that there was no occasion for the action of the directors; and that no legal notice was given all the directors of said meeting of the directors, at which the resolution was passed, but that the meeting was secretly held and the resolution passed for the fraudulent purposes set out. A copy of the bill filed is attached and by appropriate words made a part of the petition. Three creditors of the corporation adopt the allegations and prayers of the petition.

The bill of complaint filed in the state circuit court shows the complainants are stockholders in the corporation, and charges various fraudulent acts and violations of the trust resting upon directors of corporations; that the directors had by fraudulent acts wasted and misappropriated the assets until at the time of the filing of the bill the assets were not sufficient to pay the debts of the corporation; that the complainants could get no relief because the directors and officers would re-elect themselves and thus perpetuate their management, and other charges that the stock held by such directors was fraudulently obtained and should be declared held in trust for the corporation. This

bill then prayed for relief of various kinds, and also for a receiver for all the property of the corporation. The petition does not allege service of subpœna upon the defendants, but does allege, as above noted, that a time had been set by one of the circuit judges for hearing the application for the appointment of a receiver as prayed by the bill.

A rule to show cause why the petition should not be granted was issued and served upon the officers and directors of the corporation, returnable on the 15th of January, 1917. Upon that day and at the time mentioned in the rule the respondents filed a motion to dismiss and answers to the petition. The hearing was had upon the motion to dismiss the petition, which contains 17 grounds. I will not notice the ground specifically.

[1] The first question to be decided is: Have the three creditors adopting the petition of the stockholders a right to contest the voluntary adjudication? This question must be answered in the negative, on the authority of In re Ives, 113 Fed. 911, 51 C. C. A. 541; In re Guanacevi Tunnel Co., 201 Fed. 316, 119 C. C. A. 554; Johnson v. Norris, 190 Fed. 463, 111 C. C. A. 291, L. R. A. 1915B, 884. Other cases might be cited to the same effect.

[2] The next question arising for decision is: Have the board of directors of a corporation in this state the right to file a voluntary petition in bankruptcy? This question must be answered in the affirmative. The law of Florida provides that the business of the corporation shall be conducted by certain officers and the board of directors, and provides for the election of the board by the stockholders. Section 2663, Compiled Laws of Florida. The only ground upon which it could be urged that this power does not exist in the state with the board of directors is the provision for dissolving the corporation. But it has been held, and properly so, that the bankruptcy of the corporation is not equivalent to the statutory dissolution, and the proceedings for such dissolution have no application to bankruptcy proceedings. In re Guanacevi Tunnel Co., supra; Rudebeck v. Sanderson, 227 Fed. 575, 142 C. C. A. 207.

[3] The next question is the effect of the allegations in the petition that the corporation is solvent and no exigency had arisen to require the bankruptcy proceedings. The solvency vel non of the corporation is not material in a voluntary petition. In re Lachenmaier, 203 Fed. 32, 121 C. C. A. 368; In re Russell Wheel & Foundry Co. (D. C.) 222 Fed. 569.

[4] The petition also contends that, suit having been commenced in the state circuit court before the filing of the voluntary petition in bankruptcy, this court should refuse jurisdiction in this matter. I recognize the doctrine that in cases of concurrent jurisdiction in state and United States courts, if the state court has acquired possession of the res, the United States court will not exercise jurisdiction to disturb such possession. I recognize, also, that in such cases actual corporeal possession through an officer is not necessary. If the proceeding is brought for the purpose of acquiring such possession, the court in which the proceeding is first instituted will proceed to administer the same.

[5] The Bankruptcy Act vests in the bankruptcy court the exclusive jurisdiction to administer the assets of the bankrupt estate. The petition is silent as to whether process had issued upon the bill of complaint, but does state that notice of the hearing on the application for a receiver had been given. There had been no appointment of such receiver, and consequently no officer of the state court is here making application to have the property delivered to him.

The principal ground urged by petitioners at the hearing for denying the motion to strike is the allegations of fraudulent intent on the part of the directors in passing the resolution authorizing the filing of the petition, and the fear expressed that the directors will have sufficient influence with the creditors to have an improper man named as trustee at the meeting of the creditors. The allegation in the petition of the solvency of the corporation, when considered as a badge of fraud on the part of the directors in their instituting bankruptcy proceedings, is very much weakened, if not nullified, when the bill of complaint, a copy of which is attached to and made a part of the petition, is considered. Under the showing made by this bill the corporation was insolvent and unable to pay its debts, and if in that condition it was proper that the directors should have taken the course pursued. It was also contended that the resolution was passed at a special meeting of the board, and that the resolution was adopted by five out of seven members, without lawful notice having been given of such meeting to all directors, and that the directors voting on said resolution were the directors against whom the charges were made in the bill.

It does not impress me that these are sufficient reasons to vacate an adjudication in bankruptcy made upon a voluntary petition. The fact of the suit against the directors, to which the corporation was a formal party defendant, would have so affected the credit and standing of the corporation as to have jeopardized the collection of the debts due the creditors. The creditors are interested in the collection of their debts, not in the questions sought to be litigated in the bill of complaint between the stockholders and directors, except it may be incidentally, if the assets of the corporation should prove insufficient to pay its debts.

Section 4 of the Bankruptcy Act provides specifically that the bankruptcy of the corporation shall not release its officers or directors from any liability under the laws. I can see no good reason why the suit instituted by certain stockholders against the board of directors should not continue without abatement to final decree. The relief sought against such directors in said suit will be of no interest to the creditors, except in the event above noticed. One of the objects sought by the bill, taking the assets of the corporation from the custody and control of the directors and officers, has been accomplished by the bankruptcy proceedings.

It is my judgment, therefore, that the motion to dismiss the petition of certain of the stockholders and certain of the creditors should be granted. It will be so ordered.

## MEMORANDUM DECISIONS.

AMERICAN LUMBER CO. v. CONTINENTAL LUMBER CO. (Circuit Court of Appeals, Fifth Circuit. February 15, 1917.) No. 2937. In Error to the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge. J. W. Terry and A. H. Culwell, both of Galveston, Tex., and C. T. Duff, of Beaumont, Tex., for plaintiff in error. L. B. Moody and Frank Andrews, both of Houston, Tex., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. From our examination of the record in this case, we find no reversible error assigned or patent of record. Judgment affirmed.

BANK OF INVERNESS v. HAYDEN.* (Circuit Court of Appeals, Fifth Circuit. March 12, 1917.) No. 2931. In Error to the District Court of the United States for the Northern District of Mississippi; Henry C. Niles, Judge. Action by William T. Hayden against the Bank of Inverness. Judgment for the plaintiff, and defendant brings error. Affirmed. John W. Cutrer, of Clarksdale, Miss., for plaintiff in error. Gerald Fitz Gerald, of Clarksdale, Miss., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. The suggestion at the bar that the District Court was without jurisdiction in this case because the citizenship of the assignor, Dickerson, was not alleged in the record, showing that he could have brought the suit in the federal courts in Mississippi, if no assignment had been made, is without merit, because we find in the record conclusive evidence that the said Dickerson, assignor, was a citizen of the state of Alabama, therefore he could have brought the suit in the District Court on the chose in action herein sued on if no assignment had been made. On the merits, the case is clear that the plaintiff below was an innocent holder of the certificates sued on before maturity and for value, and therefore not at all liable on the equities sought to be injected in the case. We find none of the assignments of error are well taken and no reversible error patent in the record. Judgment affirmed.

CHAMBERS v. CONTINENTAL TRUST CO. (Circuit Court of Appeals, Fifth Circuit. February 21, 1917.) No. 2999. Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge. Walter De Fore, of Macon, Ga., for appellant. Geo. S. Jones and Orville A. Park, both of Macon, Ga., for appellee. Before WALKER, Circuit Judge, and GRUBB, District Judge.

PER CURIAM. We are of opinion that this case was properly decided, and that the decree appealed from (235 Fed. 441) should be affirmed, and it is so ordered.

CINCINNATI, I. & W. RY. CO. v. CENTRAL TRUST CO. OF NEW YORK et al. (Circuit Court of Appeals, Sixth Circuit. February 14, 1917.) No. 2914. Appeal from the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge. Morison R. Waite, of Cincinnati, Ohio, for appellant. George H. Warrington and Murray Seasongood, both of Cincinnati, Ohio, for appellees. Order dismissing appeal pursuant to motion filed.

CINCINNATI, I. & W. RY. CO. v. EQUITABLE TRUST CO. OF NEW YORK et al. (Circuit Court of Appeals, Sixth Circuit. February 14, 1917.) No. 2913. Appeal from the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge. Morrison R. Waite,

*Rehearing denied April 28, 1917.

of Cincinnati, Ohio, for appellant. George H. Warrington and Murray Seasongood, both of Cincinnati, Ohio, for appellees. Order dismissing appeal pursuant to motion filed.

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EL CAMPO MACH. CO. et al. v. LAYNE. (Circuit Court of Appeals, Fifth Circuit. February 21, 1917.) No. 2869. Appeal from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge. A. L. Jackson, of Houston, Tex., for appellants. Coke K. Burns, of Houston, Tex., for appellee. Before WALKER, Circuit Judge, and GRUBB, District Judge.

PER CURIAM. Our examination of the record in this case in the light of the briefs of counsel has led us to the conclusion that the record does not show the commission of any reversible error. The judgment appealed from is affirmed.

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FITCH v. YOUNG et al. (Circuit Court of Appeals, Second Circuit. February 6, 1917.) No. 80. Appeal from the District Court of the United States for the Southern District of New York. Ernst & Cane, of New York City, for appellant. Charles A. Taussig, of New York City, for appellees. Before COXE, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree (230 Fed. 743) affirmed.

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In re HOCKING VALLEY RY. CO. (Circuit Court of Appeals, Sixth Circuit. February 6, 1917.) No. 3012. Petition for writ of mandamus. Lawrence Maxwell, of Cincinnati, Ohio, for petitioner. Order for withdrawal of petition for writ of mandamus filed.

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KISKADDEN v. CHRISTY. (Circuit Court of Appeals, Sixth Circuit. February 14, 1917.) No. 2780. In Error to the District Court of the United States for the Northern District of Ohio, in Bankruptcy; John M. Killits, Judge. McCauley & Weller, of Tiffin, Ohio, for plaintiff in error. H. C. De Ran, of Fremont, Ohio, for defendant in error. Order of reversal pursuant to stipulation filed.

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NATIONAL SURETY CO. v. CITIZENS' LIGHT, HEAT & POWER CO. et al. (Circuit Court of Appeals, Fifth Circuit. February 15, 1917.) No. 2985. In Error to the District Court of the United States for the Middle District of Alabama; Henry D. Clayton, Judge. B. P. Crum and John R. Tyson, both of Montgomery, Ala., for plaintiff in error. Ray Rushton, H. F. Crenshaw, and Philip H. Stern, all of Montgomery, Ala., for defendants in error. Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. We find none of the assignments of error well taken and no reversible error patent of record. Judgment affirmed.

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QUINN v. J. H. FAW, Inc. (Circuit Court of Appeals, Second Circuit. February 20, 1917.) No. 165. Appeal from the District Court of the United States for the Southern District of New York. Walter M. Goldsmith, of New York City (Albert F. Nathan, of New York City, of counsel), for appellant. Mitchell & Allyn and Edmund Quincy Moses, all of New York City, for respondent. Before COXE, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree (235 Fed. 166) affirmed.

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REUBIN v. ERIE R. CO. (Circuit Court of Appeals, Sixth Circuit. February 16, 1917.) No. 2918. In Error to the District Court of the United States for the Northern District of Ohio; John H. Clarke, Judge. Payer,

Winch & Rogers, of Cleveland, Ohio, for plaintiff in error. Cushing, Siddall & Lamb, of Cleveland, Ohio, for defendant in error. Order dismissing writ of error pursuant to motion filed.

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SCHUYLKILL SILK MILLS v. SIEGEL. (Circuit Court of Appeals, Second Circuit. February 6, 1917.) No. 144. In Error to the District Court of the United States for the Southern District of New York. Roger Lewis, of New York City, for plaintiff in error. Abraham I. Spiro, of New York City, for defendant in error. Before COXE, WARD, and HOUGH, Circuit Judges.

PER CURIAM. Judgment affirmed.

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SCOTTEN et al. v. SAMUEL et al.* (Circuit Court of Appeals, Second Circuit. January 16, 1917.) No. 150. Appeal from the District Court of the United States for the Southern District of New York. Suit by Samuel C. Scotten and another against Albert D. Samuel and another. From an order and decree dismissing the bill, complainants appeal. Affirmed. See, also, 231 Fed. 357. On appeal from an order and decree dismissing the bill of complaint. The original bill was dismissed by Judge Learned Hand and the amended bill was dismissed by Judge Hough. Thorndike Saunders, of New York City, for appellants. Milton Dammann, of New York City, for appellee Samuel. Marx & Snydecker, of New York City, for appellee Rosenblum. Before COXE and WARD, Circuit Judges.

COXE, Circuit Judge. The questions herein involved have been carefully considered in the District Court and two opinions have been written. In the first opinion Scotten v. Rosenblum (D. C.) 231 Fed. 357, written by Judge Learned Hand the bill is carefully analyzed, with the result that he finds it "to be no more than an effort to retry the action of the plaintiffs against Rosenblum without the limitations applicable to such relief." The amended bill was dismissed by Judge Hough, who held that "the substance of this bill is that the plaintiffs are convinced that they have a good cause of action against Samuel and Rosenblum. * * * This bill is brought apparently in order to compel a discovery on the part of both Rosenblum and Samuel. It is not seen what benefit this can be to plaintiffs, except as a prelude to a suit against Samuel, for they have sued Rosenblum, and a general judgment has been entered in favor of Rosenblum. That matter is closed." We have been unable to discover that the amended bill corrects the defects of the original bill. It is unnecessary to discuss these questions anew as they have been carefully examined by the District Court and a correct conclusion reached. The decree of the District Court is affirmed with costs.

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In re SEWARD DREDGING CO. (Circuit Court of Appeals, Second Circuit. February 6, 1917.) No. 176. Petition to Revise Order of the District Court of the United States for the Southern District of New York. Nathan A. Smyth, of New York City, for petitioner. H. L. Brown, of New York City (John W. H. Crim, of New York City, of counsel), for respondent. Before COXE, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Revision denied, and petition dismissed, with costs.

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In re SHEA. (Circuit Court of Appeals, Sixth Circuit. January 8, 1917.) No. 3013. Petition for writ of mandamus. Sherman T. McPherson, of Cincinnati, Ohio, for petitioner. Order denying petition for writ of mandamus filed.

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STANDARD DRY KILN CO. v. GREEN et al. (Circuit Court of Appeals, Fifth Circuit. February 15, 1917. Rehearing Denied March 20, 1917.) No. 2974. Appeal from the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge. E. Wayles Browne, of Shreveport, La., for appellant. Leon R. Smith, of Shreveport,

*Rehearing denied.

La., for appellees. Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. From an examination of the evidence, in the light of the briefs and oral argument, we find that the decree appealed from was correct and fully supported by the law and facts in the case. Decree affirmed

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TEXAS OIL CO. v. KALMBACH. (Circuit Court of Appeals, Fifth Circuit. March 12, 1917.) No. 2747. In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge. Action by R. A. Kalmbach against the Texas Oil Company. Judgment for plaintiff, and defendant brings error. Affirmed. A. A. Armistead and Moncure Dabney, both of Vicksburg, Miss., for plaintiff in error. T. C. Catchings and O. W. Catchings, both of Vicksburg, Miss., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. There is no dispute about the contract in this case, nor as to what it called for. The evidence shows a breach on the part of the Texas Oil Company giving a right to Kalmbach to sue for damages. From our consideration of the record in the light of the assignments of error and briefs of counsel, we conclude that the plaintiff, Kalmbach, proved damages in the amount directed by the court and found by the jury. Judgment affirmed.

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UNITED STATES v. UNITED STATES ex rel. LEM HIM. (Circuit Court of Appeals, Seventh Circuit. January 19, 1917.) No. 2399. Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois. Charles F. Clyne, of Chicago, Ill., and Benjamin P. Epstein, for appellant. Frank T. Milchrist, of Chicago, Ill., for appellee. Before BAKER, MACK, and ALSCHULER, Circuit Judges.

PER CURIAM. We approve and adopt the opinion of the District Court. reported in 230 Fed. 935, under the title U. S. v. Prentis. The judgment is affirmed.

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WATTS, WATTS & CO., Limited, v. UNIONE AUSTRIACA DI NAVIGAZIONE. (Circuit Court of Appeals, Second Circuit. February 14, 1917.) Appeal from the District Court of the United States for the Eastern District of New York. Motion to recall mandate. See, also, 224 Fed. 188; 229 Fed. 136, 143 C. C. A. 412. Before COXE, WARD, and HOUGH, Circuit Judges.

PER CURIAM. Motion denied on the ground that, the term having passed. this court has no power to recall its mandate. The order entered by Judge Veeder after the certiorari was granted is a nullity. Judge Veeder sitting in admiralty.

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WILKINS v. SWARTZ. (Circuit Court of Appeals, Fifth Circuit. February 21, 1917.) No. 2952. In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge. W. B. Spencer, Charles Payne Fenner, Philip S. Gidiere, Esmond Phelps, and W. B. Le Bourgeois, all of New Orleans, La., for plaintiff in error. Edward N. Pugh and Walter Lemann, both of Donaldsonville, La., for defendant in error. Before WALKER, Circuit Judge, and GRUBB, District Judge.

PER CURIAM. We are of opinion that the action of the trial court in this case in denying the plaintiff's motion for judgment in his favor was correct. The assignment of that action as error is not sustainable. The judgment under review is affirmed.

END OF CASES IN VOL. 239

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## ADMINISTRATION.

See Bankruptcy, ⚖219–273; Executors and Administrators; Receivers, ⚖90.

## ADMIRALTY.

See Collision; Damages, ⚖67; Salvage; Seamen; Shipping; Towage.

### I. JURISDICTION.

⚖22 (U.S.D.C.) Admiralty has jurisdiction of a suit for damages against a navigating vessel for injury to a submarine cable lying on the bottom of a channel.—United States v. North German Lloyd, 239 F. 587.

⚖25 (U.S.D.C.) Where no protest is made by a foreign consul against the taking of jurisdiction of a suit in admiralty between citizens of his country until final hearing, the court may properly in the exercise of its discretion retain jurisdiction.—The Strathearn, 239 F. 583.

### IX. APPEAL.

⇐118 (U.S.C.C.A.) A finding of fact by the District Judge in an admiralty suit, based upon testimony taken in open court, should be accepted by the appellate court, unless the evidence clearly preponderates against it.—Erie & M. Ry. & Nav. Co. v. Dunseith, 239 F. 814.

### X. COSTS.

⇐122 (U.S.C.C.A.) Respondents in a suit in admiralty, who were exonerated from liability, *held* entitled to costs from a corespondent, who was held liable to libelant.—The Louise Rugge, 239 F. 458.

## ADMISSION.

See Evidence, ⇐215.

## ADVERSE POSSESSION.

See Corporations, ⇐312; Easements; Limitation of Actions; Mines and Minerals, ⇐49.

### I. NATURE AND REQUISITES.

#### (B) Actual Possession.

⇐16(1) (U.S.C.C.A.) Building small house, cutting saplings, and burning brush *held* not to constitute adverse possession under the law of West Virginia.—Ewart v. Squire, 239 F. 34.

#### (E) Duration and Continuity of Possession.

⇐42 (U.S.C.C.A.) Ky. St. § 2505, prescribing a 15-year limitation upon actions for recovery of real property, does not begin to run until adverse possession.—Pond Creek Coal Co. v. Hatfield, 239 F. 622.

⇐54 (U.S.C.C.A.) Under Ky. St. § 2505, prescribing a 15-year limitation upon actions for recovery of real property, bar is not complete unless adverse possession is continuous for full statutory period.—Pond Creek Coal Co. v. Hatfield, 239 F. 622.

## AFFIDAVITS.

See Pleading, ⇐155.

## AFFREIGHTMENT.

See Shipping, ⇐106, 145.

## AFTER-ACQUIRED TITLE.

See Deeds, ⇐116.

## AGE.

See Appeal and Error, ⇐1050.

## AGENCY.

See Principal and Agent.

## AGREEMENT.

See Contracts.

## ALIENS.

### II. EXCLUSION OR EXPULSION.

⇐32(13) (U.S.D.C.) Under Act Feb. 20, 1907, § 25, which was a continuation of earlier similar enactments, decision of collector of customs, admitting a Chinese person to United States as native-born citizen, is not a conclusive adjudication, preventing subsequent deportation proceedings.—Ex parte Chin Own, 239 F. 391.

### III. IMMIGRATION.

⇐54 (U.S.C.C.A.) Where counsel for alien whose deportation was sought stated that he did not desire to offer further testimony, and later that he did not desire to file a brief, defects in cabled authority of warrants on which the alien was arrested were waived.—Toku Sakai v. United States, 239 F. 492.

An alien deported under Immigration Act Feb. 20, 1907, § 3, as amended by Act March 26, 1910, § 2, on ground that she was practicing prostitution, *held* not entitled to complain of the order against her, having admitted the charge and received a fair hearing.—Id.

⇐56 (U.S.C.C.A.) Under Act Feb. 20, 1907, §§ 4, 5, defendant, who solicited contract laborers to enter the United States, is guilty of a violation of the act, and liable to fine, though laborers did not actually enter.—New York Cent. & H. R. R. Co. v. United States, 239 F. 130.

### IV. NATURALIZATION.

⇐61 (U.S.D.C.) Under Naturalization Laws, § 30 (Act June 29, 1906, as amended), and despite Rev. St. § 2169 (Comp. St. 1913, § 4358), which was part of Naturalization Act of 1870, as amended in 1875, persons not citizens owing permanent allegiance to United States may become citizens pursuant to section 30 on becoming residents of organized territory, though they be not white persons, nor of African nativity or descent.—In re Mallari, 239 F. 416.

⇐62 (U.S.D.C.) A petitioner for naturalization *held* not to have continuously resided within the United States or within the state for the period required by Act June 29, 1906.—In re Cook, 239 F. 782.

Merely temporary absence from the United States or a state will not prevent an alien who has actually resided here from securing naturalization; but the absence in each case must be examined, to determine whether it has broken the continuity of the residence.—Id.

⇐68 (U.S.D.C.) A citizen of the Philippines honorably discharged from the navy must comply with Naturalization Law, § 30 (Act June 29, 1906, as amended), and cannot be admitted without declaration of intention or residence under Act July 26, 1894, relating to admission to citizenship of aliens honorably discharged from the navy.—In re Mallari, 239 F. 416.

## ALTERATION OF INSTRUMENTS.

See Reformation of Instruments.

# AMENDMENT.

See Appeal and Error, ⇐888, 959; Bankruptcy, ⇐84; Equity, ⇐271; Motions, ⇐58; Pleading, ⇐17, 236.

# ANTI-TRUST LAW.

See Monopolies.

# APPEAL AND ERROR.

See Admiralty, ⇐118; Bankruptcy, ⇐455, 468; Courts, ⇐356; Criminal Law, ⇐1004, 1054, 1159.

## V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

### (B) Objections and Motions, and Rulings Thereon.

⇐204(4) (U.S.C.C.A.) Objection to introduction of exemplified copy of letters testamentary of foreign executor, who was suing as plaintiff, cannot be considered on appeal, where not called to attention of trial court.—Cordingly v. Kennedy, 239 F. 645.

⇐219(2) (U.S.C.C.A.) General finding made in cause submitted to court under Rev. St. § 700 (Comp. St. 1913, § 1668), is not reviewable where no request for special findings nor motion for a finding for adverse party was made during the trial.—Calaf v. Fernandez, 239 F. 795.

⇐230 (U.S.C.C.A.) Where it did not appear that objection to testimony was made before witness answered question, receipt thereof cannot be complained of on appeal.—Klein v. Darnell, 239 F. 844.

⇐237(5) (U.S.C.C.A.) Where there was no request to direct a verdict, the charge is not in the record, and no exceptions were taken, nor error assigned to the ruling on a motion for new trial, defendant cannot urge the insufficiency of the evidence to support the verdict.—Kalloch v. Hoagland, 239 F. 252.

### (C) Exceptions.

⇐261 (U.S.C.C.A.) Where no exception was taken relating exclusively to language of summing up of defendant's counsel, complaint on appeal cannot be predicated thereon.—Akalitis v. Philadelphia & Reading Coal & Iron Co., 239 F. 299.

⇐268(1) (U.S.C.C.A.) Where there was no request to direct a verdict, the charge is not in the record, and no exceptions were taken, nor error assigned to the ruling on a motion for new trial, defendant cannot urge the insufficiency of the evidence to support the verdict.—Kalloch v. Hoagland, 239 F. 252.

⇐274(3) (U.S.C.C.A.) Exception to judgment *held* insufficient to preserve for review rejection of testimony, and so assignment of error complaining of such rejection may be disregarded.—Cordingly v. Kennedy, 239 F. 645.

## X. RECORD AND PROCEEDINGS NOT IN RECORD.

### (J) Conclusiveness and Effect, Impeaching and Contradicting.

⇐662(1) (U.S.D.C.) A suit for the infringement of a patent will not be dismissed because of undenied statement by defendant's counsel that no infringement was involved, etc.; the record showing to the contrary.—Globe Knitting Works v. Segal, 239 F. 322.

### (K) Questions Presented for Review.

⇐694(1) (U.S.C.C.A.) Where there was no request to direct a verdict, the charge is not in the record, and no exceptions were taken, nor error assigned to the ruling on a motion for new trial, defendant cannot urge the insufficiency of the evidence to support the verdict.—Kalloch v. Hoagland, 239 F. 252.

## XI. ASSIGNMENT OF ERRORS.

⇐719(10) (U.S.C.C.A.) Where there was no request to direct a verdict, the charge is not in the record, and no exceptions were taken, nor error assigned to the ruling on a motion for new trial, defendant cannot urge the insufficiency of the evidence to support the verdict.—Kalloch v. Hoagland, 239 F. 252.

## XVI. REVIEW.

### (A) Scope and Extent in General.

⇐850(3) (U.S.C.C.A.) An opinion will not take the place of findings, as regards the record, preserving right to review depending on findings.—First Nat. Bank v. Weitzel, 239 F. 497.

⇐853 (U.S.C.C.A.) An instruction not excepted to stands as the law of the case.—American Locomotive Co. v. Harris, 239 F. 234.

⇐854(4) (U.S.C.C.A.) A judgment will not be reversed for the exclusion of evidence which was inadmissible, though the reason assigned by the trial court was inaccurate or incomplete.—Kalloch v. Hoagland, 239 F. 252.

### (D) Amendments, Additional Proofs, and Trial of Cause Anew.

⇐888(2) (U.S.C.C.A.) Where instructions allowed finding for plaintiff on count of indebitatus assumpsit, though such recovery was not warranted by evidence, *held*, that plaintiff should not be allowed on appeal to file as amendment declaration in special assumpsit, and have affirmance of judgment on theory that verdict was based on count in quantum meruit.—American Locomotive Co. v. Harris, 239 F. 234.

### (E) Presumptions.

⇐909(1) (U.S.C.C.A.) In an action for the death of a brakeman, it will be presumed that matter omitted from the record, to which a witness referred in indicating the position of a crack in the railroad truck, was sufficient to support the verdict.—Pennsylvania R. Co. v. Glas, 239 F. 256.

⇐920(1) (U.S.C.C.A.) In view of presumption of validity attending acts of a court of record, *held*, that defendant against whom a foreign executor recovered judgment could not question

judgment on appeal, because executor's bond was not in accordance with Rev. St. Colo. 1908, § 7153, for twice amount of recovery; lower court having discretion to accept lesser bond.—Cordingly v. Kennedy, 239 F. 645.

⊂=928(2) (U.S.C.C.A.) Where defendant did not complain of the charge given, there is a presumption that the instructions were as favorable to defendant as the case warranted.—Carolina C. & O. Ry. Co. v. Stroup, 239 F. 75.

**(F) Discretion of Lower Court.**

⊂=959(1) (U. S. C. C. A.) The allowance of amendments to pleadings is in the discretion of the court, and such discretion will ordinarily not be disturbed.—In re Frank, 239 F. 709.

⊂=959(1) (U.S.C.C.A.) The denial of leave to amend pleadings will not be reviewed, unless an abuse of discretion appears.—Gooch v. Presbyterian Home Hospital, 239 F. 828.

**(G) Questions of Fact, Verdicts, and Findings.**

⊂=995 (U.S.C.C.A.) An appellate court cannot weigh the evidence to determine whether it is sufficient to sustain a verdict.—Carolina C. & O. Ry. Co. v. Stroup, 239 F. 75.

⊂=997(3) (U.S.C.C.A.) In reviewing the trial court's denial of motion for new trial, the fact that he had seen and heard the witnesses should be considered in support of his action.—Carolina C. & O. Ry. Co. v. Stroup, 239 F. 75.

⊂=1002 (U.S.C.C.A.) Defendant cannot, on appeal, object that the commission for labor and materials not furnished by plaintiff should not have been allowed him, where the evidence as to plaintiff's right thereto was conflicting, and the question was properly submitted to the jury.—Valentine v. Quackenbush, 239 F. 832.

⊂=1004(1) (U.S.C.C.A.) A verdict for much less than half the amount received by defendant in an enterprise in which plaintiff claimed to be a partner will not be set aside as not based on the account of either party, where there was evidence as to the deductions to be made from the gross amount received by defendant sufficient to support the verdict.—Worden v. Kenny, 239 F. 131.

⊂=1005(1) (U.S.C.C.A.) An appellate court should be clearly convinced before setting up its own judgment against that of the trial judge and the jury on an issue of negligence.—Southern Power Co. v. McClure, 239 F. 495.

⊂=1008(2) (U.S.C.C.A.) A finding by the court in a case tried by consent without a jury, justified by the evidence received, cannot be re-examined.—Shelton v. Gas Securities Co., 239 F. 653.

⊂=1009(1) (U.S.C.C.A.) Findings in equity proceedings by the trial court, who saw the witnesses and was in close touch with the locality and physical conditions, will not be disturbed, except in case of clear and unmistakable error.—Semidey v. Central Aguirre Co., 239 F. 610.

⊂=1009(1) (U.S.C.C.A.) Findings of fact by the trial judge in an equity case will not be disturbed on appeal, unless the evidence preponderates against them.—Estep v. Kentland Coal & Coke Co., 239 F. 617.

⊂=1011(1) (U.S.C.C.A.) A finding of the District Court that miner's rules relating to the diversion of water were not in force when the rights of the parties originated, made upon conflicting evidence, cannot be disregarded by the Circuit Court of Appeals, even if contrary to the weight of evidence.—Alaska-Juneau Gold Mining Co. v. Ebner Gold Mining Co., 239 F. 638.

**(H) Harmless Error.**

⊂=1050(1) (U.S.C.C.A.) Erroneous admission of hearsay testimony, corroborating only witness testifying to fact found by jury, *held* not necessarily harmless, on theory that it did not affect jury.—Klein v. Darnell, 239 F. 844.

⊂=1050(2) (U.S.C.C.A.) In action for death of plaintiff's husband, a servant, erroneous admission of evidence as to ages and occupation of plaintiff's children was harmless.—Akalitis v. Philadelphia & Reading Coal & Iron Co., 239 F. 299.

⊂=1051(3) (U.S.C.C.A.) The admission of evidence as to a fact not alleged in the declaration is harmless, where similar evidence had been more than once introduced without objection, and defendant admitted that he knew the condition existed.—Kalloch v. Hoagland, 239 F. 252.

⊂=1064(1) (U.S.C.C.A.) In assumpsit by a sales agent, submitted on the common counts, *held*, that an instruction allowing recovery of the commissions provided amounted to reversible error; the sales agent not having consummated the sale.—American Locomotive Co. v. Harris, 239 F. 234.

**(I) Error Waived in Appellate Court.**

⊂=1078(1) (U.S.C.C.A.) Contentions not discussed either in appellant's brief or orally must be treated as abandoned.—Pond Creek Coal Co. v. Hatfield, 239 F. 622.

**XVII. DETERMINATION AND DISPOSITION OF CAUSE.**

**(D) Reversal.**

⊂=1178(6) (U.S.C.C.A.) Where it did not appear that the jury might not have found for plaintiff on an incorrect theory of liability, the new trial after reversal on appeal, should not be limited to the question of damages.—American Locomotive Co. v. Harris, 239 F. 234.

## APPEARANCE.

See Courts, ⊂=276.

## APPLIANCES.

See Master and Servant, ⊂=226.

## APPOINTMENT.

See Brokers, ⊂=7.

## APPORTIONMENT.

See Salvage, ⊂=26, 38.

## APPROPRIATION.

See Waters and Water Courses, ⊂=16.

## ARGUMENTATIVE.

See Pleading, ⇐17.

## ARGUMENT OF COUNSEL.

See Appeal and Error, ⇐261.

## ARMY AND NAVY.

See Militia.

⇐19 (U.S.C.C.A.) Under Rev. St. § 1116 (Comp. St. 1913, § 1884), amended by Act March 2, 1899, section 1117 (Comp. St. 1913, § 1885), amended by National Defense Act June 3, 1916, Comp. St. Ann. 1916. § 1714, National Defense Act June 3, 1916, § 57, Act Aug. 29, 1916, § 3, Articles of War, 54, 55, 58, a minor under 16 years who attempts to enlist does not become a soldier.—Hoskins v. Pell, 239 F. 279.

⇐36 (U.S.C.C.A.) A minor under 16 who attempted to enlist and did no other act *held* not guilty of fraudulent enlistment within Act Aug. 29, 1916, § 3, Articles of War, 54.—Hoskins v. Pell, 239 F. 279.

⇐38 (U.S.C.C.A.) A minor under 16 who attempted to enlist *held* not a deserter within Act of Aug. 29, 1916, § 3, Articles of War, 58.—Hoskins v. Pell, 239 F. 279.

## ASSIGNMENT OF ERRORS.

See Appeal and Error, ⇐719.

## ASSIGNMENTS.

See Fraudulent Conveyances; Internal Revenue, ⇐38; Patents, ⇐137, 198, 202; Powers, ⇐28.

## ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy.

### II. CONSTRUCTION AND OPERATION IN GENERAL.

⇐184 (U.S.C.C.A.) Under the Illinois law an assignee in insolvency stands in no better position than the assignor with respect to one holding a lien, legal or equitable.—In re Mossler Co., 239 F. 262.

## ASSUMPSIT, ACTION OF.

See Abatement and Revival, ⇐53; Brokers, ⇐79.

## ASSUMPTION OF RISK.

See Master and Servant, ⇐217, 226, 288.

## ATTACHMENT.

See Bankruptcy, ⇐165–198; Execution; Judgment, ⇐570.

## ATTORNEY AND CLIENT.

See Appeal and Error, ⇐261; Bankruptcy, ⇐482; Corporations, ⇐312.

## AUTHORITY.

See Principal and Agent, ⇐92, 102.

## BAILMENT.

See Bankruptcy, ⇐155; Carriers, ⇐177; Shipping, ⇐106, 145.

## BANKRUPTCY.

See Assignments for Benefit of Creditors; Conspiracy, ⇐28.

### II. PETITION, ADJUDICATION, WARRANT, AND CUSTODY OF PROPERTY.

#### (A) Jurisdiction and Course of Procedure in General.

⇐20(1) (U.S.D.C.) State court has no power by any form of order or injunction to limit operation of Bankruptcy Act, or impair jurisdiction of court of bankruptcy, and cannot enjoin corporation from filing petition for voluntary bankruptcy.—In re Hargadine-McKittrick Dry Goods Co., 239 F. 155.

⇐20(1) (U.S.D.C.) In cases of concurrent jurisdiction, where the state court had acquired possession of the res, the United States court will not exercise jurisdiction to disturb such possession, and in such cases actual corporeal possession through an officer is not necessary.—In re United Grocery Co., 239 F. 1016.

⇐20(2) (U.S.D.C.) Fact that state court has, by appointing receiver, acquired jurisdiction over all property of petitioner for voluntary bankruptcy, and that such jurisdiction is exclusive, is no defense to voluntary petition.—In re Hargadine-McKittrick Dry Goods Co., 239 F. 155.

Under Bankr. Act, §§ 3(4), 67c, 67f, insolvency of voluntary bankrupt is indispensable prerequisite to exercise by bankruptcy court of jurisdiction over property of bankrupt in possession of receiver of state court.—Id.

#### (B) Voluntary Proceedings.

⇐41 (U.S.D.C.) To entitle petitioner to be adjudicated voluntary bankrupt, it is not essential that it should own any property, or that its property should be subject to administration in bankruptcy.—In re Hargadine-McKittrick Dry Goods Co., 239 F. 155.

It is not essential that petitioner for voluntary bankruptcy be insolvent.—Id.

⇐43 (U.S.D.C.) Directors of a corporation have authority in Missouri to put corporation into voluntary bankruptcy.—In re Hargadine-McKittrick Dry Goods Co., 239 F. 155.

That corporation and its directors appeared and contested suit against them in state court, in which receiver was appointed, does not estop them from filing voluntary petition in bankruptcy.—Id.

Right of corporation in proper case under Bankruptcy Act to file petition for voluntary bankruptcy cannot be denied, because of improper motives.—Id.

⇐43 (U.S.D.C.) Under Comp. Laws Fla. 1914, § 2663, the directors have authority to file on

behalf of the corporation a voluntary petition in bankruptcy, notwithstanding the provisions regulating the dissolution of corporations.—In re United Grocery Co., 239 F. 1016.

The solvency or insolvency of a corporation petitioning for voluntary bankruptcy is not material.—Id.

⊂=44 (U.S.D.C.) Allegation in petition for voluntary bankruptcy that bankrupt owes debts establishes prima facie existence of provable debts against bankrupt.—In re Hargadine-McKittrick Dry Goods Co., 239 F. 155.

⊂=47 (U.S.D.C.) Creditors of a corporation have no right to contest the voluntary adjudication of the corporation on the ground that the directors had no authority to file the petition, and that their purpose was to avoid liability in a suit by the stockholders.—In re United Grocery Co., 239 F. 1016.

⊂=51 (U.S.D.C.) Stockholders of corporation, petitioning for voluntary bankruptcy, cannot intervene to object to adjudication.—In re Hargadine-McKittrick Dry Goods Co., 239 F. 155.

Where petition for voluntary bankruptcy is in due form, properly verified, and avers all the jurisdictional and other essential facts, adjudication must be made, and thereafter any party in interest can move to vacate it upon jurisdictional grounds.—Id.

⊂=51 (U.S.D.C.) In view of Bankr. Act, § 4, the fraudulent purpose of directors of a corporation to avoid liability in the stockholders' suit, in which no receiver had yet been appointed, by filing a petition in voluntary bankruptcy, does not require the adjudication to be set aside on petition of the stockholders.—In re United Grocery Co., 239 F. 1016.

#### (C) Involuntary Proceedings.

⊂=59 (U.S.D.C.) Failure of an insolvent to discharge a lien, obtained through judicial proceedings more than four months prior to bankruptcy proceedings, *held* not an act of bankruptcy, although the time fixed for sale of the property was within the four months period.—In re Superior Jewelry Co., 239 F. 373.

⊂=84 (U.S.C.C.A.) The refusal to permit an involuntary petition in bankruptcy to be verified at the hearing because the testimony of petitioners showed that they had no knowledge of the facts therein stated was not an abuse of discretion.—In re Frank, 239 F. 709.

#### (D) Warrant and Custody of Property.

⊂=114(1) (U.S.D.C.) Under Bankr. Act, § 2(3), to warrant bankruptcy court in appointing receiver, it must find that it is absolutely necessary for preservation of bankrupt's property that receiver be placed in charge thereof.—In re Hargadine-McKittrick Dry Goods Co., 239 F. 155.

Petition for appointment of receiver in bankruptcy, merely alleging necessity therefor in language of statute, is not sufficient; but it must allege facts which reasonably establish such necessity.—Id.

Where voluntary petition in bankruptcy was filed by corporation after state court had handed down opinion announcing appointment of receiver, but before entry of decree of appointment, no receiver will be appointed in bankruptcy proceedings.—Id.

In voluntary bankruptcy proceedings, *held*, that there was not sufficient showing of insolvency of the bankrupt to warrant appointment of receiver in bankruptcy, who would take property from control of receiver appointed by state court.—Id.

### III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

#### (A) Appointment, Qualification, and Tenure of Trustee.

⊂=125 (U.S.C.C.A.) Under Bankr. Act, § 44, efforts of creditors to control election of trustee, so long as directed to the welfare of the entire body of unsecured creditors, are not objectionable.—Bollman v. Tobin, 239 F. 469.

⊂=132 (U.S.C.C.A.) The trustee in bankruptcy failing, without reason, to carry out the wishes of the creditors by whom he was chosen, preventing their necessary co-operation, should be removed.—Bollman v. Tobin, 239 F. 469.

#### (B) Assignment, and Title, Rights, and Remedies of Trustee in General.

⊂=140(1) (U.S.C.C.A.) Under Personal Property Law N. Y. § 62, an unrecorded conditional sale contract is valid against the creditors of the buyer, so that the trustee in bankruptcy acquires no rights to the property under Bankr. Act, § 47a2.—Mergenthaler Linotype Co. v. Hull, 239 F. 26.

⊂=143(12) (U.S.C.C.A.) The trustee of a bankrupt cannot recover, after the bankrupt's death, the amount of a policy payable to his wife, with right to change beneficiary, which the company had paid to the wife without notice of any adverse claim thereto.—Frederick v. Metropolitan Life Ins. Co. of New York, 239 F. 125.

⊂=145(2) (U.S.C.C.A.) A stockholder of a Minnesota corporation is liable for the difference between the par value of his stock and the agreed amount he paid therefor only to those giving credit on the capital stock, notwithstanding Gen. St. Minn. 1913, § 6193, and such liability cannot be enforced by the trustee in bankruptcy.—Courtney v. Croxton, 239 F. 247.

⊂=155 (U.S.C.C.A.) A trustee can have the bonds of the bankrupt corporation pledged for a debt which had been paid, and which are held by the pledgee to secure the debt of another, canceled, though there was no fraud.—First Nat. Bank v. Towner, 239 F. 433.

#### (C) Preferences and Transfers by Bankrupt, and Attachments and Other Liens.

⊂=165(2) (U.S.C.C.A.) For insolvent partners of an insolvent firm, within four months of petition in bankruptcy, to secure a firm debt on their individual properties, is a preference.—Ft. Pitt Coal & Coke Co. v. Diser, 239 F. 443.

⊂=165(3) (U.S.C.C.A.) Whether a debt, to secure which a lien was created within four months of bankruptcy, was a pre-existing debt, within Bankr. Act, § 60, must be determined as of the date of the creation of the lien.—In re Mossler Co., 239 F. 262.

Where a lease reserved to the lessor the right

to distrain for rent due declaring that the lessor should have a lien on all property of the lessee, rent for which levy was made was a pre-existing debt, under Bankruptcy Act.—Id.

⚖178(2) (U.S.D.C.) The promise arising from payment by bankrupt on a barred claim is an "incumbrance," which being made within four months of bankruptcy proceedings with intent to defraud any creditors are declared void by Bankr. Act, § 67e.—In re Salmon, 239 F. 413.

⚖188(1) (U.S.C.C.A.) Under the Bankruptcy Act, and Lien Law N. Y. § 235, the rights of a chattel mortgagee against the trustee in bankruptcy of the mortgagor are limited to the amount of his interest, as stated in the statement filed in accordance with Lien Law N. Y. § 235.—Senft v. Lewis, 239 F. 116.

Where a chattel mortgagee at the expiration of one year filed a statement that his interest in the mortgage was a certain amount, with interest, and there was no proof that any interest had been paid, he is entitled to the interest on the amount of principal claimed from the date of the mortgage, as against the trustee in bankruptcy of the mortgagor.—Id.

⚖188(3) (U.S.D.C.) Claimant, who made advances to corporation which later became bankrupt, *held* entitled to an equitable lien on accounts, or proceeds thereof, which the bankrupt corporation agreed to assign to him.—In re Imperial Textile Co., 239 F. 775.

⚖198 (U.S.C.C.A.) Lien obtained within four months of bankruptcy under a distress warrant levied by lessor pursuant to an express grant of such right in lease is not one obtained through legal proceedings, and is not dissolved under Bankr. Act, §§ 67d, 67f.—In re Mossler Co., 239 F. 262.

⚖217(3) (U.S.C.C.A.) Bankr. Act, § 67f, nullifies the lien of a garnishment process issued by a state court within four months before bankruptcy, against the wages of the bankrupt, so that an order of the bankrupt court after discharge of the bankruptcy is not invalid as an attempt to oust the state court from possession of the fund.—In re Obergfoll, 239 F. 850.

### (D) Administration of Estate.

⚖219 (U.S.C.C.A.) Adjudication in bankruptcy of a partnership on grounds of insolvency *held* to give the court jurisdiction to pass on acts of partners in securing a partnership debt on their individual properties, though they are not adjudged bankrupt.—Ft. Pitt Coal & Coke Co. v. Diser, 239 F. 443.

Though the court only adjudges a partnership insolvent, it may, under the power given by Bankr. Act, § 5g, to marshal assets, set aside security given by partners on their individual properties to a firm creditor, even if not a technical preference.—Id.

⚖223 (U.S.C.C.A.) Where trustee in bankruptcy is not entitled to statutory commissions for general administration of estate out of proceeds of sale of mortgaged property which amount to less than liens, referee is entitled to no commissions.—Gugel v. New Orleans Nat. Bank, 239 F. 676.

⚖249 (U.S.C.C.A.) Where, to wind up estate, trustee needed demised premises, *held*, that rent paid by trustee during time of his occupancy should be charged as expense of administration, but other rentals should not.—Louisville Woolen Mills v. Tapp, 239 F. 463.

⚖254 (U.S.C.C.A.) Holder of an option from a bankrupt for the purchase of land *held* entitled to specific enforcement by the bankruptcy court, on an offer to pay sufficient to satisfy all claims against the estate and costs.—Dunlop v. Baker, 239 F. 193.

⚖255 (U.S.C.C.A.) The lessor cannot claim from the receiver in bankruptcy of his lessee reasonable rental for the premises during the period prior to the commencement of the term during which the lessee was to have possession rent free.—In re Budd, 239 F. 307.

⚖257 (U.S.C.C.A.) A sale through bankruptcy proceedings is a judicial sale, subject to the same rules as an auction; so that a bid may be withdrawn before the hammer falls.—In re Glas-Shipt Dairy Co., 239 F. 122.

The trustee in bankruptcy, ordered to receive bids for property and to submit them to the court with recommendations, having recommended that the only bid received be accepted, if it be increased a certain amount, it could, before it was accepted, be withdrawn.—Id.

⚖258 (U.S.C.C.A.) Where lienholder accepted service of petition, in bankruptcy of owner, to sell property free from liens, such acceptance amounts to a consent to that mode of disposition.—Gugel v. New Orleans Nat. Bank, 239 F. 676.

⚖260 (U.S.C.C.A.) An order in bankruptcy *held* not strictly one of sale, but for the trustee to receive bids and submit them to the court with recommendations.—In re Glas-Shipt Dairy Co., 239 F. 122.

⚖267 (U.S.C.C.A.) Holder of an option from a bankrupt for the purchase of land, subsequently sold by the trustees, *held* entitled to the surplus proceeds after payment of the debts and costs of proceedings.—Dunlop v. Baker, 239 F. 193.

⚖268 (U.S.D.C.) An agreement between the buyer of personal property and the receiver in bankruptcy that the real estate would sell for a certain figure, with unaccrued taxes in addition, *held* not to require the buyer, on purchasing the property for more than the sum of the agreed figure and the unaccrued taxes, to pay the taxes in addition to his bid.—In re Reading Hat Mfg. Co., 239 F. 357.

⚖273 (U.S.C.C.A.) Where landlord, who asserted lien on property of bankrupt tenant found on demised premises, was overpaid by trustee, his liability to repay amounts to estate was primary, although trustee was also liable.—Louisville Woolen Mills v. Tapp, 239 F. 463.

Payments by trustee in bankruptcy pursuant to orders of referee not made at creditor's meeting and without notice, while supersedeas of former appeal was in effect, must be deemed voluntary payments by the trustee; the orders not being any protection.—Id.

⚖273 (U.S.D.C.) Where the bonds of the authorized depositaries did not extend to savings

accounts on which interest was paid, *held* that, under Bankr. Act, §§ 47a (3), 61, and General Order 29, trustee could not deposit funds of bankrupt estate as a savings account.—In re Dayton Coal & Iron Co., 239 F. 737.

**(E) Actions by or Against Trustee.**

⚖293(1) (U.S.C.C.A.) A court of bankruptcy has jurisdiction to determine any controversy over the distribution of property which has come into its possession as part of the estate of a bankrupt.—Dunlop v. Baker, 239 F. 193.

⚖303(1) (U.S.C.C.A.) In an action by the trustee, under Bankr. Act, § 67e, to recover property conveyed by the bankrupt in fraud of his creditors, proof of the insolvency of the bankrupt at the time of the conveyance is not necessary.—Senft v. Lewis, 239 F. 116.

⚖303(1) (U.S.C.C.A.) The burden of proof being on the trustee, the lien of a lessor, perfected by levy of distress warrant within four months of bankruptcy, cannot be set aside under Bankr. Act, § 60b, in the absence of evidence that the lessor had cause to believe a preference was given.—In re Mossler Co., 239 F. 262.

⚖303(1) (U.S.C.C.A.) Under Bankruptcy Act, prior to amendment of 1910, burden of proof is on a trustee in bankruptcy, seeking to avoid alleged preferential payment, to show that the creditor receiving such payment had reasonable cause to believe that the debtor intended to give him a preference.—Baxter v. Ord, 239 F. 503.

⚖303(3) (U.S.C.C.A.) In a suit by trustee in bankruptcy to set aside alleged preference, evidence *held* insufficient to show that creditor had reasonable cause to believe that he was receiving preference, or was charged with knowledge of fact sufficient to put him upon inquiry which might have resulted in discovery of fact.—Baxter v. Ord, 239 F. 503.

**(F) Claims Against and Distribution of Estate.**

⚖318(3) (U.S.C.C.A.) A claim against a bankrupt for money received cannot be based on a check secured from claimant by fraud and indorsed to the bankrupt, who was a bona fide purchaser for value without notice.—In re United States Hair Co., 239 F. 703.

⚖323 (U.S.C.C.A.) A mortgagee *held* not entitled to attorney's fee provided for in mortgage note, property being sold free from liens in bankruptcy, though note had been placed in hands of an attorney.—Gugel v. New Orleans Nat. Bank, 239 F. 676.

⚖345 (U.S.C.C.A.) The claims of solvent stockholders of a bankrupt corporation, who are liable for the difference between the amount paid for the stock and the par value only to defrauded creditors, will not be postponed in the bankruptcy proceedings to the payment of other claims.—Courtney v. Croxton, 239 F. 247.

⚖348 (U.S.C.C.A.) Claims for wages due from a bankrupt corporation to its clerks *held* entitled to preference under the Texas statutes over the claim of its landlord for rent.—In re Woulfe & Co., 239 F. 128.

⚖348 (U.S.D.C.) One who had been employed by a bankrupt corporation as its president and manager, but whose duties as such were merely nominal, his principal duties being those of clerk and salesman, is entitled to a preference for his claim for wages.—In re Capital Paint Co., 239 F. 424.

**(G) Accounting and Discharge of Trustee.**

⚖368 (U.S.C.C.A.) In view of Bankr. Act, § 67d, *held* that trustees in bankruptcy are not, despite amendment of June 25, 1910, to the act, entitled to commissions where proceeds of incumbered property disposed of in bankruptcy are insufficient to satisfy liens, although lienholders may be charged with costs of foreclosure.—Gugel v. New Orleans Nat. Bank, 239 F. 676.

## IV. COMPOSITION.

⚖384 (U.S.C.C.A.) A paper filed by a District Judge in a bankruptcy proceeding *held* effective as an order confirming a composition.—In re Brookstone Mfg. Co., 239 F. 697.

## V. RIGHTS, REMEDIES, AND DISCHARGE OF BANKRUPT.

⚖391(1) (U.S.D.C.) A creditor, whose debt is not dischargeable in bankruptcy, may, in view of Bankr. Act, §§ 14, 17, 65b, proceed by action at law in state court.—In re Warnock, 239 F. 779.

⚖391(3) (U.S.D.C.) Action in a state court against bankrupt by a creditor will not be stayed by the bankrupt court, though it be creditor's purpose, on any judgment obtained, to attach funds in the trustee's hands, even if this would be a nullity.—In re Bittle, 239 F. 191.

⚖404(1) (U.S.C.C.A.) Under the present Bankruptcy Act, a discharge is a legal right, unless some objection is filed and affirmatively sustained for reasons specifically enumerated in section 14 of the act.—In re Kaufman, 239 F. 305.

⚖404(1) (U.S.D.C.) Corporation is entitled in proper case to receive discharge in bankruptcy.—In re Hargadine-McKittrick Dry Goods Co., 239 F. 155.

⚖404(2) (U.S.D.C.) Where bankrupt fails to apply in due time for discharge, or is denied discharge from debts provable in one proceeding, he cannot be discharged from such debts in subsequent proceeding.—In re Warnock, 239 F. 779.

⚖407(5) (U.S.D.C.) Quære, whether a bankrupt proprietor of a large dry goods store may be visited with the consequences of the acts of her husband in making materially false statements in writing for the purpose of obtaining, and upon which he did obtain, property for her on credit, where he was in full and complete control of the business with her full consent, even though such statements were made without the bankrupt's knowledge or consent.—In re Landersman, 239 F. 766.

⚖408(4) (U.S.C.C.A.) A voluntary bankrupt *held* not the owner of a store in which he was employed as manager, but which he had formerly owned under a conditional sale contract, so that his failure to list it among his assets

did not prevent his discharge in bankruptcy.—In re Kaufman, 239 F. 305.

⇐409(1) (U.S.D.C.) Books kept by a bankrupt merchant, from which no information as to financial condition could be obtained without a complete inventory of the assets, will not prevent denial of discharge, under Bankr. Act, § 14b(2).—In re Landersman, 239 F. 766.

The omission of the agent to whom the bankrupt had intrusted entire control and management of the business to keep proper account books, with intent to conceal financial condition, can be attributed to the bankrupt, so as to bar discharge.—Id.

⇐414(1) (U.S.C.C.A.) In view of presumption of honesty, creditors opposing discharge on ground that bankrupt had been guilty of fraudulent transfer of his property have burden of proof.—In re Braun, 239 F. 113.

⇐414(1) (U.S.D.C.) The failure of a bankrupt to keep proper books and records will be presumed to have been with intent to conceal her financial condition, which was the natural and probable consequence of such failure.—In re Landersman, 239 F. 766.

⇐414(3) (U.S.D.C.) Evidence as to the shrinkage of the bankrupt's assets within a short time, so that books, if kept, would have revealed bad financial condition, *held* sufficient to show an intention to conceal financial condition by failure to keep the books.—In re Landersman, 239 F. 766.

### VI. APPEAL AND REVISION OF PROCEEDINGS.

#### (B) Appeal.

⇐455 (U.S.C.C.A.) Where, to avoid bankruptcy, alleged bankrupt effected settlement with creditors, etc., pending examination, which was stayed for that purpose, complaint of order fixing fees for counsel for petitioning and intervening creditors did not make controversy arising in bankruptcy, appealable under Bankr. Act July 1, 1898, § 24a.—In re Jacobson, 239 F. 79.

⇐461 (U.S.C.C.A.) Assuming the right of appeal from an order confirming a composition, such appeal is governed by Bankr. Act, § 25a, and must be taken within 10 days.—In re Brookstone Mfg. Co., 239 F. 697.

⇐468 (U.S.C.C.A.) On appeal from order denying bankrupt's application for discharge on ground that he had, within four months of the filing of the petition in bankruptcy, conveyed his property to hinder and defraud creditors, *held*, that order should not be affirmed, but should be remanded for purpose of taking further testimony.—In re Braun, 239 F. 113.

⇐468 (U.S.C.C.A.) In contest between lessor and trustee in bankruptcy, *held* that, on reversal of decree denying lessor's petition for payment of claim out of proceeds of sale of goods distrained, cause would be remanded to allow trustee an opportunity to introduce proof against claim, which was evidently excluded by court, because deemed unnecessary.—In re Mossler Co., 239 F. 262.

### VII. COSTS AND FEES.

⇐475 (U.S.D.C.) Under Bankr. Act, § 51a(2), an oath of poverty does not relieve a petitioner in voluntary bankruptcy from his obligation under General Order in Bankruptcy No. 10 (89 Fed. vi, 32 C. C. A. vi) to furnish indemnity, when required, to enable the requisite notice to creditors to be published.—In re Crisp, 239 F. 419.

Where a petitioner in voluntary bankruptcy without excuse fails to indemnify the referee for the cost of publishing notice to creditors in time, his petition may be and should be dismissed for want of prosecution.—Id.

The provisions of Bankr. Act July 1, 1898, §§ 58a, 59g, as amended by Act June 25, 1910, §§ 9½, 10, relate only to dismissals on application of a party in interest, and do not apply to the dismissal of a voluntary petition on initiation of the court for the bankrupt's failure to take the preliminary steps necessary to bring the creditors before the court.—Id.

⇐482(1) (U.S.C.C.A.) Where trustee in bankruptcy is not entitled to statutory commissions for general administration of estates out of proceeds of sale of mortgaged property which amount to less than liens, referee is entitled to no commissions, and trustee cannot take credit for counsel fees for services unconnected with sale of property.—Gugel v. New Orleans Nat. Bank, 239 F. 676.

## BANKS AND BANKING.

### III. FUNCTIONS AND DEALINGS.

#### (E) Loans and Discounts.

⇐179 (U.S.C.C.A.) A bank cannot claim bonds of one corporation delivered to it to secure the debts of another corporation by the controlling stockholder of both as a bona fide purchaser from the stockholder, where it knew that he claimed the bonds only by virtue of his stock ownership.—First Nat. Bank v. Towner, 239 F. 433.

⇐182 (U.S.C.C.A.) Where money loaned by a bank to one corporation was used for another corporation controlled by the same stockholder, such use did not make the latter corporation a debtor to the bank.—First Nat. Bank v. Towner, 239 F. 433.

### IV. NATIONAL BANKS.

⇐254 (U.S.D.C.) Bill by receiver of national bank against directors *held* sufficient to state civil liability, under Rev. St. § 5239 (Comp. St. 1913, § 9831), for knowingly violating or permitting violation of the national banking laws.—Dudley v. Hawkins, 239 F. 386.

## BAR.

See Judgment, ⇐570.

## BEST AND SECONDARY EVIDENCE.

See Evidence, ⇐162, 187.

# BILLS AND NOTES.

See Factors, ⊂⊃47; Waters and Water Courses, ⊂⊃230.

## V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

### (A) Indorsement Before Delivery to or Transfer by Payee.

⊂⊃242 (U.S.C.C.A.) Under Acts Tenn. 1899, c. 94, § 63, an indorser of a note before delivery is not liable as joint maker.—First Nat. Bank v. Towner, 239 F. 433.

### (D) Bona Fide Purchasers.

⊂⊃359 (U.S.C.C.A.) The payment of an existing indebtedness from a firm to a corporation is valuable consideration for the transfer to the corporation of a check payable to the firm.—In re United States Hair Co., 239 F. 703.

Where a firm indorsed a check payable to a corporation to which it was indebted, and there is no evidence as to the purpose of such transfer, it will be presumed to have been a payment of the existing debt.—Id.

## VIII. ACTIONS.

⊂⊃504 (U.S.C.C.A.) That defendant was an accommodation indorser of the note sued on may be shown by transactions occurring out of plaintiff's presence; it being shown to be chargeable with notice.—First Nat. Bank v. Weitzel, 239 F. 497.

⊂⊃525 (U.S.C.C.A.) Evidence in action on note *held* to warrant a finding that plaintiff was not a holder in due course, by reason of facts putting it on inquiry, which would have disclosed that defendant bank indorser was only a forwarding bank.—First Nat. Bank v. Weitzel, 239 F. 497.

# BILLS OF LADING.

See Shipping, ⊂⊃106.

# BONA FIDE PURCHASERS.

See Banks and Banking, ⊂⊃179; Bills and Notes, ⊂⊃359; Specific Performance, ⊂⊃23.

# BONDS.

See Bankruptcy, ⊂⊃155; Banks and Banking, ⊂⊃179; Insurance, ⊂⊃511; Municipal Corporations, ⊂⊃347; Taxation, ⊂⊃95; Waters and Water Courses, ⊂⊃230.

# BOOK KEEPING MACHINES.

See Fraud, ⊂⊃11.

# BOOKS.

See Bankruptcy, ⊂⊃409.

# BOUNDARIES.

## I. DESCRIPTION.

⊂⊃3(1) (U.S.C.C.A.) Relative importance of conflicting elements in the description of boundaries stated.—Ewart v. Squire, 239 F. 34.

# BRIDGES.

See Navigable Waters, ⊂⊃20.

# BROKERS.

See Factors.

## II. EMPLOYMENT AND AUTHORITY.

⊂⊃7 (U.S.C.C.A.) Though a principal appointing a sales agent for particular territory reserved to itself the right to sell in that territory, *held*, that there was an implied agreement not to interfere with pending negotiations of the agent.—American Locomotive Co. v. Harris, 239 F. 234.

## IV. COMPENSATION AND LIEN.

⊂⊃77 (U.S.C.C.A.) A note broker is not entitled to a lien on all notes of his principal in his possession for the amount paid by him on the return of notes sold with option to return.—Eames v. H. B. Claflin Co., 239 F. 631.

## V. ACTIONS FOR COMPENSATION.

⊂⊃79 (U.S.C.C.A.) In assumpsit to recover compensation claimed by sales agent *held* that recovery could not be had on common counts, the contract not being consummated; hence plaintiff's relief was restricted to recovery of damages.—American Locomotive Co. v. Harris, 239 F. 234.

⊂⊃86(3) (U.S.C.C.A.) In assumpsit for commissions for effecting sale of auto trucks, evidence *held* insufficient to show that the contract was completely consummated, though warranting a finding that it would have been effected, but for defendant's interference.—American Locomotive Co. v. Harris, 239 F. 234.

# CABLES.

See Admiralty, ⊂⊃22.

# CANALS.

## I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

⊂⊃18 (U.S.C.C.A.) There is no presumption that a contractor engaged in work on land, on the side of a canal, the doing of which did not interfere with navigation, caused an obstruction in the canal by which a boat was sunk.—Wandell v. Murray, 239 F. 847.

Evidence *held* not to sustain the allegation of a libel that an obstruction on the bottom of the Erie Canal, which caused the sinking of libelant's canal boat, was a stone negligently dropped into the canal by respondent's subcontractors, working on the banks.—Id.

# CANCELLATION OF INSTRUMENTS.

See Contracts, ⊂⊃284; Corporations, ⊂⊃80; Reformation of Instruments.

# CARGO.

See Shipping.

# CARMACK AMENDMENT.

See Carriers, ⊂⊃177.

# CARRIERS.

## II. CARRIAGE OF GOODS.

### (D) Transportation and Delivery by Carrier.

⊂⊃78 (U.S.C.C.A.) A contract by defendant to transport coal in certain vessels on the Great Lakes during three seasons, and by complainant to load all such vessels on their west-bound trips, construed, and *held* to obligate defendant by implication to continue the boats in service during the term.—Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co., 239 F. 603.

### (I) Connecting Carriers.

⊂⊃177(4) (U.S.D.C.) Under the Carmack Amendment, a shipper cannot sue a subsequent carrier to restrain recovery of freight charges and to enforce set-off against such charges of damages to the goods, where there is no showing as to the carrier on whose lines the damage occurred.—Johnson-Brown Co. v. Delaware, L. & W. R. Co., 239 F. 590.

### (J) Charges and Liens.

⊂⊃196 (U.S.D.C.) A plea of recoupment for damages to the shipment to defeat the railroad company's charges is contrary to the act of Congress requiring the freight to be paid only in cash.—Johnson-Brown Co. v. Delaware, L. & W. R. Co., 239 F. 590.

# CAUSE OF ACTION.

See Action.

# CHANCERY.

See Equity.

# CHARGE.

By carriers, see Carriers, ⊂⊃196.
To jury, see Trial, ⊂⊃234–296.

# CHARTER PARTIES.

See Shipping, ⊂⊃41, 54, 58.

# CHATTEL MORTGAGES.

See Bankruptcy, ⊂⊃188.

## III. CONSTRUCTION AND OPERATION.

### (C) Property Mortgaged, and Estates and Interests of Parties Therein.

⊂⊃116 (U.S.C.C.A.) Under Louisiana Act No. 65, of 1912, a chattel mortgage on specifically described lumber gives the mortgagee a lien, subject to the liens of laborers, on the proceeds of the sale of that lumber, not of all lumber coming into the hands of receivers of the mortgagor.—Security Trust Co. v. Bank of Bernice, 239 F. 665.

### (D) Lien and Priority.

⊂⊃138(1) (U.S.C.C.A.) A chattel mortgage on lumber conveys only an equity in the lumber above the amount of the existing liens of mill laborers under Louisiana Act No. 145 of 1888, as amended by Act No. 52 of 1910 and Act No. 23 of 1912.—Security Trust Co. v. Bank of Bernice, 239 F. 665.

⊂⊃157(1) (U.S.C.C.A.) The amount of a mill laborer's lien against lumber covered by a chattel mortgage may be determined between the mortgagee and the mortgagor's receiver by apportioning to that lumber the usual cost of labor in that mill for producing an equal quantity.—Security Trust Co. v. Bank of Bernice, 239 F. 665.

# CHEAT.

See Fraud.

# CHINESE.

See Aliens, ⊂⊃32.

# CHINESE EXCLUSION ACTS.

See Aliens, ⊂⊃32.

# CHURCHES.

See Religious Societies.

# CIRCUIT COURTS OF APPEALS.

See Courts, ⊂⊃405, 406.

# CITATION.

See Process.

# CITIES.

See Municipal Corporations.

# CITIZENS.

See Aliens; Courts, ⊂⊃317.

# CLAIMS.

See Bankruptcy, ⊂⊃318, 323, 345–348; Executors and Administrators, ⊂⊃264; Patents, ⊂⊃167, 174, 176.

# COLLISION.

See Shipping, ⊂⊃81.

## VII. VESSELS AT REST, AT ANCHOR, OR AT PIERS.

⊂⊃71(2) (U.S.C.C.A.) A moving steamer *held* solely in fault for a collision with one of a tow of canal boats anchored in the Hudson river during a dense fog.—The Emeline, 239 F. 502.

⊂⊃74 (U.S.C.C.A.) A finding by the trial court that a collision in Chesapeake Bay at night between an anchored and a moving vessel was due solely to the fault of the moving vessel for failing to keep a proper lookout *held* sustained by the evidence.—The John G. McCullough, 239 F. 111.

## VIII. LIGHTS, SIGNALS, AND LOOKOUTS.

⊂⊃75 (U.S.C.C.A.) That the stern anchor light of a vessel lacked perhaps 5 feet of being 15 feet lower than the forward light, as required by statute, *held* not sufficient to charge her with

fault for collision with a moving vessel.—The John G. McCullough, 239 F. 111.

### IX. FOG OR THICK WEATHER.

⊂=82(2) (U.S.C.C.A.) Failure of a steam vessel to stop on hearing a signal from a vessel ahead in a fog, as required by article 16 of the Inland Rules, *held* to sustain a decree holding her in fault for a collision with a crossing vessel.—The Easton, 239 F. 859.

### X. NARROW CHANNELS, HARBORS, RIVERS, AND CANALS.

⊂=87 (U.S.D.C.) It is proper and usual to discharge a pilot from the lee side of the vessel.—The Philadelphia, 239 F. 396.

It is proper and frequent practice for the pilot to decide from which side he will leave the ship, and to make his arrangements accordingly.—Id.

It is proper and the usual practice, in discharging pilots, for the vessel having the pilot aboard to lay to and stay stopped, making in so doing the side from which the pilot has arranged to leave the lee side.—Id.

It is proper and customary for the pilot boat to do whatever maneuvering is necessary to take off the pilot, and for the other vessel to stay stopped and do nothing.—Id.

It is a proper and frequent course for the pilot boat, if under steam when she approaches another vessel to take off her pilot on the weather side, to go astern and round up on the lee side; but there is nothing improper in her coming to on either side.—Id.

⊂=91 (U.S.C.C.A.) One of two meeting tugs with tows *held* solely in fault for a collision in East River at night for changing her course to port after the exchange of passing signals.—The Madison, 239 F. 860.

⊂=102 (U.S.C.C.A.) A towing tug and a dredge at work in Arthur Kill both *held* in fault for a collision between a boat in the tow and the dredge.—The Ticeline, 239 F. 119.

⊂=102 (U.S.C.C.A.) A collision in North River at night, between a steam yacht passing up, after rounding the Battery, and a steam lighter passing down, but at the time on a crossing course, *held* due to faults of both vessels.—The J. W. Wonson, 239 F. 857.

⊂=102 (U.S.D.C.) A steamship and a pilot boat approaching to take off the steamer's pilot both *held* in fault for a collision between them.—The Philadelphia, 239 F. 396.

### XII. SUITS FOR DAMAGES.

⊂=136 (U.S.C.C.A.) An award of damages to a vessel, injured in collision, for her detention while being repaired, *held* sustained by the evidence.—The Orion, 239 F. 301.

## COLOR OF TITLE.

See Adverse Possession.

## COMBINATIONS.

See Conspiracy; Monopolies; Patents, ⊂=26.

## COMITY.

See Courts, ⊂=96.

## COMMERCE.

See Carriers; Shipping.

### II. SUBJECTS OF REGULATION.

⊂=27(8) (U.S.C.C.A.) A car repairer, employed by an interstate carrier, who was injured while working on a car belonging to another interstate carrier, and which must be returned in interstate commerce, is not "engaged in interstate commerce," within the federal Employers' Liability Act.—Central R. Co. of New Jersey v. Paslick, 239 F. 713.

⊂=27(8) (U.S.C.C.A.) An employé of a carrier, practically all of whose business was interstate commerce, is not engaged in interstate commerce while placing rails in a pit, where they were to be stored until needed.—Hudson & M. R. Co. v. Iorio, 239 F. 855.

## COMMERCIAL PAPER.

See Bills and Notes.

## COMMISSION MERCHANTS.

See Factors.

## COMMISSIONS.

See Brokers, ⊂=79, 86; Principal and Agent, ⊂=81, 89.

## COMMON CARRIERS.

See Carriers; Master and Servant, ⊂=13.

## COMMON LAW.

See Death.

## COMPENSATION.

See Bankruptcy, ⊂=223, 368; Brokers, ⊂=79, 86; Death; Eminent Domain, ⊂=75; Principal and Agent, ⊂=81, 89.

## COMPETENCY.

See Witnesses, ⊂=52, 140–178.

## COMPLAINT.

See Indictment and Information.

## COMPOSITIONS WITH CREDITORS.

See Bankruptcy, ⊂=384.

## COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction; Payment.

⊂=16(1) (U.S.D.C.) Settlement of a suit for infringement against the maker and seller of infringing articles *held* not to bar a subsequent suit against the users.—De Laski & Thropp Circular Woven Tire Co. v. Empire Rubber & Tire Co., 239 F. 139.

## COMPUTATION.

See Limitation of Actions, ⊂=55.

## CONCLUSIVENESS.

See Appeal and Error, ⇐662, 1008.

## CONCURRENT JURISDICTION.

See Courts, ⇐493.

## CONDEMNATION.

See Eminent Domain.

## CONDITIONAL SALES.

See Bankruptcy, ⇐140; Sales, ⇐451, 474.

## CONDITIONS.

See Carriers, ⇐78; Fraudulent Conveyances, ⇐241.

## CONFLICT OF LAWS.

See Landlord and Tenant, ⇐2; Sales, ⇐451.

## CONFORMITY ACT.

See Courts, ⇐347.

## CONNECTING CARRIERS.

See Carriers, ⇐177.

## CONSIDERATION.

See Bills and Notes, ⇐359; Evidence, ⇐432; Mines and Minerals, ⇐58.

## CONSIGNMENT.

See Factors.

## CONSPIRACY.

See Criminal Law, ⇐393, 918; Indictment and Information, ⇐125; Monopolies.

### II. CRIMINAL RESPONSIBILITY.

#### (A) Offenses.

⇐28 (U.S.C.C.A.) Defendants may be convicted of conspiracy to receive the property from a bankrupt after bankruptcy, though the property was taken out of the bankrupt's possession two days before the petition in bankruptcy was filed.—Knoell v. United States, 239 F. 16.

Those conspiring before a petition in bankruptcy was filed to receive the property of the bankrupt, under an agreement which contemplated further action after the petition was filed, may be convicted of a conspiracy to receive the property after bankruptcy.—Id.

#### (B) Prosecution and Punishment.

⇐43(5) (U.S.D.C.) An indictment for conspiracy need not set forth the manner in which the overt acts tended to effect the purpose of the conspiracy.—United States v. United States Brewers' Ass'n, 239 F. 163.

⇐43(6) (U.S.C.C.A.) An indictment *held* sufficient to charge conspiracy to receive property of the bankrupt after bankruptcy, contrary to Bankruptcy Act July 1, 1898, § 29b, cl. 4.—Knoell v. United States, 239 F. 16.

⇐43(6) (U.S.D.C.) An indictment against corporations for conspiracy to make unlawful campaign contributions contrary to Cr. Code, § 83, need not allege that offense with the particularity of an indictment directly charging it as an offense.—United States v. United States Brewers' Ass'n, 239 F. 163.

## CONSTITUTIONAL LAW.

Partial invalidity of statutes, see Statutes, ⇐64.

### II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

⇐48 (U.S.C.C.A.) Where a statute is susceptible of two constructions, one of which works out more reasonable results and in no way infringes the Constitution, that construction will be adopted.—Gugel v. New Orleans Nat. Bank, 239 F. 676.

### V. PERSONAL CIVIL AND POLITICAL RIGHTS.

⇐90 (U.S.D.C.) Cr. Code, § 83, forbidding corporations from making contributions in connection with an election at which Representatives are to be voted for, does not prohibit the freedom of speech or of the press.—United States v. United States Brewers' Ass'n, 239 F. 163.

### VII. OBLIGATION OF CONTRACTS.

#### (B) Contracts of States and Municipalities.

⇐134 (U.S.D.C.) The restriction contained in Civ. Code Cal. § 499, as it existed when a street railroad franchise was granted, on the extent to which two corporations might use the same street or track, was a restriction on the power to grant permission for such use, which could be repealed by the Legislature.—United Railroads of San Francisco v. City and County of San Francisco, 239 F. 987.

### XI. DUE PROCESS OF LAW.

⇐318 (U.S.D.C.) Congress may intrust the decision of an immigrant's right to enter to an executive officer, and, though a denial deprives him of his liberty, he is not denied due process of law.—Ex parte Chin Own, 239 F. 391.

## CONSTRUCTION.

See Carriers, ⇐78; Chattel Mortgages, ⇐116–157; Constitutional Law, ⇐48; Courts, ⇐366; Deeds, ⇐93–116; Mines and Minerals, ⇐73–81; Patents, ⇐157, 202; Sales, ⇐59–87; Statutes, ⇐188–245; Wills, ⇐440.

## CONSTRUCTIVE DELIVERY.

See Gifts, ⇐22.

## CONSULS.

See Admiralty, ⇐25.

# CONTEMPT.

See Courts, ⇐405; Jury, ⇐21.

# CONTRACTOR'S BONDS.

See Municipal Corporations, ⇐347.

# CONTRACTS.

See Abatement and Revival, ⇐53; Accord and Satisfaction; Bankruptcy, ⇐318; Bills and Notes; Chattel Mortgages; Compromise and Settlement; Copyrights, ⇐50; Corporations, ⇐80; Customs and Usages; Damages, ⇐121; Drains, ⇐49; Highways, ⇐113; Injunction, ⇐59; Insurance; Interest; Liens; Mechanics' Liens; Mortgages; Municipal Corporations, ⇐339–375; Partnership; Patents, ⇐218; Payment; Principal and Agent, ⇐81, 89, 102; Receivers, ⇐90; Reformation of Instruments; Sales; Shipping, ⇐41, 54, 58, 106, 145; Specific Performance; Sunday, ⇐13; Vendor and Purchaser.

## V. PERFORMANCE OR BREACH.

⇐284(4) (U.S.D.C.) Where a contract provided that in case of ambiguity the engineer's decision should be final, such decision is binding in the absence of fraud or gross mistake.—Smith v. Copiah County, 239 F. 425.

## VI. ACTIONS FOR BREACH.

⇐346(3) (U.S.C.C.A.) Evidence of defendant's agreement to pay a commission for furnishing plans, which agreement was not alleged in the complaint, but was in the bill of particulars, was admissible, in view of Comp. Laws Alaska 1913, § 919.—Valentine v. Quackenbush, 239 F. 832.

# CONVEYANCES.

See Chattel Mortgages; Deeds; Fraudulent Conveyances; Mortgages.

# COPYRIGHTS.

## II. TITLE, CONVEYANCES, CONTRACTS, AND REGULATIONS.

⇐50 (U.S.C.C.A.) A contract granting the exclusive right to dramatize a novel for presentation on the stage *held* not to convey the right to dramatize for motion picture performance.—Klein v. Beach, 239 F. 108.

A contract, executed after motion picture presentations had become well known, which granted the exclusive right to dramatize for presentation on the stage, has no implied covenant against granting rights for dramatization for motion pictures.—Id.

In a contract granting the exclusive right to dramatize a novel for presentation on the stage, a subsequent clause for the reversion of rights, granted to the producer, to the novelist and dramatist, *held* not to enlarge the rights of the dramatist.—Id.

# CORPORATIONS.

See Bankruptcy, ⇐20–114, 145, 345, 348, 404; Banks and Banking; Carriers; Conspiracy, ⇐43; Constitutional Law, ⇐90; Counties; Courts, ⇐314; Evidence, ⇐22; Internal Revenue, ⇐9, 220; Master and Servant, ⇐304; Municipal Corporations; Railroads; Waters and Water Courses, ⇐230.

## IV. CAPITAL, STOCK, AND DIVIDENDS.

### (B) Subscription to Stock.

⇐80(1) (U.S.D.C.) Provision in stock subscription contract that it should not be annulled by any statement or representation of warranty by agent taking same, unless reduced to writing and incorporated therein, does not apply to fraudulent representations and prevent cancellation of subscription on that ground.—Jones v. Bankers' Trust Co., 239 F. 770.

Stock subscription obtained by verbal fraudulent misrepresentations may be set aside, notwithstanding it provided that no representation of warranty by agent taking it should operate to cancel contract, unless reduced to writing and incorporated therein.—Id.

## V. MEMBERS AND STOCKHOLDERS.

### (A) Rights and Liabilities as to Corporation.

⇐174 (U.S.D.C.) A stockholder is not an agent of the corporation in which he holds a share.—Rensselaer & S. R. Co. v. Irwin, 239 F. 739.

⇐180 (U.S.C.C.A.) The owner of nearly all the stock in a corporation sustains a fiduciary relation to it, and acts with relation to its property at his instance are done on behalf of the corporation or for its benefit.—Alaska Juneau Gold Mining Co. v. Ebner Gold Mining Co., 239 F. 638.

⇐182 (U.S.D.C.) A stockholder has no legal title to any of the corporation's property.—Rensselaer & S. R. Co. v. Irwin, 239 F. 739.

## VI. OFFICERS AND AGENTS.

### (C) Rights, Duties, and Liabilities as to Corporation and Its Members.

⇐312(5) (U.S.C.C.A.) Where director acquired land from corporation under agreement giving corporation option to purchase within time fixed, director, notwithstanding nature of contract, is bound to pay value, and cannot take land at immense profit.—Wing v. Dillingham, 239 F. 54.

A director, who acquired land from his corporation, is charged with knowledge that the corporation had acquired such land from a second company.—Id.

Where a director purchased corporate property, corporation may avoid sale, unless sale was fairly made, and price was fair, and it was subsequently ratified by stockholders, or corporation delayed too long in seeking relief.—Id.

Where no title by limitations could have been acquired during time before his acquisition, a director who acquired timber land from his corporation cannot justify inadequacy of price on ground that he took land subject to claims of adverse holders.—Id.

Where a corporate director acquired from his company timber land recently patented by state to third person, such director cannot justify inadequacy of price on ground that right of

patentee to acquire land was being brought into question.—Id.

Where director of corporation acquired timber land belonging to it at price allowing him approximately $250,000 profit, transaction is voidable at option of corporation or its receiver; rule being same, though director had paid value.—Id.

⇐312(7) (U.S.C.C.A.) Where director of corporation, which was in financial difficulties, acquired timber land belonging to it, advancing sums of money to discharge corporate debts, delay of about 20 months in attacking sale is not such delay as will prevent corporation from avoiding it.—Wing v. Dillingham, 239 F. 54.

Director of corporation, who acquired its land at suggestion of president and other directors, who were attorneys, *held* entitled, sale being set aside on suit of receiver, to an allowance of attorney's fees.—Id.

### VII. CORPORATE POWERS AND LIABILITIES.

#### (B) Representation of Corporation by Officers and Agents.

⇐428(12) (U.S.C.C.A.) The knowledge of the president of a corporation, who was engaged in a scheme to defraud the corporation, of the fraud by which he obtained a check which he indorsed to the corporation, is not imputed to the corporation.—In re United States Hair Co., 239 F. 703.

#### (D) Contracts and Indebtedness.

⇐484(1) (U.S.C.C.A.) A corporation, organized to buy, manufacture, and sell cotton, cotton seed, and its products, *held* to have no implied power to lend its credit to another corporation.—First Nat. Bank v. Towner, 239 F. 433.

### VIII. INSOLVENCY AND RECEIVERS.

⇐568 (U.S.C.C.A.) Under the general principles of equity in the administration of the estate of an insolvent corporation through a receivership, where there are claims of different rank the holders are entitled to interest until the time of payment.—Spring Coal Co. v. Keech, 239 F. 48.

### IX. REINCORPORATION AND REORGANIZATION.

⇐573(3) (U.S.C.C.A.) A stockholder, who took part in the reorganization of the corporation and joined in the acceptance of the plan, *held* bound by the terms of the contract so made with the other stockholders as to the distribution of the new stock in exchange for the old.—Wadsworth v. Pressed Prism Plate Glass Co., 239 F. 507.

### XII. FOREIGN CORPORATIONS.

⇐632 (U.S.D.C.) The state in which a corporation is organized determines its citizenship, whether it has offices and transacts business in the state in which suit is brought or not.—Martin v. Matson Nav. Co., 239 F. 188.

⇐668(5) (U.S.C.C.A.) A sales agent *held* not to have been managing agent of foreign corporation, on whom process against the corporation could be served, under Code Civ. Proc. N. Y. § 432, subd. 3.—American Oil & Supply Co. v. Western Gas Const. Co., 239 F. 505.

## CORROBORATION.

See Criminal Law, ⇐508.

## COSTS.

See Admiralty, ⇐122; Bankruptcy, ⇐475.

## COUNTIES.

### III. PROPERTY, CONTRACTS, AND LIABILITIES.

#### (D) Torts.

⇐146 (U.S.C.C.A.) A Hawaiian county is liable for damages caused by fire started by its employés on a highway and negligently permitted to spread to adjoining premises.—Hawaii County v. Halawa Plantation, 239 F. 836.

## COURT-MARTIAL.

See Militia, ⇐20.

## COURT RULES CITED.

Equity Rule 8—239 F. 360.
Equity Rule 22—239 F. 65.
Equity Rule 48—239 F. 539.

## COURTS.

See Admiralty, ⇐25; Bankruptcy, ⇐114, 219, 260, 293, 303; Jury, ⇐37; Removal of Causes; Trial, ⇐368, 389.

### II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

#### (D) Rules of Decision. Adjudications, Opinions, and Records.

⇐89 (U.S.C.C.A.) Where a rule of decision applicable to the facts has been established by controlling authority, that authority must be followed.—Hudson & M. R. Co. v. Iorio, 239 F. 855.

⇐92 (U.S.C.C.A.) Expressions found in opinions of the Supreme Court cannot be given the effect of authoritative rulings on questions not involved in the particular cases respectively dealt with.—American Surety Co. v. United States, 239 F. 680.

⇐96(1) (U.S.C.C.A.) The decision of the Circuit Court of Appeals of another circuit that the trustee in bankruptcy cannot enforce the liability of a stockholder for the difference between the par value of his stock and the amount he paid will by comity be followed in the bankruptcy proceedings in determining the claims of some of the stockholders.—Courtney v. Croxton, 239 F. 247.

### VII. UNITED STATES COURTS.

#### (A) Jurisdiction and Powers in General.

⇐269 (U.S.D.C.) Under Judiciary Act, § 52, suit for negligence and misconduct of national

bank directors, living part in one and part in the other of two federal court districts of a state, may be brought in either.—Dudley v. Hawkins, 239 F. 386.

⊂=276 (U.S.C.C.A.) The right to object to being sued in a district other than that of defendant's or plaintiff's residence is a privilege, which may be waived, and which is waived by a general appearance to contest any matter on the merits. —Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co., 239 F. 693.

**(B) Jurisdiction Dependent on Nature of Subject-Matter.**

⊂=299 (U.S.C.C.A.) Federal court is without jurisdiction under Act Aug. 13, 1888, of suit by lessor railroad company to compel lessee to issue passes, because lessee's probable defense based on inhibition in Acts June 29, 1906, and June 18, 1910, to regulate commerce, was alleged to be invalid under constitution.—Peterborough R. R. v. Boston & M. R. R., 239 F. 97.

**(C) Jurisdiction Dependent on Citizenship, Residence, or Character of Parties.**

⊂=314 (U.S.C.C.A.) The federal District Court for New Hampshire is without jurisdiction on the ground of diversity of citizenship over an action by New Hampshire corporation against a railroad company incorporated, not only in Massachusetts, but also in New Hampshire.—Peterborough R. R. v. Boston & M. R. R., 239 F. 97.

⊂=317 (U.S.C.C.A.) In a suit by a mortgagee against the mortgagor and its employés to enjoin the latter from violating their contract of employment, the mortgagor *held* alignable as a complainant for jurisdictional purposes.—Mahon v. Guaranty Trust & Safe Deposit Co., 239 F. 266.

⊂=325 (U.S.C.C.A.) In action in federal court, defendant, a foreign corporation, by answering to merits and setting up counterclaim, without raising by demurrer question of court's jurisdiction by service on defendant's agent, waived all objections, and cannot thereafter urge them. —Moore Filter Co. v. Taugher, 239 F. 105.

**(E) Procedure, and Adoption of Practice of State Courts.**

⊂=335(1) (U.S.D.C.) Under conformity statute (Rev. St. §§ 913, 914, 916, 917 [Comp. St. 1913, §§ 1536, 1537, 1540, 1543]), the state practice is adopted only as to common-law actions.—Brown v. Fletcher, 239 F. 360.

⊂=347 (U.S.C.C.A.) Under the Conformity Act, Shannon's Code Tenn. §§ 4627, 4636, regulating pleas and the evidence admissible thereunder, is controlling in the federal courts.—Kalloch v. Hoagland, 239 F. 252.

⊂=352 (U.S.C.C.A.) Comp. St. Ann. 1916, § 1537, does not make Act Pa. May 11, 1911 (P. L. 279), applicable in the federal courts, notwithstanding rule 10, § 2, of District Court for the Eastern District of Pennsylvania, and rule 10, § 1, of Circuit Court of Appeals, Third Circuit (224 Fed. vii, 137 C. C. A. vii), forbidding general exceptions to the charge.—Philadelphia & R. Ry. Co. v. Marland, 239 F. 1.

⊂=355 (U.S.D.C.) Under Rev. St. §§ 913, 914, 916, 917 (Comp. St. 1913, §§ 1536, 1537, 1540, 1543), and new equity rule No. 8 (198 Fed. xxi, 115 C. C. A. xxi), a trustee against whom a decree was rendered in his representative capacity may be examined in supplementary proceedings. —Brown v. Fletcher, 239 F. 360.

⊂=356 (U.S.C.C.A.) Error in charge allowing recovery for loss of companionship under the Employers' Liability Act is a plain error, which the court will notice under rule 11 of Circuit Court of Appeals, Third Circuit (224 Fed. vii, 137 C. C. A. vii), though not specially excepted to.—Philadelphia & R. Ry. Co. v. Marland, 239 F. 1.

An error in the charge assigned stands as though unassigned, within rule 11 of Circuit Court of Appeals, Third Circuit (224 Fed. vii, 137 C. C. A. vii), where it was improperly assigned because of the lack of specific exception.—Id.

**(F) State Laws as Rules of Decision.**

⊂=363 (U.S.C.C.A.) The United States courts will follow and apply a state statute determining the status of an insurance agent.—Maryland Casualty Co. v. Eddy, 239 F. 477.

⊂=365 (U.S.C.C.A.) The liability of the stockholders of a Minnesota corporation for the difference between the par value of the stock and the amount they paid is a question of local law, on which the decisions of the courts of that state are controlling.—Courtney v. Croxton, 239 F. 247.

⊂=365 (U.S.D.C.) A decision of the state court that $1 is such an inadequate consideration for an option to purchase real estate as to invalidate the option does not require the holding that a similar consideration is not sufficient to support an oil and gas lease.—Lindlay v. Raydure, 239 F. 928.

⊂=366(1) (U.S.D.C.) A decision of the state court, construing its statute fixing the time in which a defendant shall answer or plead in the state court, must be followed by the United States court in determining whether the petition for removal was filed in time.—Waverly Stone & Gravel Co. v. Waterloo, C. F. & N. Ry. Co., 239 F. 561.

⊂=367 (U.S.D.C.) The validity of an oil and gas lease, which the lessee could surrender at his option, is a local question, the decision of which by the court of the state in which the land is located is binding on the federal court. —Lindlay v. Raydure, 239 F. 928.

⊂=375 (U.S.C.C.A.) State statutes of limitations are not binding on federal courts in equity suits, and question whether relief is barred depends on whether complainant has been guilty of laches; federal courts frequently finding laches in delay less than period of limitations.—Estep v. Kentland Coal & Coke Co., 239 F. 617.

⊂=375 (U.S.C.C.A.) Equitable suit in federal District Court for Eastern District of Kentucky will not be barred by Ky. St. § 2514, prescribing 15-year limitation, though such period had elapsed, unless delay amounts to laches or works estoppel.—Pond Creek Coal Co. v. Hatfield, 239 F. 622.

For the sake of uniformity, federal courts will

accept state statutes of limitation whenever by so doing they are not required to abrogate their own principles.—Id.

**(H) Circuit Courts of Appeals.**

⇐405(3) (U.S.C.C.A.) Under Judicial Code, §§ 128. 129, and in view of failure of any statute to confer on Circuit Court of Appeals jurisdiction similar to that conferred on Circuit Court by Rev. St. § 763, *held*, that Circuit Court of Appeals is without jurisdiction of appeal from order of District Judge in vacation on habeas corpus.—Hoskins v. Funk, 239 F. 278.

⇐405(4) (U.S.C.C.A.) Where defendant, convicted of contempt in District Court of Canal Zone, was not entitled to a jury trial under United States Constitution as claimed, *held*, that the Circuit Court of Appeals for the Fifth Circuit was without jurisdiction under Act Aug. 24, 1912, § 9, to review conviction.—Smith v. Government of Canal Zone, 239 F. 133.

⇐405(17) (U.S.C.C.A.) The error of the District Court in holding that, under Personal Property Law N. Y. § 62, an unrecorded conditional sale contract was invalid against creditors, *held* so plain, and so closely related to an assignment of error, that it would be considered, though not specifically assigned.—Mergenthaler Linotype Co. v. Hull, 239 F. 26.

⇐406(1) (U.S.C.C.A.) The denial of a motion for new trial cannot be reviewed on writ of error to the Circuit Court of Appeals.—Cordingly v. Kennedy, 239 F. 645.

**(K) Territorial and Provisional Courts.**

⇐438 (U.S.C.C.A.) Under Act March 2, 1901, § 3, the District Court for Porto Rico has jurisdiction of a suit by members of a firm located in Porto Rico against subjects of Spain, though the citizenship of the members of the plaintiff firm is not given.—Sucesores de L. Villamil & Co., S. en C., v. Merced, 239 F. 86.

### VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

**(B) State Courts and United States Courts.**

⇐493(3) (U.S.C.C.A.) A state court, which by the issuance and levy of an attachment obtained actual possession of property of a defendant, retains jurisdiction over such property to the exclusion of a federal court, which in a suit subsequently commenced appointed receivers for the property of such defendant.—United States Fidelity & Guaranty Co. v. First Nat. Bank, 239 F. 227.

⇐501 (U.S.D.C.) Judicial Code, § 66, authorizing federal court receivers to be sued without leave, does not give another court jurisdiction of a suit affecting the possession, control, or management of the property by the receiver or the conduct of his business.—Dickinson v. Willis, 239 F. 171.

## COVENANTS.

See Copyrights, ⇐50.

## CREDITORS.

See Assignments for Benefit of Creditors; Bankruptcy; Creditors' Suit; Fraudulent Conveyances.

## CREDITORS' SUIT.

See Assignments for Benefit of Creditors, ⇐184; Fraudulent Conveyances, ⇐241.

⇐26 (U.S.C.C.A.) The failure of a creditor to bring his creditors' bill on behalf of other creditors does not render the bill demurrable.—Murray v. Sioux Alaska Mining Co., 239 F. 818.

## CRIMINAL LAW.

See Army and Navy, ⇐36; Conspiracy, ⇐28-43; Indictment and Information; Jury, ⇐21; Militia, ⇐20; Obstructing Justice.

### I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

⇐13 (U.S.D.C.) Cr. Code, § 83, is not invalid for uncertainty because it does not define what shall be a money contribution in connection with an election.—United States v. United States Brewers' Ass'n, 239 F. 163.

⇐32 (U.S.C.C.A.) Where railroad company, by its agent, violated provisions of Act Feb. 20, 1907, §§ 4, 5, relative to importation of contract laborers, *held*, that its agent's ignorance of existence of act, was no defense.—New York Cent. & H. R. R. Co. v. United States, 239 F. 130.

### X. EVIDENCE.

**(D) Materiality and Competency in General.**

⇐393(1) (U.S.C.C.A.) Testimony, given without claim of privilege before the referee in bankruptcy by those subpœnaed as witnesses, is voluntary and admissible in a subsequent prosecution of witnesses for conspiring to receive property of the bankrupt.—Knoell v. United States, 239 F. 16.

Bankruptcy Act July 1, 1898, § 7a, cl. 9, affords no protection to witnesses other than the bankrupt, who testified in the bankruptcy proceedings, and who were subsequently charged with conspiring to receive property of the bankrupt.—Id.

**(J) Testimony of Accomplices and Codefendants.**

⇐508(1) (U.S.C.C.A.) Though defendant's employés, who altered his books under his direction, were accomplices, they were competent witnesses in the federal courts, even though their testimony was uncorroborated.—Bosselman v. United States, 239 F. 82.

⇐510 (U.S.C.C.A.) Though the jury should use the utmost caution in scrutinizing the uncorroborated testimony of an accomplice, they may render a verdict of guilty.—Knoell v. United States, 239 F. 16.

### XII. TRIAL.

#### (G) Necessity, Requisites, and Sufficiency of Instructions.

⚖780(1) (U.S.C.C.A.) It is not necessary to give the usual and proper instruction cautioning jurors against convicting upon the uncorroborated testimony of an accomplice, where the accomplice, though called by the government, testified favorably to defendant.—Bosselman v. United States, 239 F. 82.

### XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

⚖918(10, 11) (U.S.C.C.A.) The objection that the husband of the bankrupt cannot testify in a prosecution for conspiracy to receive property of the bankrupt to facts incriminating his wife cannot be first raised on the motion for new trial.—Knoell v. United States, 239 F. 16.

### XV. APPEAL AND ERROR, AND CERTIORARI.

#### (A) Form of Remedy, Jurisdiction, and Right of Review.

⚖1004 (U.S.C.C.A.) The right to an appellate review of a conviction in a criminal case does not exist, except by virtue of a statute conferring it, and the exercise of the right is dependent on the compliance with the statutory requirements prescribed therefor.—American Surety Co. v. United States, 239 F. 680.

#### (B) Presentation and Reservation in Lower Court of Grounds of Review.

⚖1054(1) (U.S.C.C.A.) A conviction will not be reversed for permitting United States attorney to read extracts from the testimony given by the witness he was cross-examining before the grand jury, which could have been read to the witness to refresh her recollection, where no exception was taken to reading those extracts.—Bosselman v. United States, 239 F. 82.

#### (C) Proceedings for Transfer of Cause, and Effect Thereof.

⚖1076(3) (U.S.C.C.A.) In view of Rev. St. § 974 (Comp. St. 1913, § 1615), Judicial Code, § 128, and Act Feb. 6, 1889, § 6, Rev. St. § 1000 (Comp. St. 1913, § 1660), authorizes the taking of security for costs on writ of error in a criminal case, where the court had exercised its jurisdiction to adjudge the costs against the defendant, though the writ was not a supersedeas.—American Surety Co. v. United States, 239 F. 680.

#### (G) Review.

⚖1159(3) (U.S.C.C.A.) Where the evidence concerning the crime charged was in decided conflict, but a material part supported the indictment, the verdict is final on the facts.—Knoell v. United States, 239 F. 16.

## CUSTOMS AND USAGES.

⚖1 (U.S.C.C.A.). "Usage" is invoked to give meaning to a contract on the assumption that the parties contracted in reference thereto, if they knew of the usage, while "custom" is a length of usage which has become law, and which the parties are presumed to know.—Eames v. H. B. Claflin Co., 239 F. 631.

⚖3 (U.S.C.C.A.) To give usage the force of law, there must be acquiescence and notoriety, from which it may be inferred that it was known to the public, though it may be only to a small portion of the public engaged in the particular business affected by the custom.—Eames v. H. B. Claflin Co., 239 F. 631.

⚖12(2) (U.S.C.C.A.) Under some circumstances, the customs of business different from that of the person sought to be charged cannot be recognized against them, without showing actual knowledge; but if one employs another to work after the method of transacting the other's business, he may be presumed to have intended the business to be performed according to the customs regulating it.—Eames v. H. B. Claflin Co., 239 F. 631.

## DAMAGES.

See Admiralty, ⚖22; Brokers, ⚖79; Carriers, ⚖177; Collision, ⚖74, 136; Counties, ⚖146; Death; Equity, ⚖24; Landlord and Tenant, ⚖280; Judgment, ⚖570; Negligence, ⚖68; Patents, ⚖262, 319; Sales, ⚖89, 384; Shipping, ⚖58; Towage, ⚖15.

### III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

#### (A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

⚖32 (U.S.C.C.A.) Under the jurisprudence of the Canal Zone, and under Civ. Code Republic of Panama, arts. 2341, 2356, in force in the Canal Zone, damages for physical pain and suffering are recoverable.—Panama R. Co. v. Bosse, 239 F. 303.

#### (C) Interest, Costs, and Expenses of Litigation.

⚖67 (U.S.D.C.) In admiralty, the allowance of interest on damages recovered is within the discretion of the court.—The Ada, 239 F. 363.

### VI. MEASURE OF DAMAGES.

#### (C) Breach of Contract.

⚖121 (U.S.D.C.) Where road contractors wrongfully abandoned their agreement, the county, etc., is entitled to recover from them all additional cost for completion of work.—Smith v. Copiah County, 239 F. 425.

### VII. INADEQUATE AND EXCESSIVE DAMAGES.

⚖132(13) (U.S.C.C.A.) A verdict for $2,500 for the crushing of a foot, necessitating amputation of the second toe, *held* not so excessive as to justify interference by the Circuit Court of Appeals.—Panama R. Co. v. Bosse, 239 F. 303.

⚖140 (U.S.D.C.) $12,600 liquidated damages for delay in completing contract for construction of a road *held* not properly allowable, being disproportionate to breach.—Smith v. Copiah County, 239 F. 425.

## DEATH.

See Abatement and Revival, ⇐53; Appeal and Error, ⇐909.

### II. ACTIONS FOR CAUSING DEATH.

#### (A) Right of Action and Defenses.

⇐11 (U.S.C.C.A.) Since there was no recovery at common law for injuries resulting from death, not only the right to recover for such injuries, but also the measure of recovery, must be found in some statute.—Philadelphia & R. Ry. Co. v. Marland, 239 F. 1.

#### (E) Damages, Forfeiture, or Fine.

⇐84 (U.S.C.C.A.) Under the federal Employers' Liability Act, the widow and children of a deceased brakeman cannot recover from his employer his funeral expenses.—Philadelphia & R. Ry. Co. v. Marland, 239 F. 1.

## DEBTOR AND CREDITOR.

See Assignments for Benefit of Creditors; Bankruptcy; Banks and Banking, ⇐182; Creditors' Suit; Fraudulent Conveyances.

## DECEDENTS.

See Executors and Administrators.

## DECEIT.

See Fraud.

## DEEDS.

See Fraudulent Conveyances; Mortgages.

### I. REQUISITES AND VALIDITY.

#### (E) Validity.

⇐72(1) (U.S.D.C.) Undue influence defined.—Sturm v. Stump, 239 F. 749.

⇐72(2) (U.S.D.C.) A voluntary conveyance of several hundred acres of land in West Virginia to a church corporation of New York *held* invalid because of undue influence.—Sturm v. Stump, 239 F. 749.

### III. CONSTRUCTION AND OPERATION.

#### (A) General Rules of Construction.

⇐93 (U.S.C.C.A.) The paramount object in the construction of a deed is to give effect to the intention of the parties, which is to be gathered from a consideration of the entire instrument, read in the light of the facts and circumstances under which it was executed.—Wise v. Watts, 239 F. 207.

#### (B) Property Conveyed.

⇐115 (U.S.C.C.A.) A deed to a tract of land granted in lieu of a Mexican grant under Act June 21, 1860, construed as to the boundaries of the land conveyed.—Wise v. Watts, 239 F. 207.

⇐116 (U.S.C.C.A.) A deed, although in form a quitclaim, *held* intended to convey title to the land and to entitle the grantee to the benefit of a subsequent conveyance of outstanding interests to the grantor.—Wise v. Watts, 239 F. 207.

### IV. PLEADING AND EVIDENCE.

⇐194(1) (U.S.C.C.A.) While there is a presumption of delivery as of date, delivery cannot be found where the grantor retains possession of the deed.—Estep v. Kentland Coal & Coke Co., 239 F. 617.

## DEFAMATION.

See Libel and Slander.

## DEFENSE ACT.

See Army and Navy, ⇐19; Militia, ⇐8.

## DELIVERY.

See Deeds, ⇐194; Gifts, ⇐22; Insurance, ⇐136; Sales, ⇐89.

## DEMURRER.

See Indictment and Information, ⇐146; Pleading, ⇐214.

## DEPORTATION.

See Aliens, ⇐32, 54.

## DESCENT AND DISTRIBUTION.

See Executors and Administrators; Wills.

## DESCRIPTION.

See Chattel Mortgages, ⇐116; Deeds, ⇐115; Mortgages, ⇐48.

## DESERTION.

See Army and Navy, ⇐38.

## DICTA.

See Courts, ⇐92.

## DIRECTING VERDICT.

See Appeal and Error, ⇐268, 997; Trial, ⇐178.

## DISCHARGE.

See Accord and Satisfaction; Bankruptcy, ⇐59, 391–414; Release.

## DISCRETION OF COURT.

See Admiralty, ⇐25; Appeal and Error, ⇐920, 959; Damages, ⇐67; Evidence, ⇐187; Pleading, ⇐236; Trial, ⇐223, 368.

## DISMISSAL AND NONSUIT.

See Judgment, ⇐256.

## DISTRESS.

See Landlord and Tenant, ⇐2, 265.

## DITCHES.

See Drains.

## DIVERSE CITIZENSHIP.

See Courts, ⇐317; Removal of Causes, ⇐ 26, 31.

## DIVERSITY OF CITIZENSHIP.

See Courts, ⇐314; Removal of Causes, ⇐ 36.

## DOCTORS.

See Physicians and Surgeons.

## DOCUMENTS.

See Evidence, ⇐350.

## DONATIONS.

See Gifts, ⇐22.

## DRAINS.

### I. ESTABLISHMENT AND MAINTENANCE.

⇐13 (U.S.C.C.A.) Under Act Mo. March 24, 1913, §§ 52, 56–58, and Act Mo. March 27, 1913, repealing Rev. St. Mo. 1909, §§ 5578–5635, the reorganization of a drainage district under Act Mo. March 24, 1913, does not relieve the county from its liability under the former act on the contracts of the district.—Bates County, Mo., v. Wills, 239 F. 785.

⇐49 (U.S.C.C.A.) A municipal or quasi municipal corporation, which makes contracts for improvements that it has power to make and stipulates that the contractor shall be paid from special assessments or bonds, but fails to make the assessments or issue the bonds or misapplies the funds to other purposes, becomes primarily liable.—Bates County, Mo., v. Wills, 239 F. 785.

Under Rev. St. Mo. 1909, §§ 5578, 5580–5584, 5588, 5595–5597, 5601–5603, a county is estopped to deny liability for the contract price of a drainage district ditch which has been constructed, on the ground that the bond issue was exhausted and the county had no authority to levy additional assessments.—Id.

Refusal of a requested instruction that the burden of proving the fraud or failure to exercise honest judgment of a drainage district engineer in withholding estimates of the quantity of work done by a contractor rested on plaintiffs *held* reversible error.—Id.

### II. ASSESSMENTS AND SPECIAL TAXES.

⇐68 (U.S.C.C.A.) A municipal or quasi municipal corporation, which makes a contract for improvements which it has power to make and does not specify the source of payment therefor, there being no statutory prohibition of a general levy, has power to levy, collect and pay to the contractor the contract price.—Bates County, Mo., v. Wills, 239 F. 785.

⇐83 (U.S.C.C.A.) Under Rev. St. Mo. 1909, §§ 5578, 5580–5584, 5588, 5592, 5595–5597, 5599, 5601–5603, the county court has power to levy additional assessments for a drainage district when the first assessment is insufficient to meet the contracts for the work.—Bates County, Mo., v. Wills, 239 F. 785.

## DREDGES.

See Collision, ⇐102.

## DUE PROCESS OF LAW.

See Constitutional Law, ⇐318.

## DUPLICITY.

See Indictment and Information, ⇐125.

## EASEMENTS.

See Highways.

### I. CREATION, EXISTENCE, AND TERMINATION.

⇐32 (U.S.C.C.A.) An easement to maintain a mining tunnel through property of others *held* extinguished under the law of Utah by adverse possession of the tunnel for more than 20 years by the owners of such property.—Wall v. United States Mining Co., 239 F. 90.

## ELECTION.

See Sales, ⇐107.

## ELECTIONS.

See Bankruptcy, ⇐125; Constitutional Law, ⇐90.

## ELECTRICITY.

See Master and Servant, ⇐119.

## EMINENT DOMAIN.

See Municipal Corporations, ⇐321, 339–375.

### II. COMPENSATION.

#### (A) Necessity and Sufficiency in General.

⇐75 (U.S.D.C.) Civ. Code Cal. §§ 469, 500, do not require compensation to be paid before a city lays its street car tracks across the tracks of a private street railroad, and such compensation is not necessary in the absence of statute.—United Railroads of San Francisco v. City and County of San Francisco, 239 F. 987.

#### (B) Taking or Injuring Property as Ground for Compensation.

⇐86 (U.S.D.C.) The construction by a city of a municipal street railroad along the streets already occupied by a private street railroad is not a taking of the private corporation's property contrary to the United States Constitution or the Constitution of California.—United Railroads of San Francisco v. City and County of San Francisco, 239 F. 987.

## EMPLOYERS AND EMPLOYÉS.

See Master and Servant.

## ENLISTMENT.

See Army and Navy, ⇐19; Militia, ⇐8.

## EQUITABLE ESTOPPEL.

See Estoppel, ⇐90.

## EQUITY.

See Action, ⇐25; Creditors' Suit, ⇐11; Estoppel; Fraudulent Conveyances; Gifts, ⇐22; Injunction; Liens, ⇐7; Patents, ⇐222, 287; Quieting Title; Receivers; Reformation of Instruments; Specific Performance; Trusts.

### I. JURISDICTION, PRINCIPLES, AND MAXIMS.

#### (A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

⇐24 (U.S.C.C.A.) Equity views forfeiture with disfavor, and will only interfere, to work a forfeiture and ascertain damages, where the remedies at law are plainly and substantially inadequate.—Semidey v. Central Aguirre Co., 239 F. 610.

#### (C) Principles and Maxims of Equity.

⇐57 (U.S.D.C.) Equity regards as done that which ought to be done.—In re Imperial Textile Co., 239 F. 775.

⇐66 (U.S.D.C.) One seeking to enjoin collection of penalties for nonpayment of internal revenue taxes has not, as is required of one seeking equity, done equity, not having paid or tendered the taxes admitted to be due.—Kohlhamer v. Smietanka, 239 F. 408.

### II. LACHES AND STALE DEMANDS.

⇐72(1) (U.S.C.C.A.) Defense of laches does not depend upon mere lapse of time, but circumstances must be such that assertion of plaintiff's rights would be inequitable.—Pond Creek Coal Co. v. Hatfield, 239 F. 622.

⇐75 (U.S.C.C.A.) Plaintiff's delay in commencing suit involving mineral rights to land *held* not to amount to laches; defect in plaintiff's title being discovered only shortly before suit, and defendant, who asserted title to the land, not having discovered defect when he acted as agent for plaintiff's predecessor in purchasing same.—Pond Creek Coal Co. v. Hatfield, 239 F. 622.

⇐87(1) (U.S.C.C.A.) Kentucky statutes of limitation apply to equitable as well as to legal actions.—Pond Creek Coal Co. v. Hatfield, 239 F. 622.

### III. PARTIES AND PROCESS.

⇐119 (U.S.D.C.) Substituted service of a bill in equity against a foreign corporation, made on its attorney without any order having been procured therefor, is invalid.—Johnson-Brown Co. v. Delaware, L. & W. R. Co., 239 F. 590.

### IV. PLEADING.

#### (F) Amended and Supplemental Pleadings and Revivor.

⇐271 (U.S.C.C.A.) In suit to compel defendant to hold, as trustee for plaintiff, mineral rights in land, *held*, that leave to file trial amendment to plaintiff's bill, excusing delay in suing, was improperly refused.—Pond Creek Coal Co. v. Hatfield, 239 F. 622.

#### (H) Issues, Proof, and Variance.

⇐324 (U.S.C.C.A.) In cases of great delay in seeking relief, courts of equity on their own motion require plaintiff to allege and show affirmatively facts excusing delay.—Pond Creek Coal Co. v. Hatfield, 239 F. 622.

## EQUITY RULES.

See Court Rules Cited; Trial, ⇐11.

## ERROR, WRIT OF.

See Appeal and Error.

## ESTATES.

See Executors and Administrators; Wills.

## ESTOPPEL.

See Bankruptcy, ⇐43; Drains, ⇐49; Judgment, ⇐570; Waters and Water Courses, ⇐230.

### III. EQUITABLE ESTOPPEL.

#### (B) Grounds of Estoppel.

⇐90(2) (U.S.C.C.A.) Plaintiffs *held* estopped from questioning reservation of the mineral rights in a deed conveying land to them.—Estep v. Kentland Coal & Coke Co., 239 F. 617.

## EVIDENCE.

See Accord and Satisfaction, ⇐25; Admiralty, ⇐118; Appeal and Error, ⇐854, 1050; Bankruptcy, ⇐303, 414; Bills and Notes, ⇐504, 525; Brokers, ⇐86; Canals, ⇐18; Collision, ⇐136; Contracts, ⇐346; Criminal Law, ⇐393, 780; Judgment, ⇐948; Libel and Slander, ⇐110; Master and Servant, ⇐157, 276, 281, 285; Navigable Waters, ⇐26; Negligence, ⇐134, 135; Obstructing Justice, ⇐15; Partnership, ⇐54; Patents, ⇐35, 87; Physicians and Surgeons, ⇐18; Post Office, ⇐306; Principal and Agent, ⇐89; Quieting Title, ⇐44; Sales, ⇐87; Trial, ⇐252; Waters and Water Courses, ⇐17, 33; Witnesses.

Reception at trial, see Trial, ⇐51.

### I. JUDICIAL NOTICE.

⇐22(1) (U.S.C.C.A.) In action by New Hampshire corporation in federal District Court for New Hampshire, *held*, that court would take judicial notice that defendant was incorporated under Laws N. H. 1835, c. 14, and Laws 1841, c. 6.—Peterborough R. R. v. Boston & M. R. R., 239 F. 97.

### II. PRESUMPTIONS.

⊂=54 (U.S.C.C.A.) While jury may in some cases presume existence of fact from other facts, no presumption can be based on that presumption which jury is authorized to make.—Smith v. Pennsylvania R. Co., 239 F. 103.

⊂=70 (U.S.C.C.A.) Act Porto Rico March 9, 1905 (Rev. St. & Codes, pp. 288, 298) §§ 102, 170, repealed Civ. Code Porto Rico, § 1195, and under the later act private writings create a presumption of correct dating against third parties.—Rucabado v. Longpre, 239 F. 291.

⊂=77(5) (U.S.C.C.A.) In a suit for injury to a vessel through the alleged negligence of bridge tenders employed by respondent, the failure of respondent to produce their testimony raises a damaging presumption.—The Louise Rugge, 239 F. 458.

### V. BEST AND SECONDARY EVIDENCE.

⊂=162(2) (U.S.C.C.A.) The judgment itself and the judgment record is the best evidence of a judgment, and parol evidence concerning it is incompetent.—Kalloch v. Hoagland, 239 F. 252.

⊂=187 (U.S.C.C.A.) The reception in evidence of photographs or descriptions of a chattel in place of the object itself is largely discretionary with the court.—Monroe v. Bresee, 239 F. 727.

### VII. ADMISSIONS.

#### (A) Nature, Form, and Incidents in General.

⊂=215(1) (U.S.D.C.) A subsequent proposal by one of the parties to a contract for a new contract, in which were to be embodied certain provisions of the first contract, is inadmissible to show an admission that those provisions were not superseded by the second contract between the parties.—Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. 976.

### IX. HEARSAY.

⊂=317(12) (U.S.C.C.A.) Testimony by substituted trustee, who held sale, that trustee named in deed had written him that he had declined to act, *held* inadmissible as hearsay.—Klein v. Darnell, 239 F. 844.

### X. DOCUMENTARY EVIDENCE.

#### (C) Private Writings and Publications.

⊂=350 (U.S.C.C.A.) Civ. Code Porto Rico, § 1195, concerning the date of private papers with regard to third persons, was a rule of evidence, not of substantive law.—Rucabado v. Longpre, 239 F. 291.

### XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

#### (B) Invalidating Written Instrument.

⊂=432 (U.S.D.C.) Parol evidence is not admissible, even in equity, to show that the consideration of $1, which the lease recited had been paid, was not in fact paid.—Lindlay v. Raydure, 239 F. 928.

⊂=434(11) (U.S.D.C.) Parol evidence is admissible to show that the contract for the sale of machines, evidenced by written memoranda, was procured by fraudulent representations.—Burroughs Adding Mach. Co. v. Scandinavian-American Bank, 239 F. 179.

#### (D) Construction or Application of Language of Written Instrument.

⊂=448 (U.S.D.C.) Evidence of the negotiations between the parties leading up to the execution of a written contract, which was expressly intended to embody the language of the written contract, is inadmissible, though contract is ambiguous.—Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. 976.

Where the language of a written contract is ambiguous, evidence as to the situation of the parties when it was entered into is admissible, to the extent that it assists in determining the meaning of the language used.—Id.

### XII. OPINION EVIDENCE.

#### (A) Conclusions and Opinions of Witnesses in General.

⊂=487 (U.S.C.C.A.) In action to recover for services, whereby plaintiff induced third person to confess judgment for infringement of defendant's filter patents, witness familiar with patent situation, etc., may testify as to value of such services.—Moore Filter Co. v. Taugher, 239 F. 105.

#### (B) Subjects of Expert Testimony.

⊂=506 (U.S.C.C.A.) The testimony of experts in an infringement suit as to the meaning of words untechnical used in the patent, which it is the province of the court to determine, is incompetent.—Safety Car Heating & Lighting Co. v. Gould Coupler Co., 239 F. 861.

## EXCEPTIONS.

See Appeal and Error, ⊂=261, 274; Criminal Law, ⊂=1054.

## EXCESSIVE DAMAGES.

See Damages, ⊂=132, 140.

## EXCISE TAX.

See Internal Revenue, ⊂=38.

## EXCLUSION.

See Aliens, ⊂=32.

## EXCLUSIVE AGENCY.

See Principal and Agent, ⊂=81, 89.

## EXECUTION.

See Attachment; Fraudulent Conveyances, ⊂=241.

### IV. LIEN, LEVY OR EXTENT, AND CUSTODY OF PROPERTY.

⊂=113 (U.S.D.C.) Lien acquired by levy of an execution *held* to relate back to the filing of a petition in a bankruptcy court for release of the property, to enable the sheriff to make the levy.—In re Superior Jewelry Co., 239 F. 373.

## EXECUTORS AND ADMINISTRATORS.

See Trusts; Wills.

### VI. ALLOWANCE AND PAYMENT OF CLAIMS.

#### (D) Priorities and Payment.

⇐264(1) (U.S.C.C.A.) Under the Illinois law an executor does not stand in any better position than the decedent with respect to one holding a lien, legal or equitable.—In re Mossler Co., 239 F. 262.

### XII. FOREIGN AND ANCILLARY ADMINISTRATION.

⇐524(2) (U.S.C.C.A.) A defendant duly served and appearing cannot attack judgment against him on ground that notice of action, which was by foreign executor, was not given in accordance with Rev. St. Colo. 1908, § 7152.—Cordingly v. Kennedy, 239 F. 645.

⇐524(3) (U.S.C.C.A.) Under Rev. St. Colo. 1908, § 7152, complaint of foreign executor is not subject to demurrer because it did not set out copy of exemplification of his official bond and letters testamentary, where he had actually filed copy of his appointment duly authenticated.—Cordingly v. Kennedy, 239 F. 645.

## EXPERT TESTIMONY.

See Evidence, ⇐506.

## FACTORS.

See Brokers.

⇐47(2) (U.S.C.C.A.) Amounts paid by a note broker on the return of his principal's notes sold by him with option to return, for which he had assumed personal liability, are not "expenses and advancements" on the notes, for which a factor would be given a general lien on all his principal's goods.—Eames v. H. B. Claflin Co., 239 F. 631.

## FEDERAL COURTS.

See Courts, ⇐269–406; Removal of Causes.

## FEDERAL EMPLOYERS' LIABILITY ACT.

See Commerce, ⇐27; Death; Master and Servant, ⇐228.

## FEES.

See Bankruptcy, ⇐482; Corporations, ⇐312; Shipping, ⇐209.

## FILING.

See Appeal and Error, ⇐888; Removal of Causes, ⇐92.

## FINDINGS.

See Appeal and Error, ⇐219, 1008–1011; Trial, ⇐389.

## FIRES.

See Counties, ⇐146.

## FOG.

See Collision, ⇐82.

## FORECLOSURE.

See Mortgages, ⇐553.

## FOREIGN ADMINISTRATION.

See Executors and Administrators, ⇐524.

## FOREIGN CONSULS.

See Admiralty, ⇐25.

## FOREIGN CORPORATIONS.

See Corporations, ⇐632, 668; Equity, ⇐119.

## FOREIGNERS.

See Aliens.

## FORFEITURES.

See Equity, ⇐24; Insurance, ⇐376; Landlord and Tenant, ⇐111, 280; Public Lands, ⇐186.

## FRANCHISES.

See Constitutional Law, ⇐134; Eminent Domain, ⇐86.

## FRAUD.

See Bankruptcy, ⇐303, 414; Contracts, ⇐284; Corporations, ⇐80, 428; Evidence, ⇐434; Fraudulent Conveyances; Landlord and Tenant, ⇐265; Pleading, ⇐17; Process, ⇐65; Removal of Causes, ⇐86.

### I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

⇐11(1) (U.S.D.C.) Representations as to the work which plaintiff's bookkeeping machines would do for defendant, whereby defendant was induced to buy the machines, *held* representations of fact, not statements of opinion.—Burroughs Adding Mach. Co. v. Scandinavian-American Bank, 239 F. 179.

## FRAUDULENT CONVEYANCES.

See Bankruptcy, ⇐165–198, 303, 414.

### I. TRANSFERS AND TRANSACTIONS INVALID.

#### (I) Retention of Possession or Apparent Title by Grantor.

⇐138 (U.S.C.C.A.) Where Illinois lease reserved lien to landlord on all property of lessee, including stock in trade, which lessee impliedly has right to dispose of as he pleases, lien must be deemed fraudulent and invalid.—In re Mossler Co., 239 F. 262.

### III. REMEDIES OF CREDITORS AND PURCHASERS.

#### (C) Right of Action to Set Aside Transfer, and Defenses.

⊂⊃241(2) (U.S.C.C.A.) The rule that a creditors' bill cannot be maintained to set aside a fraudulent conveyance until the creditor has reduced his claim to judgment and had execution issued thereon, which is returned unsatisfied, is modified where the statutes of the state or territory have created new rights.—Murray v. Sioux Alaska Mining Co., 239 F. 818.

Equity will grant relief to a creditor against the proceeds of a sale of its insolvent debtor's property by a nonresident trustee, to whom it had been fraudulently conveyed to prevent plaintiff from enforcing his claim without requiring plaintiff to first secure a judgment at law.—Id.

## FREEDOM OF SPEECH.

See Constitutional Law, ⊂⊃90.

## FREIGHT.

See Carriers, ⊂⊃196.

## FUNERAL EXPENSES.

See Death, ⊂⊃84.

## GARNISHMENT.

See Attachment; Bankruptcy, ⊂⊃217.

## GAS LEASE.

See Courts, ⊂⊃365; Mines and Minerals, ⊂⊃58.

## GENERAL AVERAGE.

See Shipping, ⊂⊃200.

## GIFTS.

### I. INTER VIVOS.

⊂⊃22 (U.S.C.C.A.) A gift of securities, evidenced only by a statement prepared by the donor and kept by him, a sealed copy being delivered to another, to be opened only after his death, is ineffectual for want of delivery, and will not be perfected by equity.—Ambrosius v. Ambrosius, 239 F. 473.

## GOOD FAITH.

See Banks and Banking, ⊂⊃179; Bills and Notes, ⊂⊃359.

## GRAND JURY.

See Indictment and Information.

## GRANTS.

See Public Lands.

## HABEAS CORPUS.

See Courts, ⊂⊃405.

### I. NATURE AND GROUNDS OF REMEDY.

⊂⊃16 (U.S.C.C.A.) Under Rev. St. § 761 (Comp. St. 1913, § 1289), *held* that, on habeas corpus by father to avoid enlistment of minor son over 16 and under 18 in National Guard, immediate surrender would not be directed, where son was guilty of military offense, but the military authorities would be allowed to retain custody to punish for such offense.—Hoskins v. Dickerson, 239 F. 275.

## HARMLESS ERROR.

See Appeal and Error, ⊂⊃1050–1064, 1078.

## HEARING.

See Trial, ⊂⊃368.

## HEARSAY EVIDENCE.

See Evidence, ⊂⊃317.

## HIGHWAYS.

See Municipal Corporations, ⊂⊃321, 339–375, 682, 764, 821.

### III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

⊂⊃113(1) (U.S.D.C.) A contract for the construction and graveling of roads *held* not to impliedly warrant that suitable gravel would be found in all of the gravel pits along the road designated.—Smith v. Copiah County, 239 F. 425.

The method of computing the overhaul charge for hauling gravel under a contract for the construction and graveling of a road stated.—Id.

Under contract for construction and graveling of road, *held*, that contractor was not entitled to extra compensation for each acre cleared and grubbed, regardless of extent to which it was cleared.—Id.

## HOLIDAYS.

See Sunday.

## HOURS OF SERVICE.

See Master and Servant, ⊂⊃13.

## HUSBAND AND WIFE.

See Witnesses, ⊂⊃52.

## IMMIGRATION.

See Aliens, ⊂⊃54, 56; Constitutional Law, ⊂⊃318.

## IMPRISONMENT.

See Habeas Corpus.

## IMPROVEMENTS.

See Drains, ⇐49; Mechanics' Liens; Municipal Corporations, ⇐321, 339–375; Patents, ⇐174.

## INCOME TAX.

See Internal Revenue, ⇐7, 9.

## INCONSISTENT DEFENSES.

See Pleading, ⇐93, 362.

## INDEMNITY.

See Insurance, ⇐511.

## INDICTMENT AND INFORMATION.

See Conspiracy, ⇐43; Criminal Law, ⇐1159; Obstructing Justice, ⇐15.

### V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

⇐60 (U.S.D.C.) An indictment must fully and clearly set out the elements which constitute the crime, but need not allege matters of evidence nor the means by which the crime was to be accomplished, unless the act is one the criminality of which depends on the circumstances under which it was done.—United States v. United States Brewers' Ass'n, 239 F. 163.

⇐71 (U.S.D.C.) An indictment is sufficient if it advises the defendants of the nature and cause of the accusation against them with such a particularity as to enable them to prepare the defense.—United States v. United States Brewers' Ass'n, 239 F. 163.

### VI. JOINDER OF PARTIES, OFFENSES AND COUNTS, DUPLICITY, AND ELECTION.

⇐125(5½) (U.S.C.C.A.) An indictment, charging a conspiracy to commit four separate offenses, is not bad for duplicity.—Knoell v. United States, 239 F. 16.

### VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

⇐146 (U.S.C.C.A.) On demurrer to the indictment, the averments contained therein are to be taken as true.—Knoell v. United States, 239 F. 16.

## INDORSEMENT.

See Bills and Notes, ⇐242, 359.

## INFANTS.

See Army and Navy, ⇐19–36; Militia, ⇐8, 20.

## INFORMATION.

See Indictment and Information.

## INFRINGEMENT.

See Appeal and Error, ⇐662; Evidence, ⇐487; Patents, ⇐241–328; Trade-Marks and Trade-Names, ⇐66.

## INJUNCTION.

See Bankruptcy, ⇐20, 217; Courts, ⇐317; Equity, ⇐66; Mines and Minerals, ⇐81; Patents, ⇐317, 326; Waters and Water Courses, ⇐33.

### I. NATURE AND GROUNDS IN GENERAL.

#### (B) Grounds of Relief.

⇐19 (U.S.D.C.) Where there are, at most, so far as appears, but two entitled to relief, the court is not justified in taking jurisdiction of injunction suit on ground of avoiding a multiplicity of suits.—Kohlhamer v. Smietanka, 239 F. 408.

### II. SUBJECTS OF PROTECTION AND RELIEF.

#### (C) Contracts.

⇐59(1) (U.S.C.C.A.) Under contract by defendant to transport coal in certain vessels for complainant for term of three years, plaintiff *held* entitled to restrain defendant from selling vessels for foreign service, where plaintiff's profits were dependent on water transportation, and such sale would leave defendant insolvent.—Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co., 239 F. 603.

### III. ACTIONS FOR INJUNCTIONS.

⇐114(1) (U.S.C.C.A.) To a suit by a mortgagee based upon a contract of the mortgagor with its employés, the mortgagor is an indispensable party.—Mahon v. Guaranty Trust & Safe Deposit Co., 239 F. 266.

### IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

#### (A) Grounds and Proceedings to Procure.

⇐136(2) (U.S.C.C.A.) Where an insolvent debtor had conveyed its only property to a nonresident, who had contracted to sell it to resident purchasers, a creditor, on filing a creditors' bill, is entitled to a temporary injunction to restrain the purchasers from paying to the trustee the purchase price.—Murray v. Sioux Alaska Mining Co., 239 F. 818.

## INSOLVENCY.

See Assignments for Benefit of Creditors; Bankruptcy; Corporations, ⇐568.

## INSTRUCTIONS.

To jury, see Appeal and Error, ⇐1064; Trial, ⇐223, 234–296.

## INSURANCE.

### III. INSURANCE AGENTS AND BROKERS.

#### (A) Agency for Insurer.

⇐73 (U.S.C.C.A.) Comp. Laws Mich. 1897, § 7246, relating to agents of fire and marine insurance companies, does not apply to agents of accident insurance companies, which are regu-

lated by sections 5110–5115.—Maryland Casualty Co. v. Eddy, 239 F. 477.

In the absence of statutory regulation, a stipulation in a policy that no person, unless duly authorized in writing, shall be deemed the agent of the company, is binding on those who take the policy.—Id.

### V. THE CONTRACT IN GENERAL.

#### (A) Nature, Requisites, and Validity.

⇐136(5) (U.S.C.C.A.) Though the signature of insured to the application is questioned, the authenticity of the answers therein, which were made part of the policy as issued, must be treated as admitted.—Maryland Casualty Co. v. Eddy, 239 F. 477.

### IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

#### (C) Matters Relating to Person Insured.

⇐300 (U.S.C.C.A.) A misrepresentation by an applicant for accident insurance that no similar insurance had been canceled, or renewal refused, *held*, as a matter of law, material and intentional, and to prevent recovery on the policy.—Maryland Casualty Co. v. Eddy, 239 F. 477.

### XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

⇐376(2) (U.S.C.C.A.) The provision in an insurance policy against waiver by agents applies to a provision, read into the policy by law, that a material intentional misrepresentation avoids the policy.—Maryland Casualty Co. v. Eddy, 239 F. 477.

### XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.

#### (C) Guaranty and Indemnity Insurance.

⇐511 (U.S.C.C.A.) Where first credit indemnity bond was surrendered before expiration and second bond was obtained as substitute, no recovery could be had for loss which did not fall within second bond, by reason of provisions as to subsequent bonds.—Henry A. Hitner's Sons Co. v. American Credit Indemnity Co., 239 F. 689.

## INTENT.

See Bankruptcy, ⇐178; Deeds, ⇐93.

## INTEREST.

See Bankruptcy, ⇐188; Corporations, ⇐568; Damages, ⇐67; Usury; Waters and Water Courses, ⇐230.

### I. RIGHTS AND LIABILITIES IN GENERAL.

⇐19(1) (U.S.C.C.A.) Comp. Laws Alaska 1913, § 684, does not authorize recovery of interest before judgment on an architect's commission for superintending the erection of a building, the amount of which was disputed.—Valentine v. Quackenbush, 239 F. 832.

## INTERNAL REVENUE.

See Abatement and Revival, ⇐53.

⇐7 (U.S.D.C.) Income Tax Act Oct. 3, 1913, § 2, imposes a tax on the income from corporate stocks and bonds owned by a nonresident alien, where the stock certificates and bonds were kept in this country by an agent who collected the income thereon for the owner.—De Ganay v. Lederer, 239 F. 568.

⇐9 (U.S.D.C.) Under Income Tax Act Oct. 3, 1913, c. 16, § 2, G (a), dividends paid direct to the stockholders of a railroad corporation, which leased all its property, must be deemed corporate income, and taxable as such; dividends being rent payments for use of property of corporation.—Rensselaer & S. R. Co. v. Irwin, 239 F. 739.

A corporation, which leased its property and had no actual income, rents being paid direct to its stockholders, *held* liable under Income Tax Act for taxes on such income, regardless of its lack of funds.—Id.

Where corporation, before enactment of Income Tax Act, leased its property, lease providing for payment of rents direct to stockholders, taxes based on such income cannot be defeated on theory of novation; corporation receiving income.—Id.

⇐28 (U.S.D.C.) Three-year clause in Excise Law of 1909, § 38, subd. 5, imposing special tax on corporations, is not a limitation on right of government to sue for unpaid taxes, but at most is limitation on collecting officers to make assessment to enforce payment by summary proceedings.—United States v. Grand Rapids & I. Ry. Co., 239 F. 153.

In collection of taxes imposed on corporations by Excise Law of 1909, government is not confined to summary proceedings therein, but may resort to plenary suit.—Id.

Where tax of fixed percentage like one imposed by Excise Law of 1909 on corporations is so definitely described in statute that its amount or value can be ascertained and determined on evidence by a court, a suit therefor will lie without assessment.—Id.

⇐38 (U.S.D.C.) In a suit to recover the excise tax erroneously paid by a leasing railroad corporation, the lease cannot be collaterally attacked by showing that the lessee claimed under it as assignee, though it was not assignable.—Philadelphia, H. & P. R. Co. v. Lederer, 239 F. 184.

In the absence of statute, one from whom internal revenue was illegally collected cannot recover the amount from the successor in office of the collector who made the collection.—Id.

Act March 3, 1863, § 12, does not authorize recovery from a collector of internal revenue of money illegally collected by his predecessor in office.—Id.

Act Feb. 8, 1899, does not authorize recovery from an internal revenue collector of money erroneously collected by his predecessor in office against whom no action had been brought; plaintiff's remedy being by proceeding under Rev. St. § 3226 (Comp. St. 1913, § 5949), or judicial Code, § 24, par. 20.—Id.

⇐45 (U.S.D.C.) Rev. St. § 3224 (Comp. St. 1913, § 5947), prohibiting suit to enjoin collec-

tion of any tax, in view of section 3176 (Comp. St. 1913, § 5899), providing for collection of penalty as part of tax, applies to penalty provided by section 23 of Act Oct. 22, 1914, to increase internal revenue.—Kohlhamer v. Smietanka, 239 F. 408.

In view of Rev. St. § 3182 (Comp. St. 1913, § 5904), made part of Act Oct. 22, 1914, to increase internal revenue, by section 23, the internal revenue collector can make assessment of penalties arising out of the act.—Id.

One is not relieved from the penalty provided by Act Oct. 22, 1914, § 23, to increase internal revenue, for failure to pay the tax, by section 22 making his default, when accompanied by criminal intent, a misdemeanor.—Id.

## INTERNATIONAL LAW.

See Aliens.

## INTERSTATE COMMERCE.

See Commerce.

## INTERVENTION.

See Bankruptcy, ⇐51; Patents.

## JOINDER.

See Judgment, ⇐256; Removal of Causes, ⇐36.

## JUDGMENT.

See Courts, ⇐96; Creditors' Suit; Execution.

### VI. ON TRIAL OF ISSUES.

#### (C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

⇐256(1) (U.S.C.C.A.) Where two causes of action for same injuries, one based on tort, and other on contract, were joined, pursuant to Shannon's Code Tenn. § 4439, *held*, that verdict for defendants in tort case did not warrant dismissal as to count on contract.—Gooch v. Presbyterian Home Hospital, 239 F. 828.

### XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

#### (A) Judgments Operative as Bar.

⇐570(1) (U.S.C.C.A.) A judgment dismissing a cross-complaint by attachment defendants, because the damages had not been proven, is res judicata in a subsequent action by those defendants to recover damages for the attachment.—Sucesores de L. Villamil & Co., S. en C., v. Merced, 239 F. 86.

### XIV. CONCLUSIVENESS OF ADJUDICATION.

#### (B) Persons Concluded.

⇐700 (U.S.C.C.A.) The parties to an action in the district court for San Juan between two copartnerships, suing and sued by their firm names only, are the same as in a subsequent action in the United States District Court, in which the names and citizenship of the individual partners were given.—Sucesores de L. Villamil & Co., S. en C., v. Merced, 239 F. 86.

### XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

⇐948(1) (U.S.C.C.A.) Under Shannon's Code Tenn. §§ 4627, 4636, evidence offered by defendant, in an action for malpractice by a physician, to show former recovery, is inadmissible, where such defense was not pleaded.—Kalloch v. Hoagland, 239 F. 252.

## JUDICIAL NOTICE.

See Evidence, ⇐22.

## JUDICIAL SALES.

See Bankruptcy, ⇐257, 260; Mortgages, ⇐553.

## JUDICIARY ACT.

See Courts, ⇐269.

## JURISDICTION.

See Admiralty, ⇐25; Bankruptcy, ⇐20, 51, 219, 293, 303; Courts, ⇐89, 493; Militia, ⇐20.

## JURY.

See Trial, ⇐139, 142.

### II. RIGHT TO TRIAL BY JURY.

⇐21(4) (U.S.C.C.A.) In a proceeding in a federal court to punish for contempt, defendant is not entitled to a jury trial under the federal Constitution.—Smith v. Government of Canal Zone, 239 F. 133.

⇐37 (U.S.C.C.A.) The Circuit Court of Appeals, on reversing a judgment of the lower court for failure to direct the verdict because matters had been previously adjudicated, will remand the case for a new trial.—Sucesores de L. Villamil & Co., S. en C., v. Merced, 239 F. 86.

## LACHES.

See Equity, ⇐72–87; Reformation of Instruments, ⇐32.

## LANDLORD AND TENANT.

See Bankruptcy, ⇐348.

### I. CREATION AND EXISTENCE OF THE RELATION.

⇐2 (U.S.C.C.A.) The right created by the distress and lien clauses in a lease is governed by the law of the state in which is located the demised property.—In re Mossler Co., 239 F. 262.

### III. LANDLORD'S TITLE AND REVERSION.

#### (A) Rights and Powers of Landlord.

⇐55(3) (U.S.C.C.A.) If the original lessee of land and a water right, or those claiming under it, have diverted the water from the land to its substantial damage, there is a proper case for

equitable protection, which might be given either by forfeiture of the lease or by the more common remedy of injunction and accounting for damages.—Semidey v. Central Aguirre Co., 239 F. 610.

### IV. TERMS FOR YEARS.

#### (D) Termination.

⊂=111 (U.S.C.C.A.) Permission given in good faith by a tenant to another to use water on other lands *held* not to injure the lessor substantially, and therefore not entitle him in equity to a forfeiture of the lease.—Semidey v. Central Aguirre Co., 239 F. 610.

Under Civ. Code Porto Rico, §§ 1459, 1472, breaches of the lease by the lessee do not ipso facto give the right of rescission, regardless of extenuating or moderating circumstances.—Id.

### VIII. RENT AND ADVANCES.

#### (C) Lien.

⊂=246(5) (U.S.C.C.A.) An Illinois lease *held* to give no lien on the lessee's property, unless possession should be taken.—In re Mossler Co., 239 F. 262.

#### (D) Distress.

⊂=265(1) (U.S.C.C.A.) Under the Illinois law, where lessor distrains the tenant's property under a lease reserving a lien, the right of distress is protected, though the lien is fraudulent and invalid.—In re Mossler Co., 239 F. 262.

### IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

⊂=280 (U.S.C.C.A.) If the original lessee of land and a water right, or those claiming under it, have diverted the water from the land to its substantial damage, there is a proper case for equitable protection, which might be given either by forfeiture of the lease or by the more common remedy of injunction and accounting for damages.—Semidey v. Central Aguirre Co., 239 F. 610.

In a suit to forfeit a lease of land and water for the lessee's act in separating the water from the land, which rendered the water right subject to forfeiture, the lessor's remedy, either at law or by usual proceedings in equity, *held* not so inadequate as to justify the forfeiture.—Id.

⊂=285(3) (U.S.C.C.A.) In a suit in equity to forfeit a lease which permitted subletting the premises, but not assigning them, the determination of whether a transfer was an assignment or a sublease is not material.—Semidey v. Central Aguirre Co., 239 F. 610.

In a suit to forfeit a lease for violation of the restrictions concerning the use of water rights, the lessor cannot raise the question that the lessee is violating Joint Resolution May 1, 1900, because its holdings are excessive.—Id.

## LANDS.

See Public Lands.

## LARCENY.

See Post Office, ⊂=50.

## LAW OF THE CASE.

See Appeal and Error, ⊂=853.

## LEASE.

See Courts, ⊂=365; Landlord and Tenant; Mines and Minerals, ⊂=58; Monopolies, ⊂=16; Railroads, ⊂=131.

## LEAVE OF COURT.

See Pleading, ⊂=236.

## LEVY.

See Partnership, ⊂=54.

## LIBEL.

See Navigable Waters, ⊂=26.

## LIBEL AND SLANDER.

### I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

⊂=7(1) (U.S.C.C.A.) Publication charging plaintiff with various offenses and moral delinquencies, some of which were indictable, *held* libelous per se.—Robinson v. Johnson, 239 F. 671.

### II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.

⊂=39 (U.S.C.C.A.) To be privileged, as a public record, an entry, writing, or document must have been made by a public officer in the line of his official duty.—Robinson v. Johnson, 239 F. 671.

Publication of letter of Assistant Secretary of Interior relative to discharge of a special Indian officer *held* not absolutely privileged; publication not being fair, because failing to include portions of record which were extenuating.—Id.

### IV. ACTIONS.

#### (C) Evidence.

⊂=104(1) (U.S.C.C.A.) Where defendant asserted privilege, in that publication contained excerpts from public record, other portions of record contradicting publication are admissible to show that defendant picked out only portions of record which served his purpose.—Robinson v. Johnson, 239 F. 671.

⊂=110(1) (U.S.C.C.A.) In prosecution for libel, where defendant asserted truth of his charge of subornation of perjury, testimony that determination of Assistant Secretary of Interior to that effect was reversed *held* admissible.—Robinson v. Johnson, 239 F. 671.

## LIENS.

See Bankruptcy, ⊂=59, 165–198, 217; Brokers, ⊂=77; Execution, ⊂=113; Factors, ⊂=47; Fraudulent Conveyances, ⊂=138; Landlord and Tenant, ⊂=2, 246; Logs and Logging, ⊂=26; Mechanics' Liens.

⊂=7 (U.S.D.C.) While equity will enforce an agreement to give a lien upon property to be produced or acquired in the future, no such lien can be established, unless the property is clear-

ly designated.—In re Imperial Textile Co., 239 F. 775.

## LIFE INSURANCE.

See Insurance, ⊂=300.

## LIGHTS.

See Collision, ⊂=75.

## LIMITATION OF ACTIONS.

See Adverse Possession.

### I. STATUTES OF LIMITATION.

#### (B) Limitations Applicable to Particular Actions.

⊂=19(1) (U.S.C.C.A.) Under Ky. St. § 458, *held*, that section 2505, prescribing a 15-year limitation upon actions to recover real property, applies to actions to recover mineral interests in lands.—Pond Creek Coal Co. v. Hatfield, 239 F. 622.

### II. COMPUTATION OF PERIOD OF LIMITATION.

#### (A) Accrual of Right of Action or Defense.

⊂=55(5) (U.S.D.C.) Under Rem. & Bal. Code Wash. § 159, subd. 1, and section 165, *held* that more than three years after its transfer of franchise and right of way, including tunnel, no action could be maintained against transferor of tunnel for injuries occasioned by construction and maintenance.—City of Seattle v. Great Northern Ry. Co., 239 F. 1009.

### III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

⊂=163(1) (U.S.D.C.) As between the parties, a payment takes a barred claim out of the statute, there being no other debt.—In re Salmon, 239 F. 413.

## LIMITATION OF LIABILITY.

See Shipping, ⊂=209.

## LIQUIDATED DAMAGES.

See Damages, ⊂=140.

## LITERARY PROPERTY.

See Copyrights.

## LOANS.

See Banks and Banking, ⊂=182.

## LOGS AND LOGGING.

⊂=26(2) (U.S.C.C.A.) Under Louisiana Act No. 145, of 1888, the operatives of a logging railroad owned by a subsidiary corporation acquire no lien on the lumber produced if they contributed nothing in the way of labor in converting the standing timber into the mortgaged lumber.—Security Trust Co. v. Bank of Bernice, 239 F. 665.

## LUMBER.

See Logs and Logging.

## MAIL.

See Post Office.

## MALPRACTICE.

See Accord and Satisfaction, ⊂=25; Judgment, ⊂=948; Physicians and Surgeons, ⊂=18.

## MANDAMUS.

### II. SUBJECTS AND PURPOSES OF RELIEF.

#### (A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

⊂=57(1) (U.S.C.C.A.) A petition for a mandamus to require a lower court to enter an order to permit petitioners to appeal therefrom is addressed to the discretion of the court, and is not to be granted unless to prevent substantial injustice.—In re Brookstone Mfg. Co., 239 F. 697.

## MASTER AND SERVANT.

### I. THE RELATION.

#### (B) Statutory Regulation.

⊂=13 (U.S.C.C.A.) The members of a switching crew, employed by a terminal company engaged in interstate transportation, whose only duties were to move drags of one or more cars to or from car floats and about the terminal yards, are persons actually engaged in or connected with the movement of a train, within the Hours of Service Act.—Brooklyn Eastern Dist. Terminal v. United States, 239 F. 287.

A terminal company, receiving and delivering goods only from or to common carriers by railroad or steamship with whom it had contracts, and dealing with the shippers and consignees only as agents for such carriers, is not a common carrier, within the Hours of Service Act. —Id.

A terminal company, not a common carrier, but an agent of such carrier, within Hours of Service Act, §§ 2, 3, is not liable to penalties under that act for permitting its own employés to work overtime.—Id.

⊂=13 (U.S.D.C.) The Hours of Service Act, which was intended to avoid the danger resulting from exhausted employés, must be liberally construed to repress the evil and advance the remedy.—United States v. Pennsylvania R. Co., 239 F. 576.

A yardmaster *held* within the provision of the Hours of Service Act limiting the time of continuous service of employés, who by the use of telephone deliver orders pertaining to train movements.—Id.

⊂=13 (U.S.D.C.) The Hours of Service Act was intended to apply in every part of the United States, without regard to difference between local conditions, and must be given a construction which would be sound in every judicial

district.—United States v. Pennsylvania Co., 239 F. 761.

Such act is so manifestly in the interests of humanity that it should be liberally construed, but because of the penalties imposed its provisions should not be extended beyond their plain meaning.—Id.

Such act does not apply, where the delay resulted from the derailing of another train, which was known by the dispatcher before the employés in question left the terminal, but where the conductor of the derailed train had stated the track could be cleared in an hour. —Id.

Where employés of an interstate carrier are delayed by casualty, so as not to be able to reach their terminal in time, such act does not require the carrier to relieve before they reach the terminal.—Id.

Under section 4 of such act, a ruling of the Interstate Commerce Commission construing a doubtful provision of the act is entitled to great weight.—Id.

## III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

### (B) Tools, Machinery, Appliances, and Places for Work.

⊂=119 (U.S.C.C.A.) An electric power company owes its employés the duty to exercise care commensurate with the dangerous and subtle power of electricity.—Southern Power Co. v. McClure, 239 F. 495.

### (F) Risks Assumed by Servant.

⊂=217(1) (U.S.C.C.A.) A brakeman assumes risks which are obvious, or of which he knew or might have learned by the ordinary use of his senses, but not the risk of hidden or latent dangers of which he was ignorant, and concerning which the railroad company owes him the duty to warn.—Philadelphia & R. Ry. Co. v. Marland, 239 F. 1.

⊂=226(1) (U.S.C.C.A.) A railroad employé assumes the ordinary risks incident to his work, but not the risk of company's negligence in performing its duty to provide a safe place and safe appliances for the employé's use.—Philadelphia & R. Ry. Co. v. Marland, 239 F. 1.

### (G) Contributory Negligence of Servant.

⊂=228(1) (U.S.C.C.A.) In an action under the federal Employers' Liability Act, a recovery for injuries to a servant is not defeated by proof of his negligence, unless it is shown that such negligence was the sole cause of the injury.—Southern Ry. Co. v. Mays, 239 F. 41.

### (H) Actions.

⊂=276(7) (U.S.C.C.A.) Evidence *held* sufficient to warrant the jury in inferring, not merely speculating, that a brakeman was killed by one of three bridges across the track, striking his head while he was standing on the tender.—Philadelphia & R. Ry. Co. v. Marland, 239 F. 1.

Evidence *held* sufficient to warrant the jury in inferring, not speculating, that a particular one of three bridges having insufficient clearance struck and killed a brakeman on a train passing under the bridge.—Id.

⊂=278(13) (U.S.C.C.A.) In an action for personal injuries to an employé, evidence *held* to show as a matter of law that he was testing the machine in connection with the repair thereof at the time, so that its operation without the guard required by statute was not negligence on the part of his employer.—Shenandoah Abattoir Co. v. Sustock, 239 F. 284.

⊂=278(20) (U.S.C.C.A.) In action for death of railroad brakeman, struck by bridge while riding on train, evidence *held* not to sustain defendant's contention that jury were permitted to presume negligence from fact of accident, where there was evidence on issue of failure to warn decedent of danger from construction of bridge.—Philadelphia & R. Ry. Co. v. Marland, 239 F. 1.

⊂=281(12) (U.S.C.C.A.) In an action for the death of an electric power lineman, evidence *held* to show that the proximate cause of the accident was the lineman's negligence in striking a wire which he knew to be highly charged with electricity, instead of the wire he was directed to strike and which was not then charged. —Southern Power Co. v. McClure, 239 F. 495.

⊂=285(7) (U.S.C.C.A.) In action for injuries received by brakeman, struck by some object which he claimed extended from passing train, *held*, that evidence was insufficient to carry case to jury under doctrine of res ipsa loquitur.—Smith v. Pennsylvania R. Co., 239 F. 103.

⊂=286(3) (U.S.C.C.A.) The question whether an employer, who directed an ignorant immigrant to load gravel from a gravel bank without warning him of the danger or taking any precaution, negligently failed to furnish a safe place to work, was properly submitted to the jury.—Schunnemunk Const. Co. v. Sbaratta, 239 F. 716.

⊂=286(33) (U.S.C.C.A.) In an action by a brakeman for injuries received while attempting to cut some cars of a train from the rest, question of negligence of engineer in failing to set brakes on rear cars, which brakeman contended pressed down and injured him, *held* for jury.—Carolina, C. & O. Ry. Co. v. Stroup, 239 F. 75.

⊂=288(5) (U.S.C.C.A.) In an action for the death of a brakeman, evidence as to the warning given him concerning a low bridge *held* not to show as a matter of law that he knew of the particular danger of that bridge, and therefore assumed the risk.—Philadelphia & R. Ry. Co. v. Marland, 239 F. 1.

⊂=288(5) (U.S.C.C.A.) A wrecking foreman *held* not to have assumed the risk of the improper coupling of wrecked cars between the engine and the wrecking outfit as a matter of law, though he knew of the danger.—Southern Ry. Co. v. Mays, 239 F. 41.

⊂=288(12) (U.S.C.C.A.) The question whether the risk to a brakeman from a bridge, only part of which was so low as to be dangerous, was so obvious that he assumed the risk, *held* for the jury.—Philadelphia & R. Ry. Co. v. Marland, 239 F. 1.

## IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

### (A) Acts or Omissions of Servant.

⊂=301(4) (U.S.C.C.A.) A bridge contractor, required to maintain and operate a temporary

drawbridge, *held* liable for the negligence of those operating the same, although they were general employés of the counties building the bridge, hired temporarily to the contractor.—The Louise Rugge, 239 F. 458.

⊂=304 (U.S.C.C.A.) A corporation operating a motor bus is liable for injuries caused by the negligence of its chauffeur in running at a speed faster than permitted.—Panama R. Co. v. Bosse, 239 F. 303.

## MAXIMS.

See Equity, ⊂=57, 66.

## MECHANICS' LIENS.

### IV. OPERATION AND EFFECT.

#### (C) Priority.

⊂=198 (U.S.C.C.A.) Under Ky. St. §§ 2314, 2315, 2316, 2317, 2487, 2488, 2489, 2490, the lien of a materialman *held* to take priority over the lien of a landlord.—Louisville Woolen Mills v. Tapp, 239 F. 463.

Where, by virtue of holding over, new tenancy was created, under Ky. St. § 2295, *held*, that lien for rent accruing under new lease must be deemed to have been created after expiration of original lease, and so was inferior to lien of a materialman on property upon demised premises when second tenancy was created.—Id.

## MILITIA.

⊂=8 (U.S.C.C.A.) National Defense Act June 3, 1916, § 27, applies to enlistments of minors under 18 in the National Guard, and such enlistments may be avoided by the parents of the minors who did not consent.—Hoskins v. Dickerson, 239 F. 275.

⊂=20 (U.S.C.C.A.) A minor over 16 and under 18, who enlisted in the National Guard without the consent of his parents, became liable to punishment for military offenses, despite the right of his parents to avoid the enlistment.—Hoskins v. Dickerson, 239 F. 275.

## MINES AND MINERALS.

See Easements; Estoppel, ⊂=90; Limitation of Actions, ⊂=19.

### II. TITLE, CONVEYANCES, AND CONTRACTS.

#### (A) Rights and Remedies of Owners.

⊂=49 (U.S.C.C.A.) Although defendant, who purchased surface rights upon land at that time or soon thereafter, formed intention of holding mineral interests, his claim thereto, unless open and notorious, was not adverse.—Pond Creek Coal Co. v. Hatfield, 239 F. 622.

Where owner of surface conveyed it, reserving mineral rights which he did not own, mere use and possession of surface was not enough to constitute adverse possession of mineral rights.—Id.

Where owner of surface rights in land, who was entitled to mine coal for domestic purposes, cut timber and mined coal, such acts constitute no adverse possession.—Id.

That owner of surface rights in land paid taxes on the lands containing the mineral does not constitute adverse possession of mineral rights.—Id.

#### (C) Leases, Licenses, and Contracts.

⊂=58 (U.S.D.C.) A consideration of $1 is sufficient to support an oil and gas lease on condition subsequent for the drilling of wells and payment of royalties, though the lessee is not bound to perform the conditions.—Lindlay v. Raydure, 239 F. 928.

A consideration for an oil and gas lease *held* to support the privilege given the lessee to secure an extension of time within which to drill a well by payment of the sum specified.—Id.

The rule that unperformed contracts optional as to one party are optional as to both does not apply to an oil and gas lease, for which the consideration has been paid and which gives the lessee a vested interest in the right to explore for the minerals.—Id.

A clause in an oil and gas lease giving the lessee the right to surrender the lease at any time and be relieved from all liability thereon does not invalidate the lease.—Id.

⊂=73 (U.S.D.C.) An oil and gas lease *held* to convey a vested interest in the right to explore for minerals and an interest in the minerals contingent on their discovery and reduction to possession.—Lindlay v. Raydure, 239 F. 928.

⊂=73½ (U.S.D.C.) The lessee in an oil and gas lease, for which the consideration had been paid, who has a right to surrender the lease, *held* not a tenant at will, so as to permit the landlord to cancel the deed.—Lindlay v. Raydure, 239 F. 928.

⊂=81 (U.S.D.C.) A suit by the lessee under an oil and gas lease to enjoin the removal of oil and gas from the premises by a subsequent lessee is a suit to prevent trespass and waste to the interest of the lessee, not for specific performance of the lease.—Lindlay v. Raydure, 239 F. 928.

A lessee under an oil and gas lease has no adequate remedy at law which deprives him of his right to enjoin a subsequent lessee from removing the oil and gas.—Id.

The right of the lessee under an oil and gas lease to enjoin the removal of those minerals by a subsequent lessee is not affected by the inadequacy of the consideration for the lease.—Id.

## MINORS.

See Army and Navy, ⊂=19-36; Militia, ⊂=8, 20.

## MISREPRESENTATION.

See Fraud; Insurance, ⊂=300.

## MODIFICATION.

See Sales, ⊂=89.

# MONOPOLIES.

## II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

⚖16(1) (U.S.D.C.) Neither a lease in 1885 of the lines of a former lessee to the former lessor, nor the substitution of a new lease, making only immaterial changes, in 1893, affected the exemption from the Anti-Trust Act of 1887 of the relations existing between the railroads prior to the passage of the act.—United States v. Southern Pac. Co., 239 F. 998.

That a lease of railroad lines was not authorized by state statutes does not render it subject to the Anti-Trust Act.—Id.

The Anti-Trust Act does not apply where there had been a continuous control by lease of railroads owned by two corporations, two lines of which were naturally competing, since 1870, and the lessee in 1899 purchased the stock of lessor.—Id.

# MORTGAGES.

See Bankruptcy, ⚖188; Chattel Mortgages.

## I. REQUISITES AND VALIDITY.

### (B) Form and Contents of Instruments.

⚖48(2) (U.S.C.C.A.) Description in deed of trust as "east half of the" survey, "situated about 14 miles southwest from Boston, in Bowie county," *held* sufficient to identify land intended.—Klein v. Darnell, 239 F. 844.

## X. FORECLOSURE BY ACTION.

### (J) Sale.

⚖553 (U.S.C.C.A.) Where defendant was a tenant of plaintiff when he acquired outstanding title based on foreclosure of deed of trust, defendant has burden of proving regularity of foreclosure proceedings.—Klein v. Darnell, 239 F. 844.

# MOTIONS.

See Appeal and Error, ⚖219; Criminal Law, ⚖918; Pleading, ⚖362; Trial, ⚖11, 178.

⚖36 (U.S.C.C.A.) A court has power by an order to carry over pending motions for determination at a subsequent term.—Calaf v. Fernandez, 239 F. 795.

⚖58 (U.S.C.C.A.) A court has power, while a case and the parties are before it, upon proper hearing, to reconsider, modify, or enlarge its previous orders in respect to a pending controversy.—Calaf v. Fernandez, 239 F. 795.

# MOVING PICTURES.

See Copyrights, ⚖50.

# MULTIPLICITY OF SUITS.

See Injunction, ⚖19.

# MUNICIPAL CORPORATIONS.

See Counties; Eminent Domain, ⚖75, 86; Street Railroads, ⚖24, 29.

## IX. PUBLIC IMPROVEMENTS.

### (B) Preliminary Proceedings and Ordinances or Resolutions.

⚖321(2) (U.S.D.C.) The necessity for the construction of a municipal street railroad along a street occupied by tracks of a private corporation is a legislative rather than a judicial question, where there is no showing of the exercise of an arbitrary power by the city.—United Railroads of San Francisco v. City and County of San Francisco, 239 F. 987.

### (C) Contracts.

⚖339(2) (U.S.C.C.A.) The specifications for paving adopted by the city council *held* to authorize the mayor to include in the contract a condition on the guaranty that the city engineer should give notice of defects.—City of Hutchinson v. Kansas Bitulithic Co., 239 F. 659.

⚖347(1) (U.S.C.C.A.) A surety on the bond given by a paving contractor cannot, if the contract was invalid because in excess of the mayor's authority, be held liable for the contractor's failure to conform to the specifications.—City of Hutchinson v. Kansas Bithulithic Co., 239 F. 659.

⚖368 (U.S.C.C.A.) A city *held* not entitled to recover on the guaranty of a paving contract, where the city engineer had given no notice of defects as required by the contract, whether the contract was valid or the rights of the parties were determined by the specifications.—City of Hutchinson v. Kansas Bithulithic Co., 239 F. 659.

Paving contract *held* to require the contractor to construct the paving so that it would be accepted by the city authorities, and to maintain it in repair if any defects appeared during the first year.—Id.

⚖375 (U.S.C.C.A.) In an action at law, where paving contractor's defense was failure of the city engineer to give notice of defects, the city can reply that the engineer was corruptly hired by the contractor not to give such notice.—City of Hutchinson v. Kansas Bithulithic Co., 239 F. 659.

## XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

### (A) Streets and Other Public Ways.

⚖682(2) (U.S.D.C.) A city's police power cannot be so limited as to prevent the city from constructing a street railroad of its own on the same streets as the lines of a private corporation, when that is made necessary by changing conditions.—United Railroads of San Francisco v. City and County of San Francisco, 239 F. 987.

## XII. TORTS.

### (C) Defects or Obstructions in Streets and Other Public Ways.

⚖764(1) (U.S.C.C.A.) Under St. Wis. 1915, § 1339, question what is sufficient street is relative, municipality being required to exercise

greater care with respect to sidewalks than carriageway, though bound to govern itself accordingly when it is charged with knowledge that sidewalks are obstructed.—City of Superior v. Olt, 239 F. 100.

⇐821(8) (U.S.C.C.A.) In an action by a pedestrian, injured in a fall caused by a brick in street, which she used because sidewalk was obstructed with building material, question whether city was liable under St. Wis. 1915. § 1339. *held* for the jury.—City of Superior v. Olt, 239 F. 100.

⇐821(26) (U.S.C.C.A.) As the whole of a street is open to public travel, a pedestrian is not guilty of contributory negligence as a matter of law in using carriageway when sidewalk is obstructed.—City of Superior v. Olt, 239 F. 100.

Whether a pedestrian, who used the carriageway on finding the sidewalk obstructed, used ordinary care under the circumstances, *held* a question for the jury.—Id.

## NAMES.

See Trade-Marks and Trade-Names.

## NATIONAL BANKS.

See Banks and Banking, ⇐254; Courts, ⇐269.

## NATIONAL DEFENSE ACT.

See Army and Navy, ⇐19; Militia, ⇐8.

## NATIONAL GUARD.

See Militia.

## NATURALIZATION.

See Aliens, ⇐61, 62, 68.

## NAVIGABLE WATERS.

See Canals; Waters and Water Courses.

### I. RIGHTS OF PUBLIC.

⇐19 (U.S.C.C.A.) A pile driver, used with a catamaran in repairing a ferry rack in the Hudson, *held* liable, under Act March 3, 1899, for the action of one of its crew in throwing the ends cut from piles on the catamaran into the river.—The Pile Driver No. 2, 239 F. 489.

⇐20(8) (U.S.C.C.A.) Injury to a lighter by striking a drawbridge *held* due to negligence of bridge tenders in failing to raise the draw to its full height.—The Louise Rugge, 239 F. 458.

⇐20(8) (U.S.C.C.A.) Injury to a lighter passing through a drawbridge *held* due solely to the negligence of the bridge tenders in failing to see the lighter and in closing the draw prematurely.—Wright & Cobb Lighterage Co. v. Snare & Triest Co., 239 F. 482.

A contractor with two counties to operate a drawbridge over a navigable river *held* not entitled to exoneration from liability for injury to a passing vessel through negligent operation of the draw, on the ground that the counties owed a public duty, which they could not delegate.—Id.

⇐26(3) (U.S.C.C.A.) Evidence *held* insufficient to sustain the allegation of a libel that an injury to the bottom of libelant's steamer was caused by striking rocks thrown up by respondent dredging company in the course of its work.—New England S. S. Co. v. R. G. Packard Dredging Co., 239 F. 120.

## NAVIGATION.

See Navigable Waters, ⇐19, 20, 26.

## NAVY.

See Army and Navy.

## NEGLIGENCE.

See Canals, ⇐18; Carriers, ⇐177; Collision; Counties, ⇐146; Death; Master and Servant, ⇐119, 217-288, 301, 304; Municipal Corporations, ⇐764, 821; Physicians and Surgeons, ⇐14; Railroads, ⇐400; Shipping, ⇐81, 200; Towage, ⇐11, 12; Trial, ⇐260.

### I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

#### (C) Condition and Use of Land, Buildings, and Other Structures.

⇐52 (U.S.C.C.A.) Defendant hotel company, which placed chain across passageway leading to its delivery entrance, *held* guilty of negligence in failing to take means to notify pedestrians using way of its presence.—The Ansonia v. Sullivan, 239 F. 296.

### III. CONTRIBUTORY NEGLIGENCE.

#### (A) Persons Injured in General.

⇐68 (U.S.C.C.A.) It is not contributory negligence, which deprives a landowner of his right to recover damages caused by fire started on the highway and negligently permitted to spread, for him to have permitted dry leaves to accumulate on land controlled by him adjacent to the highway.—Hawaii County v. Halawa Plantation, 239 F. 836.

### IV. ACTIONS.

#### (B) Evidence.

⇐121(2) (U.S.C.C.A.) Before a defendant is called upon to explain how injury is received, there must be facts showing surrounding situation, which in ordinary course would not permit or produce injury, and that something under defendant's control inflicted injury.—Smith v. Pennsylvania R. Co., 239 F. 103.

⇐134(1) (U.S.C.C.A.) In action against defendant proprietor of hotel for injuries resulting in death of plaintiff's intestate, who was caught by chain stretched across passageway by defendant, *held*, that evidence warranted finding that defendant was negligent.—The Ansonia v. Sullivan, 239 F. 296.

⇐135 (U.S.C.C.A.) In action against defendant proprietor of hotel for injuries resulting in death of plaintiff's intestate, who was caught by chain stretched across passageway by defendant, *held*, that evidence warranted finding

that deceased was not contributorily negligent.—The Ansonia v. Sullivan, 239 F. 296.

**(C) Trial, Judgment, and Review.**

⊂=136(27) (U.S.C.C.A.) Plaintiff's intestate, who was caught by chain extending across passageway, *held* not guilty of contributory negligence as a matter of law in using the way, being entitled to assume it was safe.—The Ansonia v. Sullivan, 239 F. 296.

## NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

## NEW TRIAL.

See Appeal and Error, ⊂=1178; Criminal Law, ⊂=918; Jury, ⊂=37.

**I. NATURE AND SCOPE OF REMEDY.**

⊂=9 (U.S.C.C.A.) A court may order a new trial upon a particular branch of a controversy.—Calaf v. Fernandez, 239 F. 795.

## NONJOINDER.

See Parties, ⊂=80.

## NOTES.

See Bills and Notes.

## NOTICE.

See Bills and Notes, ⊂=504; Corporations, ⊂=428; Executors and Administrators, ⊂=524; Municipal Corporations, ⊂=339; Negligence, ⊂=52; Patents, ⊂=317; Pleading, ⊂=17; Specific Performance, ⊂=23; Waters and Water Courses, ⊂=16.

## NOVELTY.

See Patents, ⊂=39, 42.

## OBJECTIONS.

See Appeal and Error, ⊂=230, 237; Bankruptcy, ⊂=47; Courts, ⊂=325; Process, ⊂=166.

## OBSTRUCTING JUSTICE.

⊂=5 (U.S.C.C.A.) Any attempt by one whose conduct was being investigated by the grand jury to obstruct such investigation by causing his employés to alter entries in his books is corruptly impeding justice, within Criminal Code, § 135, though no bribery accompanied it.—Bosselman v. United States, 239 F. 82.

⊂=15 (U.S.C.C.A.) In a prosecution for obstructing justice by causing alteration of books material to an inquiry by the grand jury, the indictments found by the grand jury in that inquiry are admissible to show what subject it was investigating.—Bosselman v. United States, 239 Fed. 82.

In a prosecution for obstructing justice by altering books material to investigation by the grand jury of the charge that defendant had shipped illegal articles, those articles were admissible in evidence to show the motive in making the alterations.—Id.

⊂=16 (U.S.C.C.A.) In a prosecution for obstructing justice by causing alterations in the books of defendant concerning a matter under inquiry by the grand jury, evidence *held* sufficient, though circumstantial, to sustain a conviction.—Bosselman v. United States, 239 F. 82.

## OBSTRUCTIONS.

See Municipal Corporations, ⊂=764, 821; Navigable Waters, ⊂=19, 26.

## OFFICERS.

See Bankruptcy, ⊂=43; Banks and Banking, ⊂=254; Corporations, ⊂=312, 428; Courts, ⊂=269; Receivers.

## OPINION EVIDENCE.

See Evidence, ⊂=487, 506.

## OPTIONS.

See Bankruptcy, ⊂=254, 267; Courts, ⊂=365; Specific Performance, ⊂=57; Sunday, ⊂=13.

## ORDERS.

See Bankruptcy, ⊂=260.

## PAROL EVIDENCE.

See Evidence, ⊂=162, 432–448.

## PARTIES.

**V. DEFECTS, OBJECTIONS, AND AMENDMENT.**

⊂=80(6) (U.S.C.C.A.) The failure of a creditor to bring his creditors' bill on behalf of other creditors at most is a defect of parties plaintiff, which can be raised by special demurrer, or perhaps by answer.—Murray v. Sioux Alaska Mining Co., 239 F. 818.

## PARTNERSHIP.

See Bankruptcy, ⊂=165, 219; Judgment, ⊂=700.

**I. THE RELATION.**

**(C) Evidence.**

⊂=54 (U.S.C.C.A.) In action against United States marshal and deputy for alleged wrongful levy of attachment upon property of plaintiff, evidence *held* to warrant a finding that plaintiff was not partner of debtor whose property was sought to be attached.—Brenneman v. Fagerberg, 239 F. 706.

## PART PAYMENT.

See Limitation of Actions, ⊂=163.

## PATENTS.

See Appeal and Error, ⊂=662; Evidence, ⊂=487.

**II. PATENTABILITY.**

**(A) Invention.**

⊂=19 (U.S.D.C.) The mere diminution in size or reduction in quantity, which may prove ad-

vantageous in an application of a device to accomplish one specific result out of all those covered by a broad prior patent, does not constitute a new invention.—Linde Air Products Co. v. Morse Dry Dock & Repair Co., 239 F. 909.

⊂=26(1) (U.S.C.C.A.) In determining whether changes involve invention, it is of some importance that they relate to assembly rather than to operation.—Winton Motor Carriage Co. v. Lindsay Auto Parts Co., 239 F. 521.

⊂=26(2) (U.S.C.C.A.) In looking for invention in a combination of old elements, the court is guided by the new and useful means which the combination may afford, or the new and useful results which may be obtained from it.—Neill v. Kinney, 239 F. 309.

⊂=35 (U.S.C.C.A.) While a summation of merits in a patented device does not constitute invention, they are to be considered, and, when present in a marked degree, may give such utility as to amount to invention.—Neill v. Kinney, 239 F. 309.

#### (B) Novelty.

⊂=39 (U.S.D.C.) A new method cannot be predicated upon directions to use a device in some particular way, which requires nothing beyond skill in the operator, if the result and method of accomplishing the result were disclosed in the earlier patent.—Linde Air Products Co. v. Morse Dry Dock & Repair Co., 239 F. 909.

⊂=42 (U.S.C.C.A.) An invention achieves a new result where a function which had been performed by other means was performed to an efficient degree by an association of means never before combined.—American Ball Bearing Co. v. Finch, 239 F. 885.

#### (C) Utility.

⊂=49 (U.S.C.C.A.) When the device commercially accepted included features covered by claims not in suit and by other patents, and the claims in suit rest upon minor structural details, there is little reason to attribute the commercial success to these claims.—Winton Motor Carriage Co. v. Lindsay Auto Parts Co., 239 F. 521.

#### (E) Prior Public Use or Sale.

⊂=76 (U.S.C.C.A.) After proof of the sale without reservation of a machine for actual use more than two years before application for a patent therefor, evidence as to whether the patentee regarded it as a completed or experimental machine is immaterial.—Monroe v. Bresee, 239 F. 727.

⊂=81 (U.S.C.C.A.) Proof of prior public use, to defeat a patent, must be very clear and beyond a reasonable doubt; but, when such public use is clearly shown, the burden is cast upon the patentee to establish the fact that it was experimental.—Guy v. Stein, 239 F. 729.

⊂=81 (U.S.D.C.) The issuance of a patent gives to the patentee the prima facie right to the invention, of which he cannot be deprived on the ground of prior public use of the same machine by others except upon clear evidence.—Wendell v. American Laundry Machinery Co., 239 F. 555.

#### (F) Abandonment.

⊂=83 (U.S.D.C.) The prior public use of a patented machine with permission of the inventor for more than two years prior to the application is an "abandonment" in fact, unless shown to have been experimental only.—Wendell v. American Laundry Machinery Co., 239 F. 555.

### IV. APPLICATIONS AND PROCEEDINGS THEREON.

⊂=106(2) (U.S.C.C.A.) Under the rules of practice of the Patent Office a disclaimer filed by a party to an interference extends only to the particular claim or claims as to which interference has been declared.—Reed v. Cropp Concrete Machinery Co., 239 F. 869.

⊂=112(4) (U.S.C.C.A.) A finding by the Patent Office in interference proceedings of priority of invention in favor of one applicant, and the issuance of a patent to him, creates a strong presumption that he was the first inventor as against the other parties to the proceeding.—Reed v. Cropp Concrete Machinery Co., 239 F. 869.

### VII. REISSUES.

⊂=136 (U.S.D.C.) The general purpose of the statute providing for reissues is to correct mistakes and errors, not to enable the inventor to extend his monopoly so as to cover progress by others in the art.—Pierce v. Bell, 239 F. 549.

⊂=137 (U.S.C.C.A) An assignee of the Northrop patent, No. 987,817, for a misthreading device for looms, *held* entitled to a specific enforcement of the implied covenant of the patentee, as assignor, to execute an application for a reissue.—Northrop v. Draper Co., 239 F. 719.

An assignment of an application for a patent *held* to carry with it an implied covenant, running with the grant, to make application for a reissue in case the patent disclosed grounds therefor.—Id.

⊂=147 (U.S.D.C.) The introduction in a reissue patent of claims for invention which are described but which the patentee neither claimed nor intended to claim by the original patent is unauthorized and void.—Pierce v. Bell, 239 F. 549.

### IX. CONSTRUCTION AND OPERATION OF LETTERS PATENT.

#### (A) In General.

⊂=157(2) (U.S.C.C.A.) Where the court is convinced that a patentee has made a meritorious invention, it will not deprive him of its fruits on merely technical grounds.—Hinman v. Visible Milker Co., 239 F. 896.

⊂=157(2) (U.S.C.C.A.) Where a patentee has produced a structure which practically inaugurates a new industry and is of great value, a court should be zealous to so construe the claims as to give it validity.—Auto Vacuum Freezer Co. v. William A. Sexton Co., 239 F. 898.

**(B) Limitation of Claims.**

⊂=167(1) (U.S.C.C.A.) A patentee obtains a monopoly only of what he discloses and claims, and what the claimed invention is must be found in the specification, with such light as the drawings may throw upon it.—Outlook Envelope Co. v. General Paper Goods Mfg. Co., 239 F. 877.

⊂=174 (U.S.C.C.A.) In determining whether the patentee made a material advance, the invention to be considered is that defined by the claim in suit.—Winton Motor Carriage Co. v. Lindsay Auto Parts Co., 239 F. 521.

⊂=176 (U.S.C.C.A.) The word "narrow," as used in a patent claim, *held* not to limit the claim to an exact mathematical dimension.—Vacuum Cleaner Co. v. Innovation Electric Co., 239 F. 543.

⊂=177 (U.S.C.C.A.) Where a patent is for a combination of old elements, and the invention is in the combining, the patentee is not entitled to all that somebody else could do with those elements, but to only what he did with them.—Safety Car Heating & Lighting Co. v. Gould Coupler Co., 239 F. 861.

## X. TITLE, CONVEYANCES, AND CONTRACTS.

**(B) Assignments and Other Transfers.**

⊂=198 (U.S.D.C.) An assignment of a patent by heirs in Belgium, executed before a United States consul, *held* sufficient to pass title.—Linde Air Products Co. v. Morse Dry Dock & Repair Co., 239 F. 909.

⊂=202(1) (U.S.C.C.A.) Under contract assigning patents and reserving royalties, nonuser *held* not to entitle patentee to a reassignment.—Wadsworth v. Pressed Prism Plate Glass Co., 239 F. 507.

Contract assigning patents construed with respect to assignee's duty respecting expenses of obtaining patents on pending or future applications.—Id.

**(C) Licenses and Contracts.**

⊂=218(1) (U.S.C.C.A.) Contract by which complainant assigned patents to defendant construed, and under the evidence complainant *held* not entitled to recover royalties thereunder.—Wadsworth v. Pressed Prism Plate Glass Co., 239 F. 507.

## XI. REGULATION OF DEALINGS IN PATENT RIGHTS AND PATENTED ARTICLES.

⊂=222 (U.S.D.C.) Under Rev. St. § 4900 (Comp. St. 1913, § 9446), a patentee who did not mark his device with the word patented is not entitled to recover damages for an infringement except on proof that defendant after notice of the infringement continued it.—Globe Knitting Works v. Segal, 239 F. 322.

## XII. INFRINGEMENT.

**(A) What Constitutes Infringement.**

⊂=241 (U. S. D. C.) Infringement cannot be predicated on results obtained, irrespective of the mechanical apparatus employed.—Marconi Wireless Telegraph Co. v. Kilbourne & Clark Mfg. Co., 239 F. 328.

⊂=243 (U.S.C.C.A.) Infringement of a patent for a combination of old elements must be predicated on an appropriation of the same elements or their equivalents in the same combination.—Dresner v. Diamond, 239 F. 882.

⊂=245 (U.S.C.C.A.) Infringement is not avoided by the omission of an element of the patented combination, if the same result is accomplished in substantially the same way by the substitution of equivalent means.—Auto Vacuum Freezer Co. v. William A. Sexton Co., 239 F. 898.

⊂=255 (U.S.C.C.A.) The replacing of lost or injured parts of the mechanism of a patented machine constitutes repairing, and not reconstruction, and is within the right of the owner of the machine.—Foglesong Mach. Co. v. J. D. Randall Co., 239 F. 893.

Replacement of worn, lost, or injured parts of a patented machine *held* not a reconstruction which constituted infringement.—Id.

**(B) Actions at Law.**

⊂=262 (U.S.D.C.) A patentee may recover damages for infringement in an action at law.—Globe Knitting Works v. Segal, 239 F. 322.

**(C) Suits in Equity.**

⊂=287 (U.S.C.C.A.) A patentee, in addition to suing a manufacturer for infringement, *held* to have the right to maintain suits also against customers, with certain limitations.—Wagner v. Meccano, Limited, 239 F. 901.

⊂=310(9) (U.S.C.C.A.) Grounds for dismissal of a bill for infringement on motion, on the ground of invalidity of the patent considered.—Wright v. Wisconsin Lime & Cement Co., 239 F. 534.

⊂=310(9) (U.S.C.C.A.) Objection to the defense of prior public use in an infringement suit, on the ground that notice of name of user was not given, as required by Rev. St. § 4920 (Comp. St. 1913, § 9466), *held* waived by failure to object to evidence or move to strike out defense.—Monroe v. Bresee, 239 F. 727.

⊂=311 (U.S.C.C.A.) Objection to defense of prior public use in an infringement suit, on the ground that notice of name of user was not given, as required by Rev. St. § 4920 (Comp. St. 1913, § 9466), *held* waived by failure to object to evidence or move to strike out defense.—Monroe v. Bresee, 239 F. 727.

⊂=313 (U.S.C.C.A.) The dismissal of a bill for infringement of a concededly valid patent on motion based on complainants' answers to interrogatories propounded under equity rule 48 (198 Fed. xxxiv, 115 C. C. A. xxxiv) *held* error.—Asbestos Shingle, Slate & Sheathing Co. v. Asbestos Shingle Co., 239 F. 539.

⊂=317 (U.S.C.C.A.) Where defendant, after notice, sold devices infringing complainant's patent, a decree for an injunction and accounting is proper.—Atlas Floor Co. v. Robbins Mfg. Co., 239 F. 135.

⊂=317 (U.S.D.C.) Where a patent has expired during the pendency of a suit in equity for its infringement, an injunction will not be granted.—Keystone Type Foundry v. Wynkoop, 239 F. 355.

⚖318(1) (U.S.C.C.A.) Where defendant, after notice, sold devices infringing complainant's patent, a decree for an injunction and accounting is proper.—Atlas Floor Co. v. Robbins Mfg. Co., 239 F. 135.

⚖319(1) (U.S.D.C.) The measure of damages recoverable by a patentee from an infringer, except where increased by the court under the statute, is compensation for the pecuniary loss which he has suffered from the infringement.—De Laski & Thropp Circular Woven Tire Co. v. Empire Rubber & Tire Co., 239 F. 139.

⚖319(1) (U.S.D.C.) A patentee is entitled to an injunction to prevent further infringement, in which case a court of equity may award damages to do complete justice.—Globe Knitting Works v. Segal, 239 F. 322.

In a suit for the infringement of a patent, the right of a court of equity to award damages is dependent on the granting of purely equitable relief.—Id.

⚖319(1) (U.S.D.C.) Where a patent has expired during the pendency of a suit in equity for its infringement, an injunction will not be granted, but damages may be awarded for infringement during the time it was in force.—Keystone Type Foundry v. Wynkoop, 239 F. 355.

⚖321 (U.S.D.C.) Defendants' application to reopen a suit for infringement of patent, after decree was directed dismissing the bill, to admit testimony to show an assignment of the patent, *held* unreasonably delayed, and therefore denied.—Turner v. Lauter Piano Co., 239 F. 560.

⚖323 (U.S.D.C.) In a decree for defendant, in an infringement suit, on the ground of invalidity of the patent, the court will not include findings on issues determined in favor of complainant, which would not be reviewable by the appellate court.—Linde Air Products Co. v. Morse Dry Dock & Repair Co., 239 F. 909.

⚖324(1) (U.S.C.C.A.) A decree granting an injunction as to one patent sued on and dismissing the bill as to another is not final as to the latter, and complainant can appeal only within 30 days under Judicial Code, § 129, as from an interlocutory decree refusing to grant an injunction.—Stromberg Motor Devices Co. v. Arnson, 239 F. 891.

⚖324(1) (U.S.C.C.A.) The giving of a supersedeas bond by a manufacturer on appeal from an interlocutory decree enjoining infringement *held* not to affect the right of complainant to bring suits against defendant's customers pending the appeal.—Wagner v. Meccano, Limited, 239 F. 901.

⚖326(4) (U.S.C.C.A.) Where violation of an injunction against infringement by a new structure made by defendant is charged, it is within the discretion of the court to require the matter to be presented by a supplemental bill.—National Metal Molding Co. v. Tubular Woven Fabric Co., 239 F. 907.

⚖327 (U.S.D.C.) The recovery by a patentee of full compensation for the making and selling of infringing articles does not entitle a purchaser to continue the use of the infringing article thereafter.—De Laski & Thropp Circular Woven Tire Co. v. Empire Rubber & Tire Co., 239 F. 139.

A decree against the maker and seller of infringing machines *held* not to cover damages for their use, nor to bar a recovery of such damages in a subsequent suit against the users.—Id.

## XIII. DECISIONS ON THE VALIDITY, CONSTRUCTION, AND INFRINGEMENT OF PARTICULAR PATENTS.

⚖328.

### UNITED STATES.

DESIGN.

38,855. Design for font of type, held not anticipated, and infringed, 239 F. 355.

ORIGINAL.

609,154. Improvements in wireless telegraphy, held valid and infringed, 239 F. 328.

615,863. Rubber substitute and process of making the same, construed and held not infringed, 239 F. 734.

650,824. Building material, construed, and held not infringed, 239 F. 137.

665,212. Slugs and casting mold for linotype machine, held not anticipated, valid, and infringed, 239 F. 316.

665,326. Slugs and casting mold for linotype machine, held not anticipated, valid, and infringed, 239 F. 316.

670,080. Device for using engine exhaust for heating purposes, held not infringed, 239 F. 320.

671,136. Mop wringer, held not infringed, 239 F. 907.

748,760. Rear axle for automobiles, claims 2 and 3, held void, 239 F. 521.

753,820. Anti-friction bearing for automobile, claim 1 held valid and infringed, 239 F. 885.

763,772. System of wireless telegraphy, held not infringed, 239 F. 328.

825,952. Metal frame window screens, construed, and held infringed, 239 F. 135.

831,078. Method of cutting metal, held void, 239 F. 909.

847,947. Vacuum cleaner, held not anticipated valid, and infringed, 239 F. 543.

873,481. Lock, claim 10, held void, 239 F. 905.

893,105. Envelope machine, held not infringed, 239 F. 877.

933,386. Oil well derrick, held valid and infringed, 239 F. 309.

946,235. Shoe form, held not infringed, 239 F. 529.

958,860. Suit case, held not infringed, 239 F. 882.

973,902. Cleat for securing prepared roofing, held infringed, 239 F. 903.

981,111. Concrete mixer, claims 1, 2, and 11, held valid and infringed, held not infringed as to other claims, 239 F. 869.

1,013,672. Ice cream freezer, held valid and infringed, 239 F. 898.

1,070,080. Car-lighting system, construed and held not infringed, 239 F. 861.
1,104,512. Typographical machine, held not infringed, 239 F. 316.
1,022,764. Roofing material, held valid and infringed, 239 F. 534.
1,035,819. Union suit, held not to disclose invention, 239 F. 322.
1,046,066. Process of electric welding and its product, held valid and infringed, 239 F. 147.
1,097,716. Miner's carbide lamp, held void, 239 F. 729.
1,137,438. Ironing machine, held void, 239 F. 555.
1,154,337. Sewing machine attachment, held valid and infringed, 239 F. 549.

REISSUE.

13,708. Road leveling machine, held void, 239 F. 727.
13,876. Cow-milking machine, held valid and infringed, 239 F. 896.
14,149. Sewing machine attachment, held void, 239 F. 549.

## PAYMENT.

See Accord and Satisfaction; Bankruptcy, ⇐273; Bills and Notes, ⇐359; Eminent Domain, ⇐75; Seamen, ⇐24.

### IV. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⇐59 (U.S.C.C.A.) Under Shannon's Code Tenn. §§ 4627, 4636, evidence offered by defendant, in an action for malpractice by a physician, to show payment, is inadmissible, where such defense was not pleaded.—Kalloch v. Hoagland, 239 F. 252.

## PENALTIES.

See Internal Revenue, ⇐45.

## PERSONAL INJURIES.

See Damages, ⇐132; Master and Servant, ⇐119, 217-288; Municipal Corporations, ⇐764, 821; Negligence; Railroads, ⇐400.

## PETITION.

See Bankruptcy, ⇐84; Removal of Causes, ⇐86.

## PHILIPPINES.

See Aliens, ⇐68.

## PHOTOGRAPHS.

See Evidence, ⇐187.

## PHOTOPLAYS.

See Copyrights, ⇐50.

## PHYSICIANS AND SURGEONS.

See Accord and Satisfaction, ⇐25; Judgment, ⇐948.

⇐14(4) (U.S.C.C.A.) A physician is liable for negligently failing to exercise the care and skill ordinarily possessed by surgeons practicing in that locality and under the circumstances, in the light of modern advancements and learning.—Kalloch v. Hoagland, 239 F. 252.

⇐18(7) (U.S.C.C.A.) In an action against a physician for malpractice, the admission of evidence of a deformity not alleged in the declaration, for the purpose of showing lack of skill or care, *held* not reversible error.—Kalloch v. Hoagland, 239 F. 252.

⇐18(9) (U.S.C.C.A.) In an action against a physician for malpractice in the treatment of a broken leg, evidence *held* sufficient to take to the jury the question whether defendant failed to exercise proper care and skill in the treatment.—Kalloch v. Hoagland, 239 F. 252.

## PICTURES.

See Copyrights, ⇐50.

## PILOTS.

See Collision, ⇐87.

## PLEADING.

See Accord and Satisfaction, ⇐25; Appeal and Error, ⇐888, 959; Bankruptcy, ⇐44; Carriers, ⇐196; Courts, ⇐299, 347; Patents, ⇐310, 311; Release, ⇐45; Removal of Causes, ⇐47; Specific Performance, ⇐23; Towage, ⇐15; Trade-Marks and Trade-Names, ⇐92; Trusts, ⇐371; Usury, ⇐111.

### I. FORM AND ALLEGATIONS IN GENERAL.

⇐8(2) (U.S.D.C.) Where, in action to recover income taxes paid, facts were stated showing financial condition of plaintiff corporation and disposition of rents received under lease of its property, allegation that corporation had no income was a mere conclusion of law.—Rensselaer & S. R. Co. v. Irwin, 239 F. 739.

⇐17 (U.S.C.C.A.) Amended reply to a defense of failure of the city engineer to give notice of paving defects *held* to charge fraud and corruption of the engineer merely as an argumentative conclusion.—City of Hutchinson v. Kansas Bitulithic Co., 239 F. 659.

### III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

#### (A) Defenses in General.

⇐93(1) (U.S.D.C.) Under the code system of pleading in force in Washington, inconsistent defenses may not be pleaded.—Tomkins v. Paterson, 239 F. 402.

⇐93(2) (U.S.D.C.) In an action to recover the penalty for importing an alien contract laborer, denial by defendant of the allegation that plaintiff was within the prohibition of the act is a denial of a conclusion which is not inconsistent with an affirmative defense.—Tomkins v. Paterson, 239 F. 402.

⇐94 (U.S.D.C.) In an action for the purchase price of certain machines, the defenses that the sale had been procured by fraudulent representations and that the machines were me-

chanically imperfect should be separately pleaded.—Burroughs Adding Mach. Co. v. Scandinavian-American Bank, 239 F. 179.

**(F) Affidavit of Defense or of Merits.**

⇐155 (U.S.D.C.) Under Practice Act (Act Pa. May 14, 1915 [P. L. 483]) § 20, defendant cannot by affidavit of defense practically incorporate into the statement of claim matter unnecessary therefor, and thereon raise a question of law in limine.—McCarty v. Neilson, 239 F. 151.

### V. DEMURRER OR EXCEPTION.

⇐214(5) (U.S.D.C.) While a demurrer admits all facts well pleaded, it does not admit conclusions.—Rensselaer & S. R. Co. v. Irwin, 239 F. 739.

### VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

⇐236(1) (U.S.C.C.A.) The allowance of amendments to pleadings is in the discretion of the court.—In re Frank, 239 F. 709.

⇐269 (U.S.C.C.A.) The refusal of the trial court to permit a city during the trial to amend its reply, so as to allege that its engineer was corruptly hired not to give notice of defects in the paving, *held* not error.—City of Hutchinson v. Kansas Bitulithic Co., 239 F. 659.

### XI. MOTIONS.

⇐362(2) (U.S.D.C.) A motion to strike denials from the answer because they are inconsistent with the affirmative defense must be denied, where some of the denials were not inconsistent though others were.—Tomkins v. Paterson, 239 F. 402.

## PLEDGES.

⇐9 (U.S.C.C.A.) The acceptance of a new note for the antecedent debt of a corporation is not consideration for the pledge of bonds of another corporation by a controlling stockholder of both corporations.—First Nat. Bank v. Towner, 239 F. 433.

⇐19 (U.S.C.C.A.) The payee of a note indorsed before delivery cannot retain bonds pledged to secure that note and other obligations to secure a note given by the indorser.—First Nat. Bank v. Towner, 239 F. 433.

## POLICY.

See Insurance.

## POSSESSION.

See Adverse Possession.

## POST OFFICE.

### III. OFFENSES AGAINST POSTAL LAWS.

⇐50 (U.S.C.C.A.) In prosecution under Pen. Code, §§ 190, 192, for breaking into post office with intent to commit larceny, and for stealing stamps and money therein, the property of the United States, evidence *held* sufficient to go to the jury.—Coleman v. United States, 239 F. 711.

## POWERS.

### II. CONSTRUCTION AND EXECUTION.

⇐28 (U.S.C.C.A.) A privilege given by will to the sons of testator to divest the interests of the daughters in land on performance of a condition subsequent *held* personal, and not assignable.—Lucas v. Scott, 239 F. 450.

## PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

## PREFERENCES.

See Bankruptcy, ⇐59, 165–198, 303, 348.

## PRESCRIPTION.

See Adverse Possession; Easements; Limitation of Actions.

## PRESUMPTIONS.

See Appeal and Error, ⇐909, 920, 928; Bankruptcy, ⇐414; Bills and Notes, ⇐359; Canals, ⇐18; Customs and Usages, ⇐12; Deeds, ⇐194; Evidence, ⇐54, 70, 77; Patents, ⇐112; Religious Societies, ⇐16.

## PRINCIPAL AND AGENT.

See Bankruptcy, ⇐409; Brokers; Corporations, ⇐174, 668; Criminal Law, ⇐32; Factors; Insurance, ⇐73.

### II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

**(B) Compensation and Lien of Agent.**

⇐81(4) (U.S.C.C.A.) Contract appointing complainant exclusive subagent for sale of a product within certain territory construed with respect to his right to commissions on sales made by others.—Gatewood v. New River Consol. Coal & Coke Co., 239 F. 65.

Under a contract giving an exclusive agency for sale of a product on commission within a certain territory, the agent is entitled to commissions on sales within such territory by his principal or another agent.—Id.

⇐89(7) (U.S.C.C.A.) Evidence *held* erroneously excluded in a suit by an agent to recover commissions under his contract.—Gatewood v. New River Consol. Coal & Coke Co., 239 F. 65.

### III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

**(A) Powers of Agent.**

⇐92(1) (U.S.D.C.) The liability of a principal for the acts of his agent within the scope of his employment does not depend on consent by the principal or estoppel to deny consent, but is a survival from the ideas of status, which is now preserved from motives of policy.—Kidd v. Thomas A. Edison, Inc., 239 F. 405.

⚖102(1) (U.S.D.C.) An agent, authorized to engage singers for recitals in connection with phonograph records, *held* to have implied authority to bind his principal to pay the singer, notwithstanding an undisclosed restriction to arrange for only such recitals as the dealers would pay for.—Kidd v. Thomas A. Edison, Inc., 239 F. 405.

**(D) Ratification.**

⚖171(9) (U.S.C.C.A.) Plaintiff, knowing all the facts, by suing one for the money he had received on a sale on her behalf, affirms sale, and so waives right to sue to avoid sale for his lack of authority or fraud.—Arzuaga v. Gonzalez, 239 F. 60.

## PRINCIPAL AND SURETY.

See Municipal Corporations, ⚖347.

## PRIORITIES.

See Assignments for Benefit of Creditors, ⚖184; Bankruptcy, ⚖345, 348; Chattel Mortgages, ⚖138; Execution, ⚖113; Executors and Administrators, ⚖264; Mechanics' Liens, ⚖198; Receivers, ⚖162; Trade-Marks and Trade-Names, ⚖21.

## PRIVATE ROADS.

See Easements.

## PRIVILEGE.

See Criminal Law, ⚖393.

## PRIVILEGED COMMUNICATIONS.

See Libel and Slander, ⚖39.

## PROCESS.

See Attachment; Corporations, ⚖668; Equity, ⚖119; Execution; Injunction; Mandamus.

### II. SERVICE.

**(A) Personal Service in General.**

⚖61 (U.S.C.C.A.) A party enticed by false representations by plaintiff, or one acting in his behalf, to enter the district for the purpose of making service upon him, cannot be said to be "found within the district."—Blandin v. Ostrander, 239 F. 700.

⚖65 (U.S.C.C.A.) Where plaintiff expected a friend to give him assistance in procuring service on defendant in the district of plaintiff's residence, he is responsible for the fraud of the friend in procuring defendant's presence, though he did not know that fraud was employed.—Blandin v. Ostrander, 239 F. 700.

**(E) Return and Proof of Service.**

⚖149 (U.S.C.C.A.) On motion to set aside service of summons for fraud, evidence *held* to show that defendant was induced by a friend of plaintiff to come into district of plaintiff's residence, so that plaintiff might serve him there, by false representations that the friend desired to meet defendant on business.—Blandin v. Ostrander, 239 F. 700.

### III. DEFECTS, OBJECTIONS, AND AMENDMENT.

⚖166 (U.S.C.C.A.) The objection to the court's want of jurisdiction, because of the fraud by which defendant was brought into the district for service, is not waived by defendant going to trial on the merits, especially when a bill of exceptions was prepared explicitly covering the refusal of the court to set aside the service.—Blandin v. Ostrander, 239 F. 700.

## PROFITS.

See Patents, ⚖318.

## PROMISSORY NOTES.

See Bills and Notes.

## PROSTITUTION.

See Aliens, ⚖54.

## PUBLICATION.

See Libel and Slander, ⚖39.

## PUBLIC IMPROVEMENTS.

See Municipal Corporations, ⚖321, 339–375.

## PUBLIC LANDS.

### III. DISPOSAL OF LANDS OF THE STATES.

⚖186 (U.S.C.C.A.) Effect of forfeiture of land for nonpayment of taxes under a senior grant by the state of Virginia on the rights of a junior grantee considered.—Ewart v. Squire, 239 F. 34.

Const. W. Va. 1872, art. 13, § 3, and Code W. Va. 1913, c. 31, § 40 (sec. 1099), relating to transfer of title to lands forfeited for nonpayment of taxes, construed.—Id.

### V. SPANISH, MEXICAN, FRENCH, AND RUSSIAN GRANTS.

⚖205 (U.S.C.C.A.) A congressional grant of lands in lieu of a Mexican grant relinquished construed with respect to the persons who took a beneficial interest therein.—Wise v. Watts, 239 F. 207.

## PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads.

## PUBLIC USE.

See Eminent Domain.

## PUBLIC WATER SUPPLY.

See Waters and Water Courses, ⚖230.

## QUESTIONS OF LAW AND FACT.

See Trial, ⚖142, 178.

# QUIETING TITLE.

## II. PROCEEDINGS AND RELIEF.

⚖44(5) (U.S.C.C.A.) A bill to quiet title *held* not sustained by the evidence, which showed possession in defendants for more than 30 years.—Ohme v. Cleveland, C., C. & St. L. Ry. Co., 239 F. 808.

# QUITCLAIM.

See Deeds, ⚖116.

# RAILROADS.

See Aliens, ⚖56; Carriers; Commerce, ⚖27; Courts, ⚖314; Criminal Law, ⚖32; Eminent Domain; Master and Servant; Monopolies, ⚖16; Street Railroads.

## VII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATION.

⚖131 (U.S.D.C.) The Pacific Railroad Acts of July 1, 1862, July 2, 1864, and June 20, 1874, were not violated by the lease of the lines of the Central Pacific to the Southern Pacific, and the subsequent purchase by the latter of the stock of the former, so long as the statutory requirements as to service were observed.—United States v. Southern Pac. Co., 239 F. 998.

## X. OPERATION.

### (G) Injuries to Persons on or near Tracks.

⚖400(1) (U.S.C.C.A.) In an action for the death of a pedestrian, who was struck by a railroad motorcar while he was crossing a railroad bridge, negligence *held* a question for the jury.—Oregon-Washington R. & Nav. Co. v. Penso, 239 F. 684.

⚖400(10) (U.S.C.C.A.) In an action for the death of a pedestrian, who was struck by a railroad motorcar while he was crossing a railroad bridge, contributory negligence *held* a question for the jury.—Oregon-Washington R. & Nav. Co. v. Penso, 239 F. 684.

# RATIFICATION.

See Principal and Agent, ⚖171.

# REAL ACTIONS.

See Quieting Title.

# RECEIVERS.

See Bankruptcy, ⚖114, 255; Banks and Banking, ⚖254; Corporations, ⚖568; Courts, ⚖501.

## IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

### (A) Administration in General.

⚖89 (U.S.C.C.A.) Receivers *held*, under the order appointing them, authorized to execute a redelivery bond in a state court to obtain the release of attached property of the estate.—United States Fidelity & Guaranty Co. v. First Nat. Bank, 239 F. 227.

⚖90 (U.S.D.C.) An executory contract made by a corporation is not binding on its subsequent receiver, unless he affirmatively assumes it.—Dickinson v. Willis, 239 F. 171.

## V. ALLOWANCE AND PAYMENT OF CLAIMS.

⚖162 (U.S.C.C.A.) An order, directing a receiver to sell lumber and pay laborers' wages, *held* not to preclude a chattel mortgagee of part of the lumber from thereafter intervening and claiming the proceeds of the sale of the lumber covered by the mortgage.—Security Trust Co. v. Bank of Bernice, 239 F. 665.

An order in receivership proceedings upon the intervention of a chattel mortgagee which allowed the intervener's claim and postponed for future determination the relative rank and priority of its mortgage does not preclude the intervener from thereafter asserting its ownership to the lumber covered by its mortgage.—Id.

# RECORDS.

See Appeal and Error, ⚖662, 694; Bankruptcy, ⚖140, 414; Courts, ⚖405; Removal of Causes, ⚖92.

# RECOUPMENT.

See Carriers, ⚖196.

# REFORMATION OF INSTRUMENTS.

## II. PROCEEDINGS AND RELIEF.

⚖32 (U.S.C.C.A.) Plaintiffs *held* barred by laches from seeking to reform a deed, where they delayed for nearly 10 years after reaching their majority in seeking relief.—Estep v. Kentland Coal & Coke Co., 239 F. 617.

# REHEARING.

See New Trial.

# REISSUE.

See Patents, ⚖136, 137, 147.

# RELEASE.

See Accord and Satisfaction; Payment.

## I. REQUISITES AND VALIDITY.

⚖17(1) (U.S.D.C.) A release, executed by a seaman for his share of salvage received by his vessel on a payment to him by the owner, will not bar his right to recover his proper share, unless he was fairly informed of his rights and of the amount received by the vessel.—Rivers v. Lockwood, 239 F. 380.

## III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⚖45 (U.S.C.C.A.) Under Shannon's Code Tenn. §§ 4627, 4636, evidence offered by defendant, in an action for malpractice by a physician, to show release, is inadmissible, where

such defense was not pleaded.—Kalloch v. Hoagland, 239 F. 252.

## RELIGIOUS SOCIETIES.

⊂=16 (U.S.D.C.) In view of the settled policy of West Virginia to restrict the accumulation of property by church organizations, the presumption is against the validity of large gifts of property in that state to religious corporations.—Sturm v. Stump, 239 F. 749.

## REMAND.

See Removal of Causes, ⊂=100, 107.

## REMEDY AT LAW.

See Specific Performance, ⊂=5.

## REMOVAL.

See Bankruptcy, ⊂=132.

## REMOVAL OF CAUSES.

See Courts, ⊂=366.

### III. CITIZENSHIP OR ALIENAGE OF PARTIES.

#### (A) Diverse Citizenship or Alienage in General.

⊂=26 (U.S.C.C.A.) Under Judicial Code, § 28, a nonresident defendant cannot remove to the United States court a suit begun against him in the state court by a nonresident plaintiff, though the parties were citizens of different states.—American Oil & Supply Co. v. Western Gas Const. Co., 239 F. 505.

⊂=31 (U.S.D.C.) Nonresident railroad companies to which Washington railroad company transferred its franchise and right of way, including tunnel, limitations against suit against Washington company having run, *held* entitled to remove cause for injuries occasioned by construction and maintenance of tunnel, despite Const. Wash. art. 12, § 8.—City of Seattle v. Great Northern Ry. Co., 239 F. 1009.

⊂=36 (U.S.D.C.) The right of removal may not be defeated by fraudulent joinder of a resident defendant having no connection with the controversy.—Martin v. Matson Nav. Co., 239 F. 188.

In an action against steamship company, assistant engineer, and chief engineer, *held*, that cause was properly removable from state court; chief engineer being only resident party, and his joinder being improper, as liability was distinct from that of steamship company.—Id.

⊂=47 (U.S.D.C.) For the purpose of removal of a cause the issue tendered is what plaintiff makes it in his complaint.—Martin v. Matson Nav. Co., 239 F. 188.

### VI. PROCEEDINGS TO PROCURE AND EFFECT OF REMOVAL.

⊂=79(1) (U.S.D.C.) It is imperative that the application for removal of a cause from a state court be made within the time fixed by Judicial Code, § 29.—Waverly Stone & Gravel Co. v. Waterloo, C. F. & N. Ry. Co., 239 F. 561.

⊂=79(2) (U.S.D.C.) Under Judicial Code, § 29, a petition for removal from the Iowa district court, not filed before the time fixed by Code Iowa 1897, § 3550, for answer, demurrer, or motion, is too late, though filed within the extended time given by the court.—Waverly Stone & Gravel Co. v. Waterloo, C. F. & N. Ry. Co., 239 F. 561.

⊂=86(2) (U.S.D.C.) Nonresident defendant, seeking removal of an action in which resident was joined as defendant, must allege facts showing joinder was fraudulent, unless that is apparent on the face of complaint.—Martin v. Matson Nav. Co., 239 F. 188.

⊂=92 (U.S.D.C.) A transcript not filed in the United States court within 30 days after filing the petition and bond for removal in the state court, as required by Judicial Code, § 29, is too late, though the state court took no action on the petition at the time it was filed.—Waverly Stone & Gravel Co. v. Waterloo, C. F. & N. Ry. Co., 239 F. 561.

⊂=94 (U.S.C.C.A.) The objection that a suit between citizens of different states, neither of whom was a resident of the state, cannot be removed to the United States court, is waived by defendant's petition to remove, and by plaintiff's appearance to contest a motion to set aside service of process.—American Oil & Supply Co. v. Western Gas Const. Co., 239 F. 505.

### VII. REMAND OR DISMISSAL OF CAUSE.

⊂=100 (U.S.D.C.) Where defendant has a right to removal, federal court will not remand, though plaintiff in state court in good faith joined as a party defendant one not necessary to disposition of case.—City of Seattle v. Great Northern Ry. Co., 239 F. 1009.

⊂=103 (U.S.D.C.) The United States court may and should remand to the state court upon its own motion a case which, though removable, was not properly removed.—Waverly Stone & Gravel Co. v. Waterloo, C. F. & N. Ry. Co., 239 F. 561.

⊂=107(5) (U.S.D.C.) An allegation in the petition for removal of a rule of the state district court allowing defendant to plead or answer 15 days after the time fixed by statute, where no such rule appears in the record, or any showing of authority to adopt it, does not prevent a remand.—Waverly Stone & Gravel Co. v. Waterloo, C. F. & N. Ry. Co., 239 F. 561.

⊂=107(5) (U.S.D.C.) In disposing of a motion to remand where its decision depends upon facts not apparent of record, affidavits may be considered.—City of Seattle v. Great Northern Ry. Co., 239 F. 1009.

## RENT.

See Bankruptcy, ⊂=249, 348.

## RESCISSION.

See Contracts, ⊂=284; Sales, ⊂=98, 107.

## RES IPSA LOQUITUR.

See Master and Servant.

## RES JUDICATA.

See Judgment, ⊂⊃570.

## RESTRAINT OF TRADE.

See Monopolies.

## REVENUE.

See Equity, ⊂⊃66; Internal Revenue: Taxation.

## REVIEW.

See Appeal and Error; Criminal Law, ⊂⊃1004, 1054, 1159.

## RIGHT OF WAY.

See Easements.

## RISKS.

See Master and Servant, ⊂⊃217, 226, 288.

## RIVERS.

See Collision, ⊂⊃102.

## ROADS.

See Highways.

## ROYALTIES.

See Patents, ⊂⊃218.

## RULES OF COURT.

See Court Rules Cited.

## SAFE PLACE TO WORK.

See Master and Servant, ⊂⊃226.

## SALES.

See Bankruptcy, ⊂⊃257, 258, 260, 267, 268; Brokers, ⊂⊃7; Corporations, ⊂⊃312; Evidence, ⊂⊃434; Mortgages, ⊂⊃553; Principal and Agent, ⊂⊃81, 89; Vendor and Purchaser.

### II. CONSTRUCTION OF CONTRACT.

⊂⊃59 (U.S.D.C.) A contract between the parties for the sale of a specified quantity of products, and a later agreement modifying the former with respect to the quantity of the products, must be read together, in so far as they can be reconciled; but, where they cannot be reconciled, the later must prevail.—Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. 976.

⊂⊃62 (U.S.C.C.A.) A contract for sale of 10,000 barrels of flour, 2,500 barrels to be shipped each month for a period of four months, is an entire contract; provisions for delivery in installments not dividing it into separate contracts for each installment.—Consumers' Bread Co. v. Stafford County Flour Mills Co., 239 F. 693.

⊂⊃71(4) (U.S.D.C.) A contract for the sale of cinders, which, as modified by subsequent agreement, required a smelter to take a mine's output of lump cinders, estimated at a certain quantity, *held* to require the smelter to take the entire output, not merely the estimated quantity.—Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. 976.

Defendant cannot be relieved from his contract to purchase the entire output of certain by-products from plaintiff's ores by the fact that the outbreak of the war caused a demand for the principal product, which increased the output of the by-product to a point far beyond the estimate.—Id.

In a contract for the purchase of the entire output from plaintiff's mines, a provision that plaintiff shall make yearly advance estimates of the output does not relieve defendant from its obligation to purchase the entire output, though it exceeded the estimate.—Id.

⊂⊃87(3) (U.S.D.C.) Circumstances surrounding the parties to a contract for the purchase of cinders *held* to confirm the construction as a contract for the purchase of the entire output of cinders, rather than the purchase of only the estimated output.—Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. 976.

### III. MODIFICATION OR RESCISSION OF CONTRACT.

#### (A) By Agreement of Parties.

⊂⊃89 (U.S.C.C.A.) Where parties to a contract for delivery of flour in installments made mutual concessions as to delivery of installments until seller defaulted, buyer might then claim damages for seller's nondelivery.—Consumers' Bread Co. v. Stafford County Flour Mills Co., 239 F. 693.

Where parties by mutual concessions have carried time for delivery beyond that fixed in contract, each party is entitled to a reasonable time for performance to be determined under circumstances of case.—Id.

#### (B) Rescission by Seller.

⊂⊃98 (U.S.C.C.A.) A contract by a sawmill company to sell and deliver slabs and edgings to the factory of a kindling wood company construed, and the action of the kindling wood company in destroying its plant *held* a breach, which authorized a rescission by the other party.—Standard Wood Co. v. Hall, Gardner & Co., 239 F. 241.

⊂⊃107 (U.S.C.C.A.) Where a factory buying slabs was destroyed by the buyer the act of the seller in stopping shipment *held* an election to rescind for breach of contract.—Standard Wood Co. v. Hall, Gardner & Co., 239 F. 241.

### VII. REMEDIES OF SELLER.

#### (F) Actions for Damages.

⊂⊃384(1) (U.S.D.C.) Where defendant refused to accept any more cinders from plaintiff during the year, plaintiff cannot recover damages for his refusal to accept cinders produced within the year, but so late that they could not have been delivered until after the beginning of the next year.—Eustis Mining Co. v. Beer, Sondheimer & Co., 239 F. 976.

### IX. CONDITIONAL SALES.

⊂=451 (U.S.C.C.A.) The validity of a conditional sale contract is governed by the law of the place where it was made and the goods delivered, not where it was contemplated the goods should be kept, and where they were when the rights of purchasers or creditors arose.—Mergenthaler Linotype Co. v. Hull, 239 F. 26.

Conditional sales, which are valid under the law governing them at their execution, should be enforced as a matter of comity in other jurisdictions, where the goods may be taken, unless such enforcement is contrary to the policy of the laws of that jurisdiction.—Id.

⊂=474(2) (U.S.C.C.A.) Under Civ. Code Porto Rico, § 1222 (Rev. St. & Codes, § 4184), an unrecorded conditional sale contract was valid prior to Act 1916, p. 123, as against creditors, though under Civ. Code, § 1376, it was not valid as against subsequent bona fide purchasers.—Mergenthaler Linotype Co. v. Hull, 239 F. 26.

## SALVAGE.

See Release, ⊂=17.

### II. AMOUNT AND APPORTIONMENT.

⊂=26 (U.S.C.C.A.) The amount of salvage award to which a steamer was entitled for the rescue of a schooner which had broken from her moorings in a harbor *held* affected by the failure to promptly continue the service after the parting of the towline.—The Halcyon, 239 F. 840.

Lack of prompt or skillful operation by a salving vessel, with or without injurious results, may diminish the award, while the skillfulness of the rescue may increase it.—Id.

⊂=38 (U.S.D.C.) The share of a salvage award to which a common seaman is entitled depends on the character of the service rendered, the danger to the crew, and the value of their individual services, as compared with those of the vessel.—Rivers v. Lockwood, 239 F. 380.

The crews of tugs, which performed salvage services in several cases, *held* entitled to recover as their collective share, to be divided in proportion to their wages, from 10 per cent. to 20 per cent. of the salvage received by the tugs.—Id.

## SATISFACTION.

See Payment; Release.

## SEAMEN.

⊂=21 (U.S.D.C.) Seamen on British vessel who left their ship in an American port without good cause *held* deserters and not entitled to recover wages under the British law.—The Strathearn, 239 F. 583.

The word "deserter," as applied to seamen, means one continually and intentionally absent from the ship, constituting a quitting of the service of the vessel.—Id.

⊂=24 (U.S.D.C.) Act March 4, 1915, § 4, providing for payment of half wages to seamen at intermediate ports, construed.—The Strathearn, 239 F. 583.

## SECONDARY EVIDENCE.

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See Carriers, ⊂=177.

## SETTING ASIDE.

See Fraudulent Conveyances, ⊂=241.

## SETTLEMENT.

See Accord and Satisfaction; Payment; Release.

## SEWERS.

See Drains.

## SHIPPING.

See Admiralty; Collision; Salvage; Seamen; Towage.

### III. CHARTERS.

⊂=41 (U.S.C.C.A.) The charter of a scow without motive power, but including a man to take care of her, generally called the master, at a stated hire per day, is a demise by which the charterer becomes the owner pro hac vice.—Hastorf v. F. R. Long-W. G. Broadhurst Co., 239 F. 852.

⊂=54 (U.S.C.C.A.) A charterer *held* liable for injury to a scow caused by negligent blasting while the scow was aground.—Hastorf v. F. R. Long-W. G. Broadhurst Co., 239 F. 852.

⊂=58(3) (U.S.D.C.) Measure of damages recoverable by charterer for withdrawal of ship considered.—The Ada, 239 F. 363.

A charterer *held* entitled to damages because of his substitution at a loss of another chartered vessel to carry the cargo of one withdrawn from charter, only on proof that the action was a fair exercise of judgment to minimize the damages.—Id.

### V. LIABILITIES OF VESSELS AND OWNERS IN GENERAL.

⊂=81(1) (U.S.C.C.A.) That a ship was in charge of a compulsory pilot at the time of a collision for which she was in fault does not absolve her from liability for the death of persons caused by the collision under Code Va. 1904, § 2902.—Indra Line v. Palmetto Phosphate Co., 239 F. 94.

⊂=81(1) (U.S.D.C.) A steamship *held* liable for injury to a submarine cable on the ground of

negligent navigation.—United States v. North German Lloyd, 239 F. 587.

### VII. CARRIAGE OF GOODS.

⊂=106 (U.S.C.C.A.) Delivery of ordinary bills of lading, reciting receipt in good condition, dated as of the day the goods were delivered to the ship, is not a fraud which renders the carrier liable, though in the meantime the goods had been damaged by fire on the ship.—Ocean S. S. Co., Limited, v. United States Steel Products Co., 239 F. 823.

⊂=145 (U.S.C.C.A.) Delivery of bills of lading, stating that goods had been damaged after delivery to the ship, and were liable for general average and special damages, *held* not a delivery of usual bills of lading, which was a condition precedent to the collection of prepaid freight charges.—Ocean S. S. Co., Limited, v. United States Steel Products Co., 239 F. 823.

Bill of lading *held* not to authorize the shipowner to demand payment of the freight, though it was earned on delivery of the goods to the ship until the owner delivered or tendered the bills of lading.—Id.

### X. GENERAL AVERAGE.

⊂=200 (U.S.C.C.A.) In a suit to enforce general average, the ship does not establish her claim upon proof of the bare fact that she stranded; but she must show sufficient of the attending circumstances to warrant the inference that she stranded without fault.—Pittsburg & Erie Coal Co. v. George Urban Milling Co., 239 F. 271.

Owner of a stranded vessel *held* not entitled to contribution in general average from cargo owners, on the ground that the stranding was due to negligent navigation.—Id.

### XI. LIMITATION OF OWNER'S LIABILITY.

⊂=209(1) (U.S.C.C.A.) In a proceeding for limitation of liability, the petitioner is primarily liable for the fees of the commissioner, and such fees are a part of the costs.—Indra Line v. Palmetto Phosphate Co., 239 F. 94.

## SIDEWALKS.

See Municipal Corporations, ⊂=764, 821.

## SIGNALS.

See Collision, ⊂=82.

## SLANDER.

See Libel and Slander.

## SPECIFIC PERFORMANCE.

### I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

⊂=5 (U.S.C.C.A.) Contract by defendant to transport coal in certain vessels for complainant for term of three years *held* specifically enforceable in equity, where plaintiff's profits were dependent on water transportation, and a sale of the vessels would leave defendant insolvent.—Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co., 239 F. 603.

⊂=6 (U.S.C.C.A.) If specific performance be otherwise proper, equity is not deterred from granting its aid because of a so-called lack of mutuality in the remedy; but it suffices that defendant's compulsory performance is conditioned upon complainant's continued readiness to carry out his obligation.—Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co., 239 F. 603.

⊂=16 (U.S.C.C.A.) That specific enforcement of contract would deprive defendant of large profits, which it might otherwise make, *held* not a bar to such enforcement, where contract was fair and not improvident.—Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co., 239 F. 603.

⊂=23 (U.S.C.C.A.) Complainant *held* entitled to specific enforcement of contract against purchaser with notice.—Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co., 239 F. 603.

### II. CONTRACTS ENFORCEABLE.

⊂=29(2) (U.S.C.C.A.) A contract to purchase all the land owned by defendant on White Oak run in a certain county is sufficiently definite to be specifically enforced, though neither of the parties knew the exact description or acreage.—Hines v. Roller, 239 F. 486.

⊂=57 (U.S.C.C.A.) A written instrument, under seal and expressing a consideration, granting an option to purchase real estate, on election by the other party to exercise the option, becomes a valid and binding "contract of sale," which may be specifically enforced in equity.—Dunlop v. Baker, 239 F. 193.

⊂=68 (U.S.C.C.A.) Contract by defendant to transport coal in certain vessels for complainant for term of years *held* specifically enforceable in equity, where plaintiff's profits were dependent on water transportation.—Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co., 239 F. 603.

⊂=75 (U.S.C.C.A.) Need of continuous supervision does not bar, however much it may deter, court of equity from exercising its jurisdiction to enforce specific performance of contract, when the ends of justice seem to require it.—Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co., 239 F. 603.

### III. GOOD FAITH AND DILIGENCE.

⊂=97(3) (U.S.C.C.A.) Where there is a bona fide difference of opinion between the parties as to the quantity of land conveyed, the purchaser does not lose his right to specific performance by not tendering payment for the amount claimed by the vendor, though that claim was correct.—Hines v. Roller, 239 F. 486.

## STATES.

See Public Lands, ⊂=186.

# STATUTE OF LIMITATIONS.

See Courts, ⊂=375; Limitation of Actions.

# STATUTES.

See Limitation of Actions.

For statutes relating to particular subjects, see the various specific topics.

## I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

⊂=64(6) (U.S.D.C.) Alleged invalidity of Cr. Code, § 83, as applied to electors for President and Vice President, does not affect its validity as applied to actions for Representatives in Congress.—United States v. United States Brewers' Ass'n, 239 F. 163.

## VI. CONSTRUCTION AND OPERATION.

### (A) General Rules of Construction.

⊂=188 (U.S.D.C.) Where words are used in an act of Congress which have a well-known and universal use, and which, so read, express a meaning which Congress may have intended, the court is justified in assuming that they were used to express that meaning.—De Ganay v. Lederer, 239 F. 568.

⊂=219 (U.S.D.C.) Great weight and due deference is given to departmental or other executive construction of statutes, but the acceptance of such construction is limited by the principle that the intention of the Legislature must govern.—De Ganay v. Lederer, 239 F. 568.

⊂=219 (U.S.D.C.) The settlement of the indebtedness of the Central Pacific Railroad Company to the United States by a commission appointed by Congress, which shall be approved by the President, *held* entitled to more than ordinary weight as a construction of the Anti-Trust Act as not applying to the relation between the Central Pacific and the Southern Pacific Railroads.—United States v. Southern Pac. Co., 239 F. 998.

⊂=225¾ (U.S.D.C.) A subsequent act, more definite than an earlier one, is not necessarily a legislative construction of the former, but may be an enactment of a different provision, and should be so held, if it differs from the judicial construction given to the former.—De Ganay v. Lederer, 239 F. 568.

### (B) Particular Classes of Statutes.

⊂=245 (U.S.D.C.) Revenue statutes are to be so construed as to promote their main purpose, not strictly construed in favor of the taxpayer. —De Ganay v. Lederer, 239 F. 568.

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See Constitutional Law, ⇐134; Eminent Domain, ⇐75, 86; Municipal Corporations, ⇐321.

### I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

⇐29 (U.S.D.C.) A franchise given to a street railroad company, which does not expressly grant an exclusive right to operate on the streets named, nor exclude the city from establishing a street railroad of its own, will not be construed to give an exclusive right as against the city.—United Railroads of San Francisco v. City and County of San Francisco, 239 F. 987.

## STREETS.

See Municipal Corporations, ⇐339–375, 764, 821.

## SUBSCRIPTIONS.

See Corporations, ⇐80.

## SUBSTITUTED SERVICE.

See Equity, ⇐119.

## SUIT.

See Action.

## SUMMONS.

See Process.

## SUNDAY.

⇐13 (U.S.C.C.A.) Code Va. 1904, § 3799, which makes it a criminal offense if "a person on the Sabbath day be found laboring at any trade or calling," does not render illegal an instrument granting an option to purchase real estate, because executed on Sunday.—Dunlop v. Baker, 239 F. 193.

## SURGEONS.

See Physicians and Surgeons.

## SURVIVAL.

See Abatement and Revival, ⇐53.

## TAXATION.

See Drains, ⇐68; Equity, ⇐66; Internal Revenue; Public Lands, ⇐186.

### III. LIABILITY OF PERSONS AND PROPERTY.

#### (A) Private Persons and Property in General.

⇐93(1) (U.S.D.C.) Notwithstanding the legal maxim that the situs of intangible personal property is the domicile of its owner, such property of a nonresident may be given a special or particular situs for taxation, if the taxing power has jurisdiction over the rem as a practical fact.—De Ganay v. Lederer, 239 F. 568.

⇐95(1) (U.S.C.C.A.) Gen. Code Ohio, §§ 5373, 5374, does not permit the taxation of corporate bonds and stocks, kept out of the state and owned by an actual resident of another state, who came to Ohio for a purely temporary purpose and was detained until after the tax list day.—O'Brien v. Rockefeller, 239 F. 127.

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See Admiralty, ⊂⊃22; Collision; Counties, ⊂⊃146; Death; Fraud; Libel and Slander; Limitation of Actions, ⊂⊃55; Master and Servant, ⊂⊃304; Municipal Corporations, ⊂⊃764, 821; Negligence; Shipping, ⊂⊃81; United States Marshals, ⊂⊃34.

## TOWAGE.

⊂⊃11(5) (U.S.C.C.A.) Steamer *held* in fault for stranding of tow on south shore of Lake Superior in fog, on ground that she failed to take soundings, which would have shown that she was several miles nearer shore than supposed.—Erie & M. Ry. & Nav. Co. v. Dunseith, 239 F. 814.

Stranding of tow through negligent navigation of towing steamer *held* proximate cause of loss of cargo through breaking up in storm while aground.—Id.

⊂⊃11(9) (U.S.D.C.) Master of tug *held* chargeable with negligence, which rendered the owner liable for loss of tow, for leaving harbor when a storm was expected, regardless of warnings of the Weather Bureau and a very low and falling barometer.—The Salutation, 239 F. 421.

⊂⊃12(1) (U.S.C.C.A.) A barge in tow of a steamer *held* not chargeable with contributory fault for her stranding in a fog.—Erie & M. Ry. & Nav. Co. v. Dunseith, 239 F. 814.

⊂⊃15(2) (U.S.C.C.A.) Allegations of fault against a towing tug, resulting in the sinking of a dredge, *held* not sustained by the evidence.—The George I. Forsyth, 239 F. 500.

## TOWNS.

See Counties; Municipal Corporations.

## TRADE-MARKS AND TRADE-NAMES.

### I. MARKS AND NAMES SUBJECTS OF OWNERSHIP.

⊂⊃3(3) (U.S.C.C.A.) A trade-mark must, either by itself or by association, point distinctively to the origin or ownership of the article to which it is applied.—Manitou Springs Mineral Water Co. v. Schueler, 239 F. 593.

⊂⊃7 (U.S.C.C.A.) One who owns and controls source of particular natural product, such as a spring of mineral water, is entitled to be protected in name given to that product, provided it is one otherwise subject to exclusive appropriation, as fully as in case of any article or artificial product of manufacture.—Manitou Springs Mineral Water Co. v. Schueler, 239 F. 593.

⊂⊃9 (U.S.C.C.A.) To entitle name to equitable protection as trade-mark, right to its use must be exclusive, hence geographical names in their primary sense are not subject of trade-mark.—Manitou Springs Mineral Water Co. v. Schueler, 239 F. 593.

Where geographical name acquires secondary significance, indicative not only of place of manufacture, but of name of manufacturer or producer, and excellence of thing manufactured or produced, a trade-mark in such name may be obtained.—Id.

A geographical name which for a long period has referred exclusively to product made at the place and not to place itself, may be properly used as trade-mark, and in such case, notwithstanding manufacturer of original product removed to another locality, he is entitled to retain use of name.—Id.

Under Trade-Mark Act of 1905, § 5, complainant and predecessors having exclusive use of geographical name as trade-mark for 10 years next preceding act, is entitled on registration to protection, notwithstanding name be regarded in a sense merely geographical.—Id.

⊂⊃21 (U.S.C.C.A.) Exclusive right to use of mark or device claimed as trade-mark is founded on priority of appropriation, although absolute priority, like that required of an inventor in a patent, is not necessary.—Manitou Springs Mineral Water Co. v. Schueler, 239 F. 593.

### IV. INFRINGEMENT AND UNFAIR COMPETITION.

#### (A) What Constitutes Infringement.

⊂⊃66 (U.S.C.C.A.) First appropriator of name or device pointing to his ownership is injured whenever another adopts same name or device for similar articles.—Manitou Springs Mineral Water Co. v. Schueler, 239 F. 593.

#### (C) Actions.

⊂⊃92 (U.S.C.C.A.) Inartificiality of statement in bill to enjoin infringement of trade-mark will not justify dismissal of bill in limine if cause of action is substantially pleaded.—Manitou Springs Mineral Water Co. v. Schueler, 239 F. 593.

A bill, charging infringement of complainant's trade-mark in the name "Manitou" for mineral water, *held* sufficient to state cause of action for equitable relief.—Id.

### V. TRADE-MARKS AND TRADE-NAMES ADJUDICATED.

"Manitou."—Manitou Springs Mineral Water Co. v. Schueler (C. C. A.) 239 F. 593.

## TRANSFER OF CAUSES.

See Trial, ⊂⊃11.

## TREES.

See Logs and Logging.

## TRESPASS.

See Mines and Minerals, ⊂⊃81.

## TRIAL.

See Appeal and Error, ⊂⊃1002; Compromise and Settlement; Courts, ⊂⊃352; Jury; Master and Servant, ⊂⊃286; Municipal Cor-

porations, ⇐821; New Trial; Railroads, ⇐400.

## II. DOCKETS, LISTS, AND CALENDARS.

⇐11(3) (U.S.C.C.A.) Where a bill states a cause of action cognizable in equity, the denial of a motion made under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv) to transfer the cause to the law side of the court is not error.—Gatewood v. New River Consol. Coal & Coke Co., 239 F. 65.

## IV. RECEPTION OF EVIDENCE.

### (A) Introduction, Offer, and Admission of Evidence in General.

⇐51 (U.S.C.C.A.) In trial to court of action involving title to real estate, disconnected proofs relating to links in chain of title may properly be admitted with understanding that if not connected they will become immaterial and harmless.—Calaf v. Fernandez, 239 F. 795.

## VI. TAKING CASE OR QUESTION FROM JURY.

### (A) Questions of Law or of Fact in General.

⇐139(1) (U.S.C.C.A.) Where, under the evidence, reasonable men may honestly draw different conclusions, the question is one for the jury.—Carolina, C. & O. Ry. Co. v. Stroup, 239 F. 75.

⇐142 (U.S.C.C.A.) Where a question of fact exists, or reasonable men could draw different inferences from circumstances shown without contradiction, the question is for the jury.—Hudson & M. R. Co. v. Iorio, 239 F. 855.

### (D) Direction of Verdict.

⇐178 (U.S.C.C.A.) On defendant's motion to direct a verdict, it is the duty of the trial court to take that view of the evidence most favorable to plaintiff.—Carolina, C. & O. Ry. Co. v. Stroup, 239 F. 75.

## VII. INSTRUCTIONS TO JURY.

### (C) Form, Requisites, and Sufficiency.

⇐223 (U.S.C.C.A.) The mode of instructing a jury by partly written and partly oral instructions *held* within the discretion of the court.—Warren Bros. Co. v. Wright, 239 F. 71.

⇐234(7) (U.S.C.C.A.) In an action for the death of a brakeman, a portion of the charge *held* not misleading, as indicating that the action might be based in part on the presumption of negligence which applied to an action between the carrier and a passenger.—Pennsylvania R. Co. v. Glas, 239 F. 256.

⇐234(8) (U.S.C.C.A.) Where counsel discussed failure of defendant to place on stand witnesses whose testimony would have been cumulative only, refusal of request that jury might assume witnesses' testimony would have been unfavorable to defendant *held* not error; jury being informed they could draw such inferences as they saw fit.—Akalitis v. Philadelphia & Reading Coal & Iron Co., 239 F. 299.

### (D) Applicability to Pleadings and Evidence.

⇐252(11) (U.S.C.C.A.) In an action for the death of a railroad brakeman, evidence *held* sufficient to warrant an instruction submitting whether reasonable inspection would have discovered the defect, and whether defendant was negligent in that respect.—Pennsylvania R. Co. v. Glas, 239 F. 256.

### (E) Requests or Prayers.

⇐260(7) (U.S.C.C.A.) In an action for the death of a man, struck by a railroad motorcar while crossing a railroad bridge, the refusal of an instruction requested by defendant as to contributory negligence *held* not error, in view of the court's charge on that issue.—Oregon-Washington R. & Nav. Co. v. Penso, 239 F. 684.

### (G) Construction and Operation.

⇐296(3) (U.S.C.C.A.) In an action for the death of a railroad brakeman, brought under the federal Employers' Liability Act, a portion of the charge *held* not misleading, as permitting recovery for a defect not due to negligence, when construed with other parts of the charge.—Pennsylvania R. Co. v. Glas, 239 F. 256.

## X. TRIAL BY COURT.

### (A) Hearing and Determination of Cause.

⇐368 (U.S.C.C.A.) Though a case was heard on stipulated facts, the trial judge may, in his discretion, permit additional proof and amendment of the pleadings in conformity therewith.—In re Mossler Co., 239 F. 262.

### (B) Findings of Fact and Conclusions of Law.

⇐389 (U.S.C.C.A.) Where a case is submitted to the court under Rev. St. § 649 (Comp. St. 1913, § 1587), and a general finding is made on which judgment is entered, a party cannot thereafter demand as of right that special findings be made.—Calaf v. Fernandez, 239 F. 795.

# TRUST DEEDS.

See Mortgages.

# TRUSTS.

See Assignments for Benefit of Creditors; Bankruptcy, ⇐125, 132, 145.

## I. CREATION, EXISTENCE, AND VALIDITY.

### (A) Express Trusts.

⇐37½ (U.S.C.C.A.) A layman, who signed a statement that he held securities in trust for his daughter, but who thereafter dealt with them as his own, indicated an intention to transfer only such securities as he owned at his death, not to become a trustee in the legal sense.—Ambrosius v. Ambrosius, 239 F. 473.

## VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

### (C) Actions.

⇐371(8) (U.S.C.C.A.) Where a bill to recover personal property was framed on the theory

that a trust had been declared therein by complainant's father, but contained a prayer for general relief, complainant can recover, if she establishes that she was the original owner of the property.—Ambrosius v. Ambrosius, 239 F. 473.

## TUGS.

See Towage.

## TUNNELS.

See Easements.

## ULTRA VIRES.

See Corporations, ⊂=484.

## UNDUE INFLUENCE.

See Deeds, ⊂=72.

## UNITED STATES.

See Army and Navy; Copyrights; Courts, ⊂=269–406, 493; Internal Revenue; Patents; Post Office; Trade-Marks and Trade-Names.

⊂=11 (U.S.D.C.) Under Const. art. 1, § 2, cl. 1, article 1, § 4, cl. 1, article 1, § 8, cl. 18, and article 6, cl. 2, the right to vote for Representatives is conferred by the federal Constitution, and Congress can protect the electors in the enjoyment of that right.—United States v. United States Brewers' Ass'n, 239 F. 163.

Congress can exercise its constitutional power to regulate the times, places, and manner of holding elections for Representatives, though state officers are to be chosen at the same election.—Id.

Under Const. art. 1, § 2, cl. 1, article 1, § 4, cl. 1, article 1, § 8, cl. 18, and article 6, cl. 2, Congress had power to enact Cr. Code, § 83, forbidding any corporation from making a money contribution in connection with any election at which a Representative in Congress is to be voted for.—Id.

## UNITED STATES MARSHALS.

⊂=34 (U.S.C.C.A.) In action against United States marshal and deputy for alleged wrongful levy of attachment upon property of plaintiff, evidence *held* to warrant a finding that attachment was illegal.—Brenneman v. Fagerberg, 239 F. 706.

## USAGES.

See Customs and Usages.

## USURY.

### I. USURIOUS CONTRACTS AND TRANSACTIONS.

#### (B) Rights and Remedies of Parties.

⊂=111(3) (U.S.D.C.) A statement of claim on cause of action to recover usury *held* not defective, because not setting forth full record of proceedings in the matter of an estate, through distribution of which defendant received the overpayment.—McCarty v. Neilson, 239 F. 151.

## UTILITY.

See Patents, ⊂=49.

## VALUE.

See Evidence, ⊂=487.

## VENDOR AND PURCHASER.

See Sales; Specific Performance.

### I. REQUISITES AND VALIDITY OF CONTRACT.

⊂=21 (U.S.C.C.A.) Expression of the time of payment is not essential to the validity of a contract for the sale of real estate.—Dunlop v. Baker, 239 F. 193.

### IV. PERFORMANCE OF CONTRACT.

#### (A) Title and Estate of Vendor.

⊂=133 (U.S.C.C.A.) Contract for sale and purchase of lands construed with respect to titles which vendor was bound to furnish, and finding of trial court that titles tendered were sufficient to sustain an action by the vendor for breach affirmed.—Calaf v. Fernandez, 239 F. 795.

## VERDICT.

See Appeal and Error, ⊂=928–1005; Criminal Law, ⊂=1159; Trial, ⊂=178.

## WAGES.

See Bankruptcy, ⊂=348; Seamen, ⊂=21, 24.

## WAIVER.

See Aliens, ⊂=54; Appeal and Error, ⊂=1078; Courts, ⊂=276, 325; Estoppel; Insurance, ⊂=376; Principal and Agent, ⊂=171; Process, ⊂=166; Trial, ⊂=389.

## WATERS AND WATER COURSES.

See Canals; Drains; Navigable Waters.

### I. APPROPRIATION OF RIGHTS IN PUBLIC LANDS.

⊂=16 (U.S.C.C.A.) A notice of diversion of water, posted at a point where the company for which it was posted was then diverting water for a small mill, *held* sufficient to show an intention not to use the water at the site of the old mill.—Alaska Juneau Gold Mining Co. v. Ebner Gold Mining Co., 239 F. 638.

Plaintiff cannot object that defendant's notice of diversion of water posted at a point above plaintiff's dam failed to show that the water was to be taken out above the dam, where he admitted that it was the universal custom to post the notice at the point of intended diversion.—Id.

No right to the use of water can be based on a notice posted on land patented to another company without permission of the latter.—Id.

⊂=17 (U.S.C.C.A.) Evidence of a temporary suspension of the work of diverting water for a mill after the posting of the notice, as a result of hostile acts by a rival claimant, does not show want of due diligence in the prosecution of the work.—Alaska Juneau Gold Mining Co. v. Ebner Gold Mining Co., 239 F. 638.

⊂=23 (U.S.C.C.A.) Water diverted in accordance with a notice can be used on a claim in the possession of the company for whom the notice was posted at the time of posting, but subsequently declared to be public land and relocated by the same company.—Alaska Juneau Gold Mining Co. v. Ebner Gold Mining Co., 239 F. 638.

⊂=33 (U.S.C.C.A.) In a suit to restrain a mining company from interfering with water right on public lands claimed by plaintiff, evidence *held* to show that the individual who posted in his own name the notice of diversion under which the company claimed was acting for it and in pursuance of a plan for developing its property.—Alaska Juneau Gold Mining Co. v. Ebner Gold Mining Co., 239 F. 638.

A conveyance by one who posted notice of diversion of water to another, who advanced money to defendant for developing its claims, *held* not inconsistent with a finding in a suit to restrain interference with rights, that the notice was posted on behalf of defendant.—Id.

### VII. CONVEYANCES AND CONTRACTS.

⊂=156(7) (U.S.C.C.A.) Under a water right concession, which declared the water to be inseparable from the land for which it was granted, the lessee of part of the land and those claiming under it cannot legally use the water, except on the land.—Semidey v. Central Aguirre Co., 239 F. 610.

### IX. PUBLIC WATER SUPPLY.

#### (B) Irrigation and Other Agricultural Purposes.

⊂=230(1) (U.S.C.C.A.) Purchasers of irrigation district bonds which recite that they have been regularly issued need not examine the records of the proceedings for their issuance, but the district is estopped to question such proceedings.—Shelton v. Gas Securities Co., 239 F. 653.

An irrigation district is not estopped to question the proceedings by which its bonds were issued by recitals in the bond that such proceedings were regular, unless the officers executing the bonds had lawful authority to make the recitals and to make them conclusive.—Id.

⊂=230(2) (U.S.C.C.A.) The Colorado irrigation district statute (Laws 1905, p. 246) authorizes the president and secretary of a district to make binding recitals in bonds executed by them that the bonds have been regularly issued.—Shelton v. Gas Securities Co., 239 F. 653.

⊂=230(5) (U.S.C.C.A.) Negotiable bonds issued by an irrigation district are subject to the same rules as other negotiable paper.—Shelton v. Gas Securities Co., 239 F. 653.

⊂=230(6) (U.S.C.C.A.) In an action to recover the interest on irrigation district bonds payable to bearer, plaintiff makes a prima facie case of bona fide ownership of the bonds by proof of their possession.—Shelton v. Gas Securities Co., 239 F. 653.

## WAYS.

See Easements; Highways.

## WILLS.

See Executors and Administrators; Trusts.

### VI. CONSTRUCTION.

#### (A) General Rules.

⊂=440 (U.S.C.C.A.) The cardinal rule for the construction of wills is to ascertain testator's intention from the language of the will and the entire context thereof and not from isolated provisions or expressions.—Lucas v. Scott, 239 F. 450.

#### (E) Nature of Estates and Interests Created.

⊂=602(1) (U.S.C.C.A.) A will devising land, with a provision that the sons of the testator should own the land on payment of a stated sum to each of the daughters on a future date, construed, and *held* to vest each of the daughters with an interest in the land, subject to defeasance on a condition subsequent.—Lucas v. Scott, 239 F. 450.

## WIRELESS TELEGRAPHY.

See Patents, ⊂=328.

## WITNESSES.

See Appeal and Error, ⊂=230; Criminal Law, ⊂=393, 508, 510; Evidence.

### II. COMPETENCY.

#### (A) Capacity and Qualifications in General.

⊂=52(7) (U.S.C.C.A.) The competency of a witness to testify against codefendants of her husband after he had pleaded guilty depends, in the absence of state or federal statute, on the common law of the state at the time of the first judiciary act.—Knoell v. United States, 239 F. 16.

The wife of one of several defendants charged with conspiracy, who has pleaded guilty, can testify against the other defendants over their objection, where neither she nor her husband claim.—Id.

#### (C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

⊂=140(14) (U.S.C.C.A.) In action by executor on note owned by his testatrix, *held* that, under Sess. Laws Colo. 1911, p. 676, one who, according to his own testimony, was primarily liable on note, if valid, instead of defendant, was interested party and incompetent.—Cordingly v. Kennedy, 239 F. 645.

⊂=159(8) (U.S.C.C.A.) Grantees *held* incompetent, under Civ. Code Proc. Ky. § 606—2, to testify after death of grantor concerning the time a reservation was inserted in their deed.—Estep v. Kentland Coal & Coke Co., 239 F. 617.

⊂=178(3) (U.S.C.C.A.) Where, in an action by an executor, the defendant tendered an interested witness, cross-examination by the executor to such an extent as to disclose the witness' in-

terest and consequent incompetency is not a waiver of objection to his competency.—Cordingly v. Kennedy, 239 F. 645.

## WORDS AND PHRASES.

"Abandonment."—Wendell v. American Laundry Machinery Co. (U. S. D. C.) 239 F. 555.
"Act of bankruptcy."—In re Superior Jewelry Co. (U. S. D. C.) 239 F. 373.
"Act of God."—United States v. Pennsylvania Co. (U. S. D. C.) 239 F. 761.
"Books of account or records."—In re Landersman (U. S. D. C.) 239 F. 766.
"Casualty."—United States v. Pennsylvania Co. (U. S. D. C.) 239 F. 761.
"Common carrier."—Brooklyn Eastern Dist. Terminal v. United States (U. S. C. C. A.) 239 F. 287.
"Contract of sale."—Dunlop v. Baker (U. S. C. C. A.) 239 F. 193.
"Corruptly."—Bosselman v. United States (U. S. C. C. A.) 239 F. 82.
"Custom."—Eames v. H. B. Claflin Co. (U. S. C. C. A.) 239 F. 631.
"De facto soldier."—Hoskins v. Dickerson (U. S. C. C. A.) 239 F. 275.
"De jure soldier."—Hoskins v. Dickerson (U. S. C. C. A.) 239 F. 275.
"Deserter."—The Strathearn (U. S. D. C.) 239 F. 583.
"Employé who by telephone delivers orders."—United States v. Pennsylvania R. Co. (U. S. D. C.) 239 F. 576.
"Engaged in interstate commerce."—Central R. Co. of New Jersey v. Paslick (U. S. C. C. A.) 239 F. 713.
"Expenses and advancements."—Eames v. H. B. Claflin Co. (U. S. C. C. A.) 239 F. 631.
"Factor."—Eames v. H. B. Claflin Co. (U. S. C. C. A.) 239 F. 631.
"Found within the district."—Blandin v. Ostrander (U. S. C. C. A.) 239 F. 700.
"Goods."—Eames v. H. B. Claflin Co. (U. S. C. C. A.) 239 F. 631.
"Hopper misthread."—Northrop v. Draper Co. (U. S. C. C. A.) 239 F. 719.
"Income."—Rensselaer & S. R. Co. v. Irwin (U. S. D. C.) 239 F. 739.
"Incumbrance."—In re Salmon (U. S. D. C.) 239 F. 413.
"Interested party."—Cordingly v. Kennedy (U. S. C. C. A.) 239 F. 645.
"Laches."—Pond Creek Coal Co. v. Hatfield (U. S. C. C. A.) 239 F. 622.
"Libelous per se."—Robinson v. Johnson (U. S. C. C. A.) 239 F. 671.
"Managing agent."—American Oil & Supply Co. v. Western Gas Const. Co. (U. S. C. C. A.) 239 F. 505.
"Narrow."—Vacuum Cleaner Co. v. Innovation Electric Co. (U. S. C. C. A.) 239 F. 543.
"New invention."—Linde Air Products Co. v. Morse Dry Dock & Repair Co. (U. S. D. C.) 239 F. 909.
"New result."—Winton Motor Carriage Co. v. Lindsay Auto Parts Co. (U. S. C. C. A.) 239 F. 521; American Ball Bearing Co. v. Finch, Id. 885.
"Presentation on stage."—Klein v. Beach (U. S. C. C. A.) 239 F. 108.
"Product."—Gatewood v. New River Consol. Coal & Coke Co. (U. S. C. C. A.) 239 F. 65.
"Pulverized brick."—Wright v. Wisconsin Lime & Cement Co. (U. S. C. C. A.) 239 F. 534.
"Real estate."—Pond Creek Coal Co. v. Hatfield (U. S. C. C. A.) 239 F. 622.
"Real misthread."—Northrop v. Draper Co. (U. S. C. C. A.) 239 F. 719.
"Reconstruction."—Foglesong Mach. Co. v. J. D. Randall Co. (U. S. C. C. A.) 239 F. 893.
"Repair."—Foglesong Mach. Co. v. J. D. Randall Co. (U. S. C. C. A.) 239 F. 893.
"Resided continuously within the United States."—In re Cook (U. S. D. C.) 239 F. 782.
"Rule of the court."—Waverly Stone & Gravel Co. v. Waterloo, C. F. & N. Ry. Co. (U. S. D. C.) 239 F. 561.
"Sufficient street."—City of Superior v. Olt (U. S. C. C. A.) 239 F. 100.
"Taking."—United Railroads of San Francisco v. City and County of San Francisco (U. S. D. C.) 239 F. 987.
"Train."—Brooklyn Eastern Dist. Terminal v. United States (U. S. C. C. A.) 239 F. 287.
"Unavoidable accident."—United States v. Pennsylvania Co. (U. S. D. C.) 239 F. 761.
"Undue influence."—Sturm v. Stump (U. S. D. C.) 239 F. 749.
"Usage."—Eames v. H. B. Claflin Co. (U. S. C. C. A.) 239 F. 631.
"Warranty."—Jones v. Bankers' Trust Co. (U. S. D. C.) 239 F. 770.

## WORK AND LABOR.

See Mechanics' Liens.

## WRITING.

See Evidence, ⇐70, 162, 215, 350.

## WRITS.

See Attachment; Execution; Habeas Corpus; Injunction; Mandamus; Process.

## WRITS OF ERROR.

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## WRONGFUL ATTACHMENT.

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## WRONGFUL LEVY.

See Partnership, ⇐54.



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